SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAD* [2013] QCA 334
PARTIES:	**R** **v** **FAD** (appellant)
FILE NO/S:	CA No 51 of 2013 DC No 39 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	8 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2013
JUDGES:	Fraser and Gotterson JJA and Boddice 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 the appellant was found guilty by majority verdicts of one count of maintaining an unlawful sexual relationship with a child under 16 years (count 1), one count of indecent treatment of a child with the circumstance of aggravation that the child was under care (count 2) and one count of sodomy of a child under care (count 3) – where the appellant contended that the verdicts were "unsafe and unsatisfactory in the circumstances" and "inconsistent with the weight of the evidence" – where the respondent argued the complainant's account was plausible and not contradicted by sworn evidence – where the inconsistencies present were not so significant as to require the jury to doubt the complainant's credibility and reliability – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where an order was made under s 21AV of the *Evidence Act* 1977 (Qld) ('the

Act') for a support person to be present while the complainant's sister ('A') gave pre-recorded evidence – where the trial judge's directions complied with s 21AW(2) of the Act in relation to the taking of A's evidence by way of pre-recording but did not refer to the presence of a support person – where the support person was not visible at any stage during the recording – where the respondent contended that the wording used by the trial judge covered all aspects of the presentation of the evidence – where the respondent otherwise submitted that the error was not one amounting to a substantial miscarriage of justice – where A did not give evidence of the offences – where A's evidence was relevant as preliminary complaint evidence and as evidence of violent conduct by the appellant towards the complainant – whether the trial judge erred – whether trial judge's omission resulted in a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the complainant disclosed during the trial an occasion of sexual misconduct by the appellant against him outside the charged period – where the prosecutor had disclosed this offending to defence counsel the day before the trial commenced – where defence counsel applied for the jury to be discharged as the evidence was prejudicial to the appellant – where the trial judge declined to discharge the jury and found that the evidence was admissible for limited purposes – where the trial judge gave directions as to how the evidence could be used by the jury – whether evidence of sexual misconduct by the appellant outside of the charged period was admissible – whether the admission of the evidence resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the jury sent four written notes requesting re-directions – where the trial judge's conversations with the speaker did not result in communication of the content of the jury's deliberations – whether the trial judge's re-directions were appropriate – whether the trial judge's exchanges with the speaker or re-directions resulted in a miscarriage of justice

Evidence Act 1977 (Qld), s 21AC, s 21AV, s 21AW(2)

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v AG [2001] QCA 516, cited
R v DM [2006] QCA 79, cited

R v GAQ [2013] QCA 309, considered
R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, cited
R v Witham [1962] Qd R 49, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: The appellant appeared on his own behalf
B J Power for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was found guilty by a jury of three offences: between 10 August 2008 and 25 December 2010 maintaining an unlawful sexual relationship with a child under 16 years (count 1), and, in each case on a date unknown between 28 February and 25 December 2010, unlawfully and indecently dealing with the same child with the circumstance of aggravation that the appellant had the child under his care for the time being (count 2), and permitting the same child to sodomise him, with the circumstance of aggravation that this child was to the knowledge of the appellant under his care (count 3). The appellant was convicted of those offences on 20 February 2013. On 28 February he was sentenced to seven years imprisonment for the first offence and to lesser, concurrent terms of imprisonment for the other offences.

[2] The appellant has appealed against the convictions on the grounds that the verdicts were "unsafe and unsatisfactory in the circumstances" and "inconsistent with the weight of the evidence." These expressions invoke the ground of appeal in s 668E(1) of the *Criminal Code* that a verdict is "unreasonable". 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]

[3] At the hearing of the appeal the court gave the appellant leave to add a further ground, which was very properly raised by Mr Power, counsel for the respondent, that the trial judge did not give the jury the instructions required by s 21AW(2) of the *Evidence Act* 1977 in relation to the measure taken under s 21AV for a "support person" to be near a child witness when she gave pre-recorded evidence. The court received submissions upon another point raised by the respondent, concerning a comment in the trial judge's report that "the court may wish to consider the circumstances and my exchanges with the speaker leading up to the verdict."

