SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ross* [2013] QCA 87
PARTIES:	**R** **v** **ROSS, Robert Michael** (appellant)
FILE NO/S:	CA No 120 of 2012 DC No 347 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	19 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2013
JUDGES:	Muir, Fraser and White JJA 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 the appellant was found guilty of six counts of indecent treatment of a child under 16 with the aggravating circumstance that the child was under 12; one count of attempted indecent treatment; and one count of rape – where the appellant contends that there were inconsistencies between the complainant's account of the offending conduct and her mother's recollection of the complainant's account – where the appellant contends that there were inconsistencies between the complainant's account and the account given by the complainant to others – where the appellant alleged that the evidence of the complainant's mother was unreliable – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where the prosecutor invited the jury to consider the complainant's absence of motive to lie to support a finding that the offending took place – where the primary judge, in

summarising the prosecutor's closing address, referred to the absence of motive to lie – where counsel for the appellant asked that no redirection be given lest it tend to highlight the matter – where the primary judge gave a redirection – whether the primary judge properly directed the jury with respect to motive

CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – OTHER CASES – where the complainant alleged that the appellant had asked if he could watch her urinate and whether she could urinate on him – where evidence of the complainant's mother about requests by the appellant for her to urinate on him was held to be admissible on the basis that it satisfied the test in *Pfennig v The Queen* – where the appellant contends that the complainant may have overheard the appellant's requests to her mother and used it to add colour to a false complaint – where the appellant contends that there was no strong similarity between what occurred between the complainant's mother and the appellant and the complainant and the appellant – whether the primary judge erred in not excluding the evidence of the complainant's mother

Evidence Act 1977 (Qld), s 132A

BBH v The Queen (2012) 245 CLR 499; [2012] HCA 9, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, cited

COUNSEL: A Edwards for the appellant
G P Cash for the respondent

SOLICITORS: Allan R de Brenni & Co Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: **Introduction** After a trial in the District Court, the appellant was found guilty on 27 April 2012 of six counts of indecent treatment of a child under 16 with the aggravating circumstance that the child was under 12; one count of such attempted indecent treatment; and one count of rape. The jury was discharged from delivering a verdict on three other counts of such indecent treatment. The appellant appeals against his convictions.

The evidence

[2] Before considering the grounds of appeal, it is useful to identify some of the more relevant evidence before the jury. The complainant, who was aged nine during the offending period, was the daughter of the appellant's former de facto partner,

Ms HK. The complainant and her mother lived in a residence in Holland Park when Ms HK commenced a relationship with the appellant. In about August 2002, the complainant, Ms HK and the appellant moved to Loganlea where they commenced cohabitation. The complainant and Ms HK left the Loganlea residence in September 2003 to live with Ms HK's mother at Edens Landing. The appellant stayed the night there, three or four nights a week.

[3] The complainant gave an interview to police on 18 December 2008 in which she gave the following account. She was almost 15 having been born in 1994. During the Christmas holidays between grades four and five she was "nine almost 10". During a stay with her mother at the appellant's mother's house, the appellant told the complainant to take off her underpants and run around and play in the rain. The complainant refused. The appellant then took off his pants and ran around "pretty much naked". The complainant then did the same. (Count 1 – hung jury)

[4] The appellant started playing "a game like the dare game", in which the appellant would dare the complainant to do things such as, "take off a piece of clothing" or "do the splits". On occasions, the naked appellant would get the complainant from her room and take her downstairs. On one occasion he dared her to touch his penis and she did so. The dare games were played three or four times.