The complainant's evidence

[4] The complainant was between 13 and 15 years old at the time of the alleged offences and 17 years old when he gave evidence at the trial in February 2013. He gave evidence that he first met the appellant in about early 2005 when the

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.

complainant's mother began dating the appellant. He thought that they started living together as a family some months later. Also present in the household were the complainant's younger sister "A", younger half brother "B" after he was born in late 2005, and younger half sister "C", who was born in 2007. The family lived in various houses during the period of the offending alleged in count 1. In January 2011, about two years before the trial, the complainant told police officers that the appellant had sexually abused him. A recording of the police interview was tendered in evidence pursuant to s 93A of the *Evidence Act* 1977 and played to the jury. In the complainant's oral evidence he repeated and expanded upon some of his statements in the police interview.

[5] In relation to count 1, the complainant's evidence was that the appellant started abusing him when he was 13. The complainant said that on the first occasion he had wanted to play with a particular electronic game which he was not allowed to use without an adult's permission. The appellant would only let the complainant use the game if the complainant let the appellant fellate him. That kind of activity occurred about four or five times from then until the complainant turned 14, after which it became more frequent. On five or six occasions the appellant also made the complainant fellate the appellant and the appellant once attempted to sodomise the complainant. The prosecution also relied upon the complainant's evidence of counts 2 and 3 as particulars of count 1. The complainant estimated that the appellant had sexually abused him at least 30 times. The complainant said that the appellant sexually abused him when the appellant was drunk, such as on weekends and during holidays. In the course of the police interview, and when giving evidence at the trial, the complainant gave some further details about aspects of the sexual offending, including, in some cases, identifying in which house particular events had occurred, referring to related circumstances, and describing clothing and other matters.

[6] Count 2 was based upon the complainant's evidence of an occasion about six months before the police interview, when the appellant went into the complainant's room, pulled the blankets off the bed, removed the complainant's pants and underpants, and fellated him. The complainant's mother subsequently walked into the room. Count 3 was based upon the complainant's evidence that the last occasion of sexual abuse before the police interview occurred when the complainant's mother had taken A and C to hospital for C to be treated for an injury in which she had fallen and a tooth had gone through her lips. The complainant gave evidence that he, the appellant, and B were left at the house, and B had gone to bed. After the appellant removed the complainant's pants and underpants and fellated him in the lounge room of the house in which they were then living, the appellant took the complainant into the appellant's and complainant's mother's bedroom and caused the complainant to sodomise him.

[7] After giving evidence that the sexual abuse had become more frequent in 2009 the complainant was asked whether it continued "all the way up until before you talk[ed] to the police…"; he answered, "And one time after." The prosecutor responded, "All right. Well, let's not talk about that, but up until you talk[ed] to the police, it continues on regularly; is that correct?" The complainant answered "[y]es".[3] In the absence of the jury, defence counsel applied for the discharge of the jury on the ground that the jury had heard evidence, prejudicial to the appellant,

---

3 Transcript 1-18 AB 62.

about an alleged touching that occurred outside the charged period.[4] The prosecutor informed the trial judge that she had disclosed the complainant's evidence of this event to defence counsel on the previous day. The event was alleged to have occurred in circumstances in which, after the complainant had been residing with his father for about a week or so (which was not unusual), the complainant returned to live with his mother, the appellant and the rest of the family unit. The trial judge rejected the application for the discharge of the jury, holding that in the context of several specific allegations and general assertions of sexual activity more than 30 times, the unresponsive answer identifying an occasion after the complainant had spoken to the police was not inadmissible and there was no injustice in carrying on with the trial.[5]

[8] In cross-examination the complainant agreed that he had not told his parents about this event at the time when it occurred. He said that he told his mother about it in about June 2011, when the appellant had been removed from the household. The complainant agreed that he had not told the Crown prosecutor about it before two earlier trials of these charges.

[9] In cross-examination defence counsel put to the complainant that the appellant had not sexually abused him at all; that the complainant had made up the allegations because the complainant perceived the appellant to have been violent towards him. The complainant agreed that he had become "quite animated" when telling the police officer about how violent the appellant was towards him on occasions. He denied that the appellant had not sexually abused him. He denied that he had made up the allegations. The complainant agreed that he had been living at home with his mother and having regular contact with his father, yet he had not told either of them of the appellant's sexual abuse. When asked why that was so, the complainant said it was because the appellant made threats against his father. The complainant agreed that he had not told police about those threats. He said that was because he feared for his father and mother's lives and safety, and during the police interview he was asked questions about the sexual abuse and not about the welfare of his family; he was not "overly sure how to approach the problem". He did not then really consider the threats to be "overly threatening"; he had thought so when the threats were made, but "as time progressed I kind of gathered that nothing would actually befall any of my loved ones".[6] By the time of the police interview he did not find the threats to be "overly important".[7] The complainant said that he had not told his father about the sexual abuse in 2009 because he felt embarrassed, scared for his safety and for the safety of others around him, and "didn't really feel worth it".[8] The complainant referred to the "morally degrading circumstances" which would often render him incompetent to do anything: "I really dislike insecurity and this really made me insecure."[9] The complainant said that he had told his father that he was scared of the appellant (he could not remember when he started telling him that), but that was because of a beating the appellant had administered. Although it also had to do with the sexual interference, the complainant did not mention that.

[10] The complainant agreed that the appellant physically disciplined him. The complainant said that he considered the appellant was entitled to do so within

---

4 Transcript 1-21 AB 65.
5 Transcript 1-36 AB 80.
6 Transcript 1-39 AB 83.
7 Transcript 1-39 AB 83.
8 Transcript 1-40 AB 84.
9 Transcript 1-40 AB 84.

reason. He denied that he constantly "back-chatted" the appellant and constantly got into trouble. The complainant maintained his account in the course of cross-examination.

[11] The complainant's sister A was aged about 11 to 13 at the time of the alleged offences and she was 15 when she gave pre-recorded evidence in October 2012. A gave evidence that after their mother found a knife between the complainant's mattress and the bed frame, A asked the complainant about that. He said that it was to protect himself from the appellant. A asked the complainant what he meant. The complainant explained that when nobody else was around the appellant tried to make the appellant fellate him and the appellant tried to cause the complainant to sodomise the appellant. A said that the complainant told her that this happened when their mother and everybody else went to bed and the appellant and the complainant stayed up watching movies. The complainant did not go into more detail and A could not remember when the complainant told her these things. A recalled having seen the appellant being violent to the complainant and she gave one example of that.

[12] In cross-examination A agreed that the complaint that the appellant fellated the complainant was made before a complaint that the appellant had tried to sodomise the complainant. The complainant made the latter complaint on the day before the police interview, after the complainant had spoken about it to his father. A agreed that the first time the complainant told her anything about what he said the appellant had done was about a year before the complainant spoke to police. A was close to the complainant. A denied defence counsel's suggestions that the complainant was only disciplined by the appellant when the complainant was misbehaving. A said that the appellant used to "lash out" when he was drunk for no apparent reason, that the complainant did not often get into trouble for misbehaving, and that he never talked back to the appellant. By "lash out", A meant that the appellant would shout and throw things. Sometimes he also hit the children. A agreed that the complainant often told her that he did not like the appellant.

[13] The complainant's mother gave evidence that her marriage to the complainant's father ended in 2005 and she then started a relationship with the appellant. They started living together in mid-2005. The complainant's mother referred to an occasion when C had fallen over and hit the floor, and put her teeth through her lip. At about 8.00 pm on the day that occurred, 9 December 2010, the complainant's mother took C and A to hospital, leaving the appellant, the complainant, and the complainant's young brother in the house. The complainant's mother said that she recalled seeing the appellant in the complainant's room a couple of times a week with the door closed. When she walked into the room she did not see anything indecent.

[14] The complainant's mother said that the complainant stayed with his father from Christmas through to 1 January 2011; they were flooded in and stayed together for four or five weeks. On the drive home the complainant told her that the appellant had being going into his room and asking the complainant to do things to him. The complainant said that the appellant asked the complainant to fellate him, the appellant wanted the complainant to sit on the appellant's penis, and the appellant tried to fellate the complainant as well. The complainant's mother said that the complainant told her that the complainant had said "[n]o" when the appellant had asked the complainant to fellate the appellant. The complainant did not tell his

mother whether or not the appellant had succeeded in fellating the complainant or sitting on the complainant's penis. The complainant's mother said that the complainant described these things as one incident and she could not recall whether the complainant spoke about any other incidents. The complainant appeared very embarrassed and did not want to talk about it. The complainant's mother tried to get more information out of him but not very successfully. After the complainant went to the police station, the complainant lived with his father for seven weeks. The complainant then returned to live with his mother, the appellant and the other children. They were together for another four weeks before the appellant eventually left the house.