[5] During the first dare game, the complainant dared the appellant to "poke the top of the knitting needle in the top of his dick". Asked if the appellant did so, the complainant replied, "Um, I think so". Asked why she thought so, she replied, "Yeah, ah he did. I just really can't remember back". (Count 6 – hung jury) She then described the knitting needle. In the course of this incident, the appellant "made [the complainant] split [her] legs open again and he … poked [her] with it and [she] went 'Ow'". (Count 7 – guilty)

[6] When naked, the complainant, at the appellant's request, "did the splits" for him during the second dare game. (Count 2 – hung jury)

[7] When in the garage with the complainant on the second or third occasion, the appellant asked her to urinate in the toilet while standing "like a man". The complainant complied. He also lay on the ground and asked her to "pee" on him. She declined. (Count 3 – guilty)

[8] Also on the second or third occasion, the appellant masturbated, showing the complainant as he did so how it was done. He explained to her that if he kept doing it "white stuff is gona come out and that's called sperm". At the appellant's request, the complainant then masturbated the appellant. The complainant, at the appellant's request, got a cup for him to masturbate into. He did so and washed the sperm out of the cup in the sink. (Counts 4 and 5 – guilty)

[9] During the third dare game, the complainant licked the appellant's penis on his request. (Count 8 – guilty) The complainant was then instructed to put her mouth over his penis. (Count 9 – guilty) The appellant spread the complainant's legs open and licked her genital area. (Count 10 – guilty) He asked her to put her finger in her vagina. She refused, but after he persisted, she tried to do it, unsuccessfully. (Count 11 – guilty) The appellant then told her "we have to stop cause its getting too serious". Counts 8–11 occurred on the same night.

[10] The complainant accepted in cross-examination that, by the end of the Loganlea cohabitation period, she had come to dislike the appellant "for the things he did to [her] mum". She said that she had maintained a friendly relationship with the appellant at Edens Landing but that, in consequence of the appellant's conduct, she came not to like him and told her mother. The complainant understood that her mother and the appellant had broken up prior to the move to Edens Landing and she was unhappy about them getting back together again.

[11] In cross-examination, the complainant said that she told her mother about the knitting needle incident the following morning because she regarded it as a joke. She admitted that she did not tell her mother that she had been poked in the vagina with the knitting needle. Her mother told her that she was going to speak to the appellant about it. The complainant accepted that her mother was angry with the appellant over the incident and spoke to him about it. She told the complainant that the appellant "said he was just playing around".

[12] In cross-examination defence counsel suggested that the incident involving running in the rain was "just a lark in the rain with both [the appellant and the complainant] wearing [their] underpants". He suggested also that, in relation to the knitting needle incident, all his client did "was pretend to stick it down the eye of his penis".

[13] It was put to the complainant that there had been a "running joke in the house" between Ms HK and the appellant about her mother "urinating".

[14] The evidence of Ms HK was that, when she was cleaning the complainant's room, the complainant told her that the appellant "put [a knitting needle] down his – the hole in his" while pointing at her pelvic region. When taxed with this allegation by Ms HK, the appellant "sort of just giggled about it" and, at first, denied it. After Ms HK said, "Um, well, she – she wouldn't just come out with something like that, you know, for no reason, you must have done something with this knitting needle?" the appellant replied, "Yeah, I was just mucking around with her with it".

[15] Ms HK told of an occasion in which she noticed that the appellant was not in bed with her. She walked downstairs and saw the appellant, with a towel around him, sitting and watching television and the complainant walking back towards the stairs "as if to come back upstairs". She was wearing her pyjama shirt and underpants but not her matching pyjama shorts. Ms HK asked, "Where's (sic) your shorts?" to which the complainant responded that she had taken them off because she was hot. It was put to Ms HK in cross-examination that she had not referred to this occasion in her statement. She asserted to the contrary and pointed to a paragraph in her statement which she claimed supported her evidence. Relevant pages of her statement were tendered and she was reminded that at the committal hearing she had agreed that she had not mentioned remembering going downstairs in her statement.

[16] In cross-examination, Ms HK denied that there was "a bit of a running joke" between the appellant and herself about her having accidentally urinated when reaching a climax in intercourse with a former boyfriend. Asked in cross-examination whether "[t]here was an earlier occasion that [she]'d spoken to [the appellant] about where during intercourse with [her] previous boyfriend [she] had accidentally peed", she answered, "Oh, I could have said that, maybe. I may have said that to him because I may have accidentally just done something that I can't recall".

[17] Ms HK spoke of another occasion in which she found the appellant in the complainant's bedroom at night. She asked him what he was "in there for" and was told by the appellant that he was talking to the complainant. Asked what about, he replied, "It was nothing, nothing".