[15] In cross-examination the complainant's mother denied that she had no suspicion about anything going on between the appellant and the complainant. She said that she did have suspicions. She walked into the room to ask what was going on, probably on four or five occasions between 2008 and 2010. She agreed with the suggestion by defence counsel that the appellant was violent to the complainant fairly frequently between 2007 and 2010. The complainant's mother agreed that the complainant did not make any further allegations to her about the appellant **after** the appellant left her house. In re-examination, however, the complainant's mother said that, between the time when the complainant returned from his father's house (mid-March 2011) and **before** the appellant left the complainant's mother's house (shortly before Easter 2011), the complainant made additional allegations of a sexual nature about the appellant.

[16] Further evidence of complaints by the complainant was given by two of his friends, his grandparents, his father, and his father's wife. Each of the complainant's friends said that in a conversation in the first half of 2010 at school the complainant said that his stepfather was sexually abusing him; the complainant did not give details. The complainant's grandmother gave evidence that in the August/September school holidays before the complainant went to the police, the complainant told her that he had been interfered with by his stepfather. The complainant said that his stepfather wanted to have sex. The complainant said that was in the lounge room and his mother had gone to bed. In cross-examination the complainant's grandmother agreed that the complainant had come to her house for the Christmas holidays. She agreed that she had told the prosecutor in the course of evidence she had given in October 2012 that the conversation with the complainant occurred in Christmas 2010. The complainant's grandfather gave evidence that in December 2010 the complainant told him that the appellant had been molesting him, had exposed himself to the complainant, on a couple of occasions had "pounced" on top of him, taken the complainant's pants down, and was going to fellate him to show him how good it was. The complainant said that this had happened in the lounge room late at night when they were watching television together. The complainant's grandfather wanted the complainant to go to the police but the complainant did not want to go. In response to questions by the trial judge, the complainant's grandfather said that the complainant's sister A first told him some things and he then confronted the complainant.

[17] The complainant's father gave evidence that he had a conversation with the complainant on the day before he took the complainant to the police station. The complainant said that the appellant used to let him stay up and was interfering with him. The complainant said that the appellant had tried to make the complainant fellate the appellant and that the appellant had done the same. The complainant's

father did not know if the appellant had succeeded in forcing the complainant to fellate the appellant. The appellant had tried to fellate the complainant; the complainant's father did not know if that happened or not. When the complainant's father asked the complainant whether the appellant had sodomised him, the complainant said that he had. The complainant said that these things happened in the lounge room. In cross-examination the complainant's father said that he was not certain whether or not, the complainant told him that these things had actually happened, or only that the appellant had tried to do them.

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

The course of the trial

[19] The pre-recorded evidence of A was taken on 23 October 2012. Otherwise the trial ran from 18 to 20 February 2013. The prosecutor closed the Crown case shortly before 11.30 am on 19 February 2013. Following counsels' addresses, the trial judge's summing up concluded at 3.44 pm on 19 February. At 5.24 pm the trial judge allowed the jury to go home with a view to reconvening at 9.30 am in the morning, after the speaker apparently indicated that it would be better for the jury to have that break and return fresh in the morning. The Court reconvened with the jury at 11.14 am on 20 February 2013. The trial judge referred to a note from the jury (MFI "E") which sought unspecified further directions from the trial judge. The speaker communicated that the jury could not make a decision. The trial judge then gave the jury a conventional direction of the kind formulated in *Black v The Queen*.[10] (By that stage the jury had deliberated for a little more than three hours in all.) At 12.19 pm the trial judge informed the parties that he had received a note (MFI "F") indicating that the jury wished to watch the video of the police interview with the complainant again. That interview was played to the jury and the trial judge read from the transcript of the cross-examination of the complainant in oral evidence. The jury resumed their deliberations at 3.15 pm. At 4.24 pm the trial judge told the parties that he had received a note (MFI "G") indicating that the jury were having difficulty reaching agreement. (The jury had by then been deliberating for a total period of about six hours, excluding the time taken for re-directions or reminders of evidence.) The court reconvened with the jury at 4.38 pm. The trial judge then reminded the jury of the "Black direction" he had given earlier and asked the jury to refresh their discussions in an endeavour to reach agreement. When the trial judge asked the jury whether there was any part of the evidence or any issues relating to the legal ingredients of the charges that the trial judge could help the jury with, the speaker referred to a difficulty in the "legal understanding" of the complainant's testimony to the police. The trial judge directed the jury in conventional terms as to the status of the recorded police interview, and the jury retired for further deliberations at 4.45 pm.

[20] The trial judge received another note from the jury (MFI "H") at 5.55 pm. The trial judge informed the parties that the note seemed to suggest that the jury still had a concern about the way in which the complainant's statements to the police were to be used. From 6.01 pm the trial judge gave the jury directions to the effect the statements made by the complainant to the police were admitted as evidence in the trial The trial judge then repeated directions given in the summing up that unless the jury was satisfied beyond a reasonable doubt of the truthfulness and reliability

---

10 *Black v The Queen* (1993) 179 CLR 44.

of the complainant's evidence – the statements made to the police as well as the statements made in court – "you cannot convict, you must not … [y]ou must acquit because the prosecution depends on you accepting beyond a reasonable doubt the truthfulness and reliability of the boy's evidence, of which I include his statements made to the police as well as his statements made in Court in so far as they go to prove the elements of the charges."[11] The trial judge directed the jury that if they accepted the evidence relevant to the elements of the charges beyond reasonable doubt the jury might convict, but unless they accepted that evidence beyond a reasonable doubt the jury may not convict. The trial judge explained that the directions he had given that the evidence of what the complainant had said to other people went only to the complainant's credibility, and did not directly prove what happened, did not apply to the complainant's statements to the police. The jury retired for further deliberations at 6.09 pm.

[21] At 6.36 pm the trial judge advised the parties that he had received a note from the jury (MFI "I") that they could not agree on a decision. At 6.56 pm the trial judge directed the jury that, in view of the length of time they had been deliberating, the trial judge was prepared to take a verdict of a majority of at least 11 of the jury. The jury retired at 7.00 pm. A few minutes later the jury gave a note to the trial judge indicating that they had agreed upon the verdicts. Verdicts of guilty agreed upon by 11 members of jury were delivered at 7.17 pm.

The verdicts are not unreasonable

[22] The complainant's mother's evidence supplied the limited support for the complainant's evidence that there were opportunities for the appellant to commit the offences. Her evidence was also consistent with the complainant's evidence that the appellant often went into the complainant's room and was sometimes violent toward him.

[23] As to the evidence of violent conduct by the appellant towards the complainant, the trial judge appropriately directed the jury that, if it accepted that evidence, it could be used by the jury only "to find possibly why the complainant did not make a complaint, or to indicate a desire on the accused person's part to exercise control". In the same directions, the trial judge reminded the jury that "[o]f course it might, on the other hand, provide a motive for the complainant making allegations against the accused. So there are those limited uses that you might make of that evidence of violence, because outside that you can see that it's, as a matter of logic, that he might have been violent does not prove that he committed a sexual offence. You can't reason that way."[12]

[24] In relation to the preliminary complaint evidence, the trial judge appropriately directed the jury that it could be used only as it related to the credibility of the complainant, that consistencies between what a witness said that the complainant had told him or her with what the complainant told the jury could be taken into account as possibly enhancing the likelihood that the complainant's evidence was true, and that inconsistencies would have a negative effect upon the jury's assessment of the complainant's credibility. Although the evidence of the complaints was in general terms, it was broadly consistent with the evidence of the complainant. There were arguably inconsistencies in some respects, depending

---

11 AB 251.

12 Transcript 2-30, 2-31 AB 187-188.

upon how that evidence was interpreted. For example, witnesses spoke of the complainant saying that the appellant "tried" or "wanted" to do things, rather than actually doing them, but that seems merely to have reflected imprecision in the complainant's own language. The complainant made clear on many occasions in his evidence that the appellant had in fact done those things, even though the complainant also used words such as "tried" and "wanted" on many occasions. There were some other inconsistencies, concerning matters such as the date upon which the complainant first complained of the offences and whether the appellant had actually sodomised him; but there was no inconsistency of such significance as to require the jury to doubt the reliability and credibility of the complainant's apparently plausible and cogent evidence of each of the charged offences.