The complaint evidence

The complainant's evidence

[18] In a second interview with police, given on 27 April 2009, the complainant spoke of an occasion on which the appellant drove to the complainant's Waterford West residence. According to the complainant, she was on the front verandah of the house with a male friend, CD. The appellant questioned her about CD being at the house. This was against the background of Ms HK having prohibited the complainant from having boys in the house in her absence. The complainant explained that CD was her friend and that she was "allowed to hang out with him". In response, the appellant said, "like oh sure I'd better ask your mum about that".

[19] The complainant said that after her mother came home, she told her that the appellant "came around", that he was a "stupid paedophile" and that she then "told her what happened when [she] was little". Ms HK was asked about CD and confirmed that he was permitted to visit the house in her absence.

[20] The complainant said that the first person to whom she made a complaint was a female friend, Ms TR. The complainant accepted that, after Ms TR told her that her grandfather had pulled down his pants and asked to her to touch him, she had said words to the effect, "[the appellant] did the same thing to me six months ago". Asked if she told Ms TR when the incident had occurred, the complainant said "no". She then accepted that, at the committal, she had said, in effect, that she had told Ms TR that the incident had taken place about six months previously. The complainant said that she did not now remember having said that.

Other complaint evidence

[21] In an interview with police on 20 March 2009, asked about whether the complainant made a complaint to her about "something that may have happened to her", Ms TR responded, "Um oh she told me about like her mum's boyfriend … And um how like he would ask her to like do stuff to her … Like daring her [to] like touch his private part". She said that she was pretty sure that the conversation took place when the complainant lived at Holland Park and she was in grade 4 or 5 and nine or 10 years old. Later in the interview, this passage occurred:

> "Q: You mentioned asked to do stuff
>
> A: Yeah alright
>
> Q: Can you recall or, or
>
> A: Just like asked him like I/A the um
>
> Q: Um elaborate, in other words elaborate anything else?
>
> A: No
>
> Q: No okay ... you said daring

A: Yeah

Q: I/A touch private parts

A: Like oh touch it, that kinda stuff

Q: Okay, you can't remember any specific conversation or anything that

A: Nah she never really said anything she just kinda like said it like that and that was it we didn't really talk about it anymore

Q: Why is that do you think, what did you not

A: Well as a friend I didn't feel comfortable bringing it up, oh you know so; I duno I just didn't feel comfortable bringing up friends

Q: Okay yep that's fine alright, you don't recall um ah …

A: Did she tell him like did I duno if she like told her mum, did she like tell her mum?

Q: Oh we won't bother about that I-I cant (sic) um

A: Okay

Q: I can't tell you about that and I can't talk about that. We sent you here to see what. ..

A: Okay

Q: What we can find out

A: Yep that's all

Q: And um, from you; you're here to get your statement and see what information you may have. Alright is there anything else you can recall about your conversation with [the complainant] involving the daring and the touching the private parts

A: Nah"

[22] Another young female friend of the complainant, Ms DE, informed police, in an interview on 31 October 2009, that she lived near the complainant in Waterford West. She said that the complainant was talking "to her friend about it one day … and I was like what's that and she was like oh don't worry and she wouldn't tell me and eventually further down the track she she told me bits of it". The friend to whom Ms DE referred was Ms TR. On a subsequent occasion, the complainant told Ms DE that:

> "…when it was like raining [the appellant] used to like … say there was a rain dance he had to do and he had to dance outside naked and he used to be naked too and he used to late at night he used to go downstairs and play truth or dare and like touch [the complainant]".

[23] A little later in the interview, she said, "all I remember is that he used to get to touch her I mean yeah he used to touch her to get her to touch him".

[24] Another near neighbour and friend, Ms DA, was interviewed by police on 1 November 2009. She said that possibly a year before the interview she had the following conversation after school with the complainant:

> "… she's like that's the guy that assaulted me a couple of years ago[.] I'm like really and she's like yeah he did like. He used to like take me down to the basement or something like that and like assault me and stuff like that".