[25] The appellant's argument that the only evidence was hearsay failed to take into account the direct evidence which was given by the complainant. The appellant questioned the findings of guilt on the basis that there was no "physical evidence" or "medical evidence". It is not the law that such evidence is necessary to justify a reasonable conviction. The appellant also argued that the complainant's grandfather used his own paraphrasing of what the complainant said rather than stating what the complainant said. The complainant's grandfather's evidence does seem, however, to give the words used by the complainant or the effect of those words, rather than his interpretation of them. That is illustrated by a passage in which the complainant's grandfather commenced to answer a question by saying, "…my interpretation of that was…". There was an objection and the complainant's grandfather was not permitted to give any evidence of his interpretation.[13]

[26] The appellant referred also to the complainant's evidence of sexual misconduct by the appellant after the complainant had returned to live with his mother and the appellant some time after the police interview. This evidence was not admissible as evidence of the charged offences because it concerned an event after the period charged in count 1. The trial judge directed the jury that if they were not satisfied that it had occurred they should ignore it, and that would bear on their assessment of the complainant's credibility with respect to the other evidence; if the jury accepted that this event occurred, then the jury could use the evidence against the appellant in relation to the charges only if the jury was satisfied that the evidence demonstrated that the appellant had a sexual interest in the complainant and was willing to give effect to that interest by doing the acts charged in counts 1, 2 and 3. The trial judge directed the jury that if they were persuaded of that, they might think it more likely that the appellant did what is alleged in the charges under consideration; if they were not satisfied of that, they should forget about this evidence. The trial judge directed the jury that even if they were satisfied that this event occurred, it did not inevitably follow that they would find the appellant guilty of the charges; that the jury would always have to decide whether, having regard to the whole of the evidence, the offences charged had been established to the jury's satisfaction beyond reasonable doubt.

[27] That evidence was admissible for those limited purposes.[14] If, contrary to my own view, the evidence was not admissible, or if it should have been excluded in the exercise of the trial judge's discretion, that would not form a ground sufficient to justify the appeal being allowed. The jury were appropriately directed to focus

---

13 Transcript 2-13 AB 126.

14 See *R v A* [2001] QCA 516 at [27] (Mackenzie J, with whose reasons Williams JA and Chesterman J agreed), following *R v Witham* [1962] Qd R 49.

upon the reliability and credibility of the complainant's evidence of the offences alleged against the appellant. It seems most unlikely that the jury would have derived much assistance from this evidence in deciding whether the prosecution had proved the appellant's guilt of the offences beyond reasonable doubt. The trial judge described it to the jury as "a small piece of evidence, of an event that was said to have occurred outside the time of count 1, after the child [was] interviewed by the police".[15] The admission of this evidence and the directions given by the trial judge about it were not productive of any miscarriage of justice.

[28] Defence counsel apparently emphasised this evidence in addressing the jury.[16] That forensic point was open in light of the complainant's omission to mention this event until just before the third trial, but there was no evidence that the complainant was ever questioned about events in the period after the police interview. The surprising situation suggested by the evidence – that the youthful complainant was returned to a household with the appellant – does not itself convey anything about the complainant's credibility or the reliability of his evidence.

[29] The appellant argued that, if the police had evidence of sexual offences, they would have ensured that the complainant did not return to live with his mother whilst the appellant was in the house. He referred to what he contended was the failure by the police to contact the "Department of Child Safety" and the omission of the complainant's father, stepmother, mother, and grandparents to prevent the complainant from returning to that situation. None of this impugned the complainant's credibility or the reliability of his evidence.

[30] As the trial judge directed the jury, the prosecution case depended on the jury accepting the complainant's account as truthful and reliable beyond reasonable doubt; the trial judge directed the jury that "…you may not convict the accused, requiring, as that would, an acceptance of [the complainant's] testimony, unless after scrutinising it, examining it, considering it with great care, considering these matters that I just talked to you about and paying heed to my warning you are satisfied beyond reasonable doubt of its truth and accuracy. It really is a matter of being satisfied of his evidence beyond reasonable doubt, drawing support in any other respect that the other evidence provides or not. And if [you are] not satisfied beyond reasonable doubt of his evidence, it doesn't seem to me that [it is] open to you to convict."[17] The trial judge repeated directions to that effect in the re-directions given to the jury shortly after 6.00 pm on the final day of the trial, 20 February 2013. Those were the last directions about the evidence which the trial judge gave before the jury returned the guilty verdicts.

[31] The jury, which had the advantage of seeing and hearing the complainant give evidence at the trial in addition to the evidence of his recorded police interview, evidently accepted that his evidence was truthful and reliable. That was reasonably open to the jury, and it was reasonably open on the whole of the evidence to find that the prosecution had proved the appellant's guilt of each offence beyond reasonable doubt.

Section 21AW

[32] Subsection 21AV(1) of the *Evidence Act* 1977 provides that an "affected child" (defined in s 21AC as meaning "a child who is a witness in a relevant proceeding

---

15 Transcript 2-28 AB 185.
16 Summing up at AB 196.
17 Transcript 2-32 AB 189.

and who is not a defendant in the proceeding") is entitled to have near to him or her, whilst he or she is giving evidence in the relevant proceeding, a person who may provide the child with support ("a support person"). Under subsection 21AV(3), the support person must be permitted to be in close proximity to the child whilst the child is giving evidence. An order was made under those provisions for a support person to be near A whilst she gave her pre-recorded evidence.

[33] Subsection 21AW(1) provides that s 21AW applies to a proceeding on indictment if any one of various measures is taken, including, that "an affected child has a support person under section 21AV while the child gives evidence." Subsection 21AW(2) requires judges presiding at the proceeding in which an affected child gives evidence to instruct the jury that:

> "(a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
>
> (b) the probative value of the evidence is not increased or decreased because of the measure; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the measure."

[34] The trial judge's directions in relation to A's evidence were as follows:

> "…For reasons that will probably be obvious to you, the law now provides that when a child is going to give evidence, it's made as soon as possible, it's made early and recorded and kept so that it can be played to you, the jury, when the trial comes around; all right. So that's what you're about to see is the recorded evidence of the child. You should understand now that this practice of recording and presenting the evidence this way is routine and you wouldn't draw any inference against [the appellant] because of the way this evidence is being presented. And the probative value of the evidence is not increased or decreased because of the way it's presented. By that I simply mean it doesn't prove more or less because it's been recorded. And also you don't give it any greater or lesser weight because of the way it's been presented and recorded and played to you. In other words, although you're watching it on the screen, you should just attempt to receive it as if the witness were here in the room. It's a standard routine and it will happen in every case where there's a child to give evidence in proceedings like this."

[35] The directions complied with s 21AW(2) in relation to the measure of taking A's evidence by way of pre-recorded evidence, but the directions did not refer to the support person. The consequences of non-compliance with this aspect of s 21AW of the *Evidence Act* 1977 have been discussed in a number of decisions, most recently in *R v GAQ*.[18] In that case each of the complainant ("J"), her boyfriend ("S"), and her younger sister ("E") was an "affected child" who gave pre-recorded evidence under s 21AK of the *Evidence Act* 1977. A judge had made an order under s 21AV that a support person for each of those witnesses be present at the recording of their evidence.

[36] The support person was clearly visible in the recording played to the jury. The trial judge's directions to the jury about their evidence did not refer to the measure that

---

[18] [2013] QCA 309.

the evidence was taken by way of pre-recording and did not refer to the measure that there was a support person present whilst each child gave evidence. As to the latter point, McMurdo P, with whose reasons Muir JA and Atkinson J agreed, wrote that:

> "His Honour made no mention at all of a support person and so did not comply with s 21AW(2)(c). The respondent's submission that the very general terms of the judge's directions set out above were adequate to meet the requirements of s 21AW must be rejected, as it was in this Court's decision in *R v Horvath*. What was missing here was an instruction that the fact that the children gave their evidence by way of a videoed pre-recording, remotely, and in the presence only of a support person, was a routine court practice from which the jury must not draw any inference as to the appellant's guilt; its probative value was not increased or decreased nor given any greater or lesser weight because of those measures."[19]