[25] Asked if she could remember the words that were used, Ms DA said, "Like um… the word sex". She mentioned that:

> "… [the complainant] said that when she lived in the house that she used to live in with her mum's boyfriend [who] she was going out with that time with her I think he um… whenever her mum was asleep or out he would take her downstairs and yeah … well he would like force her to have sex with him and if she ever told um… her mum or someone like that he would like hurt her."

Ms HK's complaint evidence

[26] On 2 or 3 December 2008, when Ms HK was sitting at the table after dinner "doing paperwork", the complainant told her that the appellant had come to the house that day. A discussion took place during which the complainant said that the appellant was a "freak". She said that the appellant "used to give [her] alcohol and get [her] to do things". The following exchange took place:

> "And [the complainant] said, 'Do you remember how we used to do the undie run outside, how we'd take our underpants off and swing them above our heads and run around?' And I said, 'Where?' And she said, 'Here in the - at - in the - in the courtyard' and she was - no, she - she said, 'In the courtyard where we used to live.'
>
> Right?-- And I said, 'No, I don't remember that.' I said, 'What are you - what - what sort of thing, what other things, what - what do you mean?' And - and she said, 'Oh, well, it was just - it's truths - truths and dare', she said, 'and - and in the end it was just dare', she said. I said, 'Well what sort of things? What are you talking about?' And she said, 'Well, he'd dare me like to just run around the table or do silly things', she said, 'but then it was, "I dare you to take your underpants off and run around the table."' And I said, 'Did he ever touch you …?' And she - she goes, 'Yeah.' And I said, 'Where?' And she said, 'Well he dared me to let him lick me down there.' And I said - I said, 'So did you - you let him then?' And she said, 'Yeah, he said to relax and he opened my legs and he kept asking me if I liked it, if I enjoyed - if I - if I liked it.' And I said, 'And what did you think about that …?' And she said, 'I thought it was pretty gross, Mum', she said. And I said, 'And did you ever do anything to him?' And she said, 'Yeah. He - he told me that - that if I was ever going to be raped that I should tell the man that's raping me that I'll give him head instead', and she said, 'and then he showed me how to give head.' And I said, 'What did he show you?' He said - she said, 'Well, she got me' - 'he got me to start at the bottom and lick upwards a few times and then he'd put it in my mouth.' And I said, 'Did he ever put it inside of you?' And she said, 'No, but he just played with it down there and he just put his fingers in and' - he said - she said, 'but it

> stung', she said, 'and he - then he would make me put my own fingers in there', and she said, 'even it hurt with my own fingers.' And she said - I said, 'Is that all? Is that all, sweetie, like is there anything else, like did he get you to do anything else? Did he ever lay on top of you?' And she says, 'No, but he got me to sit on him once and - and asked me if I'd pee on him.' And I got - I was just so angry. As soon as she said that, I was so angry.
>
> …
>
> She said that he said that he needed her help to come, and she did it for him, and she said that he come into a cup - into a glass and then asked her to have a taste of it. And I asked her if she did - did - and she said, no, that she didn't."

The similar fact ruling – the appellant's argument

[27] In a pre-trial ruling, the evidence of Ms HK about requests by the appellant for her to urinate on him was held to be admissible on the basis that it satisfied the test in *Pfennig v The Queen*.[1]

[28] The learned primary judge ruled that there was "no reasonable view of [the impugned evidence] consistent with the innocence of the [appellant]" and that any potential inadvertent "suggestion" by Ms HK to the complainant was excluded by s 132A of the *Evidence Act* 1977 (Qld). Ms HK had given evidence at the committal that the conversations about urination happened not only in an intimate setting within the bedroom, but also whilst watching television or when they were just sitting around chatting and that they both used to laugh about it. She agreed that it was talked about with "alarming regularity", about once a week, over the time that they were not only at Edens Landing but at previous houses as well.

[29] Ms HK's evidence, if accepted, proved no more than that the appellant would joke with her about urinating on him against the background of a possible comment by her about having accidentally urinated during sex with a previous partner. Having regard to the regularity of references to the accidental urination incident and the places in which it was mentioned, the complainant may well have overheard what was said and used it to add colour to a false complaint. Alternatively, what was said about the urination was likely to have made an impression on the complainant who may have innocently confused requests made by the appellant to her mother with her own conversations with him.