[37] McMurdo P went on to hold, following *R v DM*[20] and *R v Michael*,[21] that the court can uphold any subsequent conviction only if convinced, notwithstanding the non-compliance and after viewing the whole of the record, that there has been no substantial miscarriage of justice in the terms of s 668E(1A) of the *Criminal Code*. McMurdo P observed:

> "The question is not whether the non-compliance could have had any adverse effect on the appellant's prospects of acquittal. It is whether the trial being irregular, this Court is able to conclude for itself upon its review of the record that there has been no substantial miscarriage of justice [*R v Michael* at [38]; *R v BCL* [2013] QCA 108 at [8]]."

[38] McMurdo P rejected a submission that there was no miscarriage of justice because defence counsel's failure to ask for the necessary directions was a tactical decision designed to avoid drawing a jury's attention to the presence of the support person upon whom J relied whilst clearly distressed; that submission overlooked the mandatory obligation placed on the trial judge by s 21AW. McMurdo P was unpersuaded that no substantial miscarriage of justice had arisen from the trial judge's omission to give the warnings required by s 21AW. That conclusion was expressly made referrable to the facts that the case turned wholly on J's evidence about events when, as a five year old she was awoken from sleep and which she recounted for the first time almost a decade later, the jury found that appellant not guilty on one of three counts, J became emotional and distressed when recounting the events, and she then sought assistance from the support person.

[39] This is a very different case. A's support person is not visible at any time in the video recording of A's evidence. The camera remains focussed upon A. Early in the recording A looked to one side, and it is possible to hear whispering from someone off screen, but there is nothing to indicate who was present in the room. I note also that the jury could not have discerned that the public had been excluded from the room in which A gave evidence (a measure required by s 21AV(2) about which directions also should have been given under s 21AW(1)(b)). Furthermore, A was not the complainant and she did not give evidence of the offences. Her evidence was relevant only as preliminary complaint evidence and as evidence of

---

19 [2013] QCA 309 at [9].
20 [2006] QCA 79 at [26].
21 [2008] QCA 33 at [38].

violent conduct by the appellant towards the complainant, and there was no serious challenge to either aspect of A's evidence. It was not suggested to A that the complainant had not made a complaint to her in the terms which A recited. The appellant relied upon the violence which A and other witnesses attributed to the appellant as an explanation for what was submitted to be the false complaint by the complainant. It is relevant also that the trial judge's summing up appropriately emphasised that the Crown case depended upon the evidence of the complainant and also explained the limited relevance of the evidence of his complaints and the evidence of violence.

[40] In *Weiss v The Queen*[22] the High Court referred to matters which should be taken into account in determining where no substantial miscarriage of justice has actually occurred:

> "It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.
>
> There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not "to speculate upon probable reconviction and decide according to how the speculation comes out". But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt."

[41] The constellation of circumstances mentioned in [39] of these reasons suggest that the trial judge's omission to give the required directions about the support person and the exclusion of the public would have had no consequence for the verdicts. The complainant's evidence of each offence was plausible and cogent, it derived some support from the generally consistent preliminary complaint evidence, and it was accepted by the jury. There was no substantial miscarriage of justice.

Communication between the trial judge and the speaker

[42] The trial judge's questions of the jury about the meaning of aspects of three of the notes elicited helpful answers.[23] The questions did not seek information about the

---

22 (2005) 224 CLR 300 at [42]-[43].

23 AB 210-211; AB 240-241; AB 255-256.

deliberations of the jury and the speaker's answers did not elaborate upon that topic. Once the speaker apprised the trial judge of the underlying purpose of the questions in the jury notes, the trial judge gave appropriate directions in each case. There was no error of law in the way in which the trial judge dealt with these issues and no reason to think that this contributed to any miscarriage of justice. There are some surprising aspects of the notes, but the trial judge's very clear directions should have cleared up any misunderstanding any juror might have entertained about the jury's task.

Proposed order

[43] I would dismiss the appeal.

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

[45] **BODDICE J:** I have had the opportunity to read the reasons for judgment of Fraser JA. I agree with those reasons and the proposed order.