[30] There was no strong similarity between what occurred between the complainant's mother and the appellant and the complainant and the appellant. The former concerned a consensual sexual relationship between adults in which no urination actually occurred. The complainant, by way of contrast, alleged that "it occurred whilst she was a child and being sexually abused, and that the [appellant] lay down on the floor and asked her to urinate on him". In such circumstances, the evidence of Ms HK lacked probative force and should have been excluded on the basis that its probative force was outweighed by its potential prejudicial effect.

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1 (1995) 182 CLR 461 at 483.

Consideration of the similar fact ground

[31] Having regard to Ms HK's evidence, the jury could well have accepted that there had been an incident of involuntary urination on an occasion on which Ms HK had attained sexual climax with a former lover and that this incident had been spoken of between Ms HK and the appellant. If the jury had so concluded, it was not necessary for them to accept that, contrary to Ms HK's evidence, the conversations about urination were confined, as was put by defence counsel to Ms HK in cross-examination, to a "running joke" about accidental urination. Ms HK, both in cross-examination on the committal hearing and on the trial, made it clear that the appellant raised the possibility of her urinating on him reasonably frequently, "once a week", and in a sexual context. She said "he had a fetish with wanting me to pee on him". Ms HK accepted that such requests were made, from time to time, outside her bedroom.

[32] There was no direct evidence that the complainant overheard any conversation between Ms HK and the appellant about urination. The probabilities are otherwise. The topic was not one which Ms HK would have wished to have raised in front of her daughter. Ms HK and the appellant even attempted to conceal the sexual aspect of their relationship from the complainant when Ms HK and the complainant resided at Edens Landing.

[33] Even if the jury accepted that the complainant overheard conversations based on an incident in which involuntary urination had occurred during intercourse, it is improbable that this would form a basis for a story by the complainant involving a sexual interest on the part of the appellant in viewing a female urinating and in being urinated on by a female. Contrary to the appellant's counsel's submissions, there was a marked similarity between the evidence of Ms HK and that of the complainant regarding the appellant's requests to satisfy his urologic desires. Both spoke of refusing the appellant's requests that he be urinated on.

[34] As counsel for the respondent submitted, the evidence of Ms HK was capable of demonstrating that the appellant had a particular interest in the practices involving urination narrated by the complainant. The possibility of there being an innocent explanation for the evidence did not render it irrelevant.[2] The evidence was admissible because it was relevant and not excluded by some evidentiary rule.[3] In *HML v The Queen*, Gleeson CJ observed:[4]

> "Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative."

[35] Of more direct relevance for present purposes are Gleeson CJ's observations in *HML v The Queen*:[5]

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2 *BBH v The Queen* (2012) 245 CLR 499 at 532.
3 *HML v The Queen* (2008) 235 CLR 334 at 351 per Gleeson CJ.
4 (2008) 235 CLR 334 at 352.
5 (2008) 235 CLR 334 at 354 [11].

> "To prove that a person did something many times does not compel a conclusion that he did it again. However, it might make it more likely that sworn testimony that he did it again is true. People do not act in accordance with all their inclinations at every opportunity, but proof of a person's inclinations may provide strong support for direct testimony as to that person's conduct. Decisions as to the relevance of evidence are made by asking how, if accepted, it bears on the assessment of the probability of a fact in issue. Assessments of probability are rarely the subject of syllogistic reasoning."

[36] Counsel for the appellant accepted the respondent's contention that the principle in *Pfennig v The Queen*[6] was not engaged as the subject evidence had no tendency to show that the appellant was guilty of a criminal act or discreditable conduct. If the *Pfennig* principle applied its requirements were satisfied. When considered with the other prosecution evidence, and on the assumption that the jury would accept it, there was no reasonable view of the subject evidence which was consistent with innocence.[7]

[37] Two facts in issue on the trial were: whether the appellant had asked the complainant if he could watch her urinate; and whether he had asked her to urinate on him. Ms HK's evidence, if accepted, showed that the appellant had a sexual interest in such practices. Having regard to what may be thought to be the rarity of such a sexual interest, the evidence had substantial probative force. Counsel for the respondent submitted, and I accept, that the evidence carried no prejudicial effect beyond its legitimate inculpatory force. He referred in that regard to the observation of Mason CJ, Deane and Dawson JJ, in *Pfennig*:[8]

> "The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred."

[38] Referring to the reasons for the exclusion of similar fact or propensity evidence, Gleeson CJ said in *HML*:[9]

> "The reason for the exclusion is not the irrelevance of propensity, but its prejudicial effect. In this context, prejudice means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate. If it did, probative value would be part of prejudicial effect. It is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against."

[39] The primary judge did not err in law in not excluding the subject evidence. Consequently, this ground was not made out.

The primary judge misdirected the jury in relation to the prosecution's contention that the complainant had no motive to lie

[40] Counsel for the appellant's argument in respect of this ground was as follows.

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6 (1995) 182 CLR 461 at 483.

7 See *HML v The Queen* (2008) 235 CLR 334 at 385 [118] per Hayne J.

8 (1995) 182 CLR 461 at 482.

9 (2008) 235 CLR 334 at 354 [12].

[41] In summing up the prosecutor's closing address, the primary judge said:

> "So he points that out, as being one of the bizarre allegations, and invites you to say, 'Well, look, why would a girl make up something like that?'"

[42] Shortly after, when summarising the prosecution's contention in relation to the urination incident, the primary judge said:

> "The Prosecutor relied in particular on the urination episode, again saying that if you're satisfied that the requests of urination on the mother, if you're satisfied that that happened and that that was kept private and that [the complainant] didn't know about it, then there's really no other - that makes the only sensible explanation for her subsequent complaint is that, in fact, he did do it, because it's hardly likely that, he says, that a girl would make up those sort of allegations on her own or on her own initiative."

[43] That direction alone may have not caused any difficulty but, following as it did closely upon the impugned direction, it may have compounded the problems it caused.

[44] The prosecutor requested a redirection on the basis that he had been misquoted and raised a concern about a reversal of the onus of proof. Counsel for the appellant said that he was not concerned about the direction and asked that no redirection be given lest it tend to highlight the matter. The primary judge gave the following redirection:

> "There are only two things, ladies and gentlemen, I did warn you of this. In count 3, I omitted to tell you that that was an offence of attempting to procure someone to commit the indecent offence rather than actually procuring the, so they - he requested the defendant to pee on him rather than actually getting her to pee on him, so I should have made that clear.
>
> The only other thing is that when I was summarising the Prosecutor's address to you, I mentioned in relation to the needle incident, I said that his submission was in effect, you know, 'Why would someone make up that sort of thing?' I wasn't meaning to suggest that you should speculate on a motive to do so, what I was really trying to summarise was his submission that it's not the sort of thing that someone would come up with out of the blue, so I think that's what he was really meaning."

[45] This redirection tended to direct the jury's attention to a consideration of why the complainant might make up her evidence or her motive to lie. As the final direction given to the jury, it would have assumed particular importance.

[46] The concatenation of the directions subverted the earlier direction on motive to lie and left the jury "in a state decried by the current state of the law". In order to cure the misdirection, the primary judge should have told the jury, at the very least, that it was improper to reason in the way he had earlier suggested and that the onus remained on the prosecution to satisfy them that the complainant was telling the truth and to prove guilt beyond reasonable doubt.

Consideration of the alleged erroneous misdirection on motive to lie

[47] The passage in the summing up on which the argument is based must be taken in context. In summarising the defence and prosecution cases, the primary judge said, "You were invited to consider … the nature of the allegations, being in some cases – featuring bizarre conduct". The primary judge then discussed the evidence relating to the knitting needle incident. At the conclusion of that discussion, his Honour, referring to the prosecutor, observed:

> "So he points that out, as being one of the bizarre allegations, and invites you to say, 'Well, look, why would a girl make up something like that?'"

[48] His Honour then referred to the prosecutor's reliance on the dare game as giving "a credible context to someone who was trying to get a child to do something, but without provoking complaint; just trying to make it all seem as if it was a game".

[49] The point being made in the impugned passages, taken in context, was to the effect that it was surely improbable that a young girl[10] would construct complaints around such a strange sexual fetish of which she would be unlikely to be aware. It is thus improbable that the jury would have concluded that the onus of proof had been affected in any way, particularly as the primary judge, before this part of the summing up, had explained that the prosecution had the burden of proving guilt beyond reasonable doubt.

[50] The redirection, as was appropriate, made it plain that the jury should not speculate about possible motives for the complainant to lie.[11] The primary judge explained that what he was doing was summarising the submission that the complainant's allegations of unusual sexual conduct or desires were unlikely to have been "the sort of thing that someone would come up with out of the blue". It is not suggested that the prosecutor's submissions had strayed beyond proper or permissible bounds in any way. That being the case, the primary judge's redirection was adequate to correct any wrong impression that his summing up of the prosecution case may have created. Finally, the passages from the summing up relied on by the appellant to support this argument contain a summary of the prosecution argument, not directions by the primary judge as counsel asserted.

[51] This ground was not made out.

The unsafe and unsatisfactory ground – the appellant's argument

[52] It was submitted that because of the inconsistencies in the evidence of the complainant, on the one hand, and Ms HK and other witnesses to whom complaint was made, it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. The submissions on this ground were developed as follows.

[53] There was an inconsistency between the complainant's evidence and that of Ms HK concerning the complainant's attitude to the appellant. The complainant's evidence was that she grew to hate the appellant only after his offending conduct concluded. Ms HK's evidence was that the complainant hated the appellant by the time they stopped cohabiting, at least six months before any alleged offending.

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10 Aged about 14 at the time this allegation was first made.

11 *R v Van Der Zyden* [2012] 2 Qd R 568 at 578.

[54] The complainant told her mother, contrary to her evidence, that the appellant had asked her to "taste his come", put his fingers inside her, and showed her pornography.

[55] The complainant made no allegation of the urination incident until the day she spoke to her mother, some five years after the alleged offending.

[56] The complainant told Ms TR that the appellant dared her to touch him, in response to Ms TR's own complaint, and Ms TR placed the conversation at a time when the complainant resided in Holland Park.

[57] The complainant told Ms DE on the day of the complaint to Ms HK that the appellant had forced her to have sex with him and threatened to hurt her if she ever told any one. That was not consistent with the evidence of either the complainant or Ms HK.

[58] There were difficulties with Ms HK's evidence. She denied, contrary to her evidence at committal, that the conversations about urination happened other than in intimate settings within the bedroom.[12] At committal she said it was talked about with alarming regularity, about once a week. Ms HK's oral evidence about seeing the appellant downstairs with her daughter who was not wearing pyjama shorts did not appear in her statement. The complainant said of this occasion that the appellant had been naked. Ms HK said that he had been wearing a towel. The complainant said that she had been sitting on the lounge at the time. Ms HK said that the complainant was heading upstairs. The complainant said that she had her clothes on. Ms HK said she was not wearing her pyjama shorts. The evidence of the two witnesses was suggestive of collusion about Ms HK coming downstairs, "the devil being in the inconsistent detail".

[59] Ms HK denied that the complainant had got into trouble previously for having boys in the house. She said that CD was allowed inside although Mr CD denied that. Mr CD was unable to be located at trial but it was admitted that he was not allowed in the house. The false allegations of the complainant and her mother were only explicable as attempts to hide a motive for the complainant to make false allegations of abuse after the appellant had told her he would raise with her mother the fact she had boys in the house.

Consideration of the unsafe and unsatisfactory ground

[60] This ground centres around the alleged unreliability of the complainant's evidence based on differences between the complainant's account of relevant events to police and in cross-examination; and the accounts given by her to Ms HK and others to whom she made complaint. It also relies on the alleged unreliability of Ms HK's evidence.

[61] There were inconsistencies between the complainant's account of the offending conduct and her mother's recollection of what she was told by the complainant. The most obvious differences are set out above. When considering the significance of the differences, the jury were entitled to have regard to the fact that the complaint was made some years after the incidents in question and the emotional impact of the

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[12] In evidence-in-chief, Ms HK accepted that such a topic may have arisen in intimate settings outside of the bedroom.

complainant's revelations on her mother. In the circumstances, having regard to Ms HK's shock and distress, it is hardly surprising that there would be some divergence in the two accounts.

[62] There was also much that coincided between Ms HK's recollection of what the complainant told her and the complainant's evidence. Ms HK recalled being told of: the running around without underwear; the appellant and the complainant daring each other to do various things; the licking of the genitals; oral penile penetration; the complainant's digital penetration, which hurt; the request for the complainant to urinate on the appellant; and the complainant's helping to masturbate the appellant and to ejaculate into a cup.

[63] The divergence in recollections about the complainant's attitude to the appellant at relevant times is not of particular significance. It is something about which perceptions could well differ. It is also something about which a child's recollections could easily lose clarity with the passage of time.

[64] The primary judge gave appropriate directions to the jury concerning the differences.

[65] The complainant's failure to mention the urination incident, or even the knitting needle incident, to her young friends does little, if anything, to weaken the complainant's credibility. Neither Ms TR nor Ms DA gave the impression of being persons able to give precise and accurate accounts of conversations, let alone conversations which took place well before they were asked to recollect their content.

[66] Ms TR's account of what she was told by the complainant, although quite general in nature, did extend to "daring" and "touching the private parts". Although Ms TR places the conversation at a time when the complainant was living at Holland Park, it is apparent that she was mistaken about this as her evidence is that she was nine or ten when the relevant conversation took place. That accords with the complainant's evidence. Also there is no evidence which suggests that the complainant set out to give a detailed account to Ms TR of all that had happened between her and the appellant.

[67] Ms DA was giving evidence of a conversation that took place approximately a year before her evidence. She recalled being told by the complainant that the appellant would take her downstairs. She recalled the word "sex" being spoken of in that context. Those things are consistent with the complainant's evidence. Ms DA's recollection of being told that the appellant "would like force her to have sex" is explicable as an erroneous interpretation of what Ms DA had been told by the complainant or the result of a mistake or faulty recollection. Again, Ms DA's account does not suggest that the complainant set out to give her a full account of her sexual dealings with the appellant and it would not be difficult for a person hearing the complainant explain the appellant's conduct in relation to her to gain the impression that she had been subjected to a degree of pressure, albeit subtle.

[68] The theory advanced by counsel for the appellant that Ms TR's revelation to the complainant that her grandfather had exposed himself to her sparked the complainant's subsequent detailed account to her mother of sexual activity, which included an attempt to satisfy a peculiar sexual fetish, is far from compelling.

[69] The attack on credit based on the statement of CD lacks substance. The complainant's evidence that the boy was permitted to be at the house accorded with that of her mother. CD did not give evidence and the admission that he told police that he was outside the house as boys were not allowed inside when Ms HK was absent, did not necessitate the rejection by the jury of the evidence of the complainant and Ms HK. It is not even completely clear that Mr CD's evidence was incompatible with that of the complainant and Ms HK. Mr CD may well have been outside the house as a result of a misunderstanding about the application of Ms HK's general rule in relation to boys being in the house in her absence. There could be other explanations.

[70] The matters relied on by the appellant were not such that the jury were obliged to reject the complainant as a credible and reliable witness. The complainant's account derived a measure of support from the implicit acceptance in the cross-examination of Ms HK and the complainant that the appellant had made a pretence to a nine year old girl of inserting a knitting needle into the end of his penis.

[71] The cross-examination of Ms HK laboured the alleged frequency of the appellant bringing up the topic of her alleged involuntary urination. The jury were entitled to think it unlikely that the appellant, who on the evidence, was wishing to maintain a sexual relationship with Ms HK, would frequently remind her of an experience which, if true, would have been more likely to be mortifying to her than amusing. If the jury thought that that topic was frequently discussed, they may have thought that the appellant's conduct revealed an unusual interest in female urination in a sexual context.

[72] In my view, it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.

[73] This ground of appeal has not been made out.

Conclusion

[74] For the above reasons, I would order that the appeal be dismissed.

[75] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.

[76] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with those reasons and the order which his Honour proposes.