SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBJ* [2014] QCA 2
PARTIES:	**R** **v** **HBJ** (appellant)
FILE NO/S:	CA No 139 of 2013 DC No 106 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	7 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013
JUDGES:	Fraser and Morrison JJA and Applegarth 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 convicted after a trial of one count of maintaining an unlawful sexual relationship with a child under 16 years – where the complainant was the appellant's daughter – where the trial judge accepted a submission by the appellant that he had no case to answer in respect of a count of rape and the prosecution subsequently entered a nolle prosequi in respect of that count – where the appellant argued that the complainant's evidence was unreliable, lacking in probative force and contained marked discrepancies and manifest inadequacies – where the trial judge reminded the jury of the differences between the complainant's first police interview and the statements she made during the second police interview and her pre-recorded evidence – where the appellant did not give or call evidence – whether it was open on the whole of the evidence for the jury to be satisfied of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE

APPEAL DISMISSED – where the appellant argued that the directions given by the trial judge about the offence of maintaining were inadequate – where the appellant contended that the trial judge should have given the jury an instruction about the nature of acts that would constitute an unlawful sexual act – whether the directions given by the trial judge were sufficient to avoid any risk the appellant was convicted on the basis of acts which were not sexual and indecent in nature

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – MATTERS AVAILABLE TO JURY IN JURY ROOM – where, after the jury retired to consider their verdict, they requested copies of the recordings of the complainant's police interviews and pre-recorded evidence and a copy of the complainant's mother's statement to be available in the jury room – where the appellant's solicitor acquiesced to the jury's request – where the trial judge told the jury that the recordings would be provided but the complainant's mother's statement could only be read to them as it was not in evidence – where the jury reached a verdict after the recordings were permitted in the jury room – where the appellant argued that allowing the recordings to be given to the jury to view in the jury room amounted to an error of law – where the appellant further submitted that given the complainant's evidence was the sole basis for the Crown case, such an error amounted to a miscarriage of justice in the absence of directions to the jury – whether allowing the evidence to go into the jury room was an irregularity – whether a miscarriage of justice eventuated

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the trial judge gave a direction in accordance with s 21AW(2) of the *Evidence Act* 1977 (Qld) ('the Act') before the complainant's pre-recorded evidence was played to the jury – where no issue was taken with the adequacy of that direction – where the appellant contended that remarks made in the trial judge's summing-up in relation to the pre-recording of the complainant's evidence did not comply with s 21AW(2) of the Act and had the potential to undermine the earlier direction given – where the appellant further argued that the directions mandated by s 21AW(2) of the Act should have been given to the jury when the pre-recorded evidence was permitted to go into the jury room – whether these factors amounted to a miscarriage of justice

Evidence Act 1977 (Qld), s 21AC, s 21AV, s 21AW(2), s 93A, s 99

Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Michaelides v The Queen (2013) 87 ALJR 456; [2013] HCA 9, cited
R v GAO [2012] QCA 54, cited

COUNSEL: L K Crowley for the appellant
B G Campbell for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was arraigned upon an indictment charging two counts, that between 9 December 2011 and 30 July 2012 the appellant maintained an unlawful sexual relationship with a child under 16 years (count 1) and that on a date unknown between 29 June 2012 and 30 July 2012 the appellant raped the same complainant (count 2). The complainant was the appellant's six year old daughter. At the conclusion of the Crown case the trial judge accepted the appellant's submission that he had no case to answer in respect of count 2. The prosecutor then entered a nolle prosequi in respect of that count. The jury found the appellant guilty on count 1.

[2] The appellant has appealed against conviction upon the following grounds:[1]

> "1. The verdict is unreasonable, or cannot be supported having regard to the evidence.
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> …
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> 3. The learned trial judge gave insufficient direction to the jury regarding the meaning of unlawful sexual act relevant to a charge of maintaining a sexual relationship with a child.
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> 4. The learned trial judge erred, or a miscarriage of justice was otherwise occasioned, in permitting the jury to have the recordings of the complainant's s 93A interviews in the jury room to replay during deliberations.
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> 5. The learned trial judge erred, or a miscarriage of justice was otherwise occasioned, by his Honour's failure to warn the jury not to give … the complainant's s 93A interviews disproportionate weight when replaying them in the jury room.
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> 6. A miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury properly, or at all, in accordance with s 21AW(2) of the *Evidence Act*."

The trial

[3] The evidence in the Crown case comprised recordings of police interviews of the complainant on 4 August 2012 and 30 August 2012 (admitted in evidence pursuant

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[1] The notice of appeal set out three grounds of appeal, but the appellant abandoned the original ground 2 and was granted leave at the hearing to argue three additional grounds.

to s 93A of the *Evidence Act* 1977 (Qld)), the pre-recorded evidence of the complainant taken on 8 May 2013 (admitted in evidence under sub-division 3 of Div 4 of the *Evidence Act* 1977 (Qld)), a recording of a police interview of the complainant's brother admitted pursuant to s 93A of the *Evidence Act* 1977 (Qld), and evidence given by the complainant's mother at the trial in May 2013.

[4] The Crown particularised the acts constituting count 1 as including, but as not being limited to, "touching the complainant's 'bottom' and/or digital penetration of the complainant's anus and/or the touching of her vaginal area both 'inside and outside' and/or kissing the complainant."

[5] In the complainant's first police interview the complainant said that "my Dad keeps annoying me and he won't stop … He um, tickles my bottom and it's annoying. And he just gets his finger right in it … it really tickled but it was annoying me and it gave me um, a bit of a fright and … he just kept annoying me … he just kept on going and I kept telling him to stop. He pulls my pants down, but I pull them back up after a minute or two … when we have dinner he stops … But when I have a bath it's the same too … he does it to my fanny as well." The complainant referred to it being in July on a Saturday, but when asked how many Saturdays before she said "[a] hundred". It appears that the complainant was then referring to how often the appellant had done this, because she went on to say that "he does it all the time". With reference to the last time when the appellant did it, the complainant said that "he tickled my bottom and didn't get to stop … he kept on going, but I had to keep pulling my pants up, but he just kept pulling them down". The complainant said this happened in the lounge room. The complainant again referred to the appellant pulling her pants down and said that "he tickled my bum and put his finger in my bottom". She said that the complainant put his finger in her bottom and "wriggles it around … he doesn't stop either when he does it. He, then he takes it out, then he goes and wash[es] it off, then he's finished … [a]nd he does even when I have to go to the toilet usually". When asked how this made her feel she said "all gooey and yucky … Not really comfortable". When asked for more information about what happened when the appellant put his finger in the complainant's "fanny", the complainant said "he just rubs it and um, I tell him not to do it but he just keeps going and going and going until he stops. But I have to wash it and, but he does it for me, but I do it anyway …". The complainant said that he did this to her in the bath, in the lounge room, and in her bed. He did it even when her pants were on.

[6] When asked what the appellant talked about when he was washing the complainant in the bath, the complainant responded "wash your fanny when you go to mummy's because it keeps it clean and um, you won't um, it won't, you won't get, it won't get sore … I am going to tell her that more often and drink some more, and I do drink lots now …". After the complainant made it clear that she understood the difference between her "fanny" and her "bottom" she told the police officer that the appellant put his finger in the hole in her bottom and that he usually rubbed her fanny outside or inside it. When he came into her bedroom, the appellant tickled her bottom, she told him to get out and that he needed to go but he didn't, and that he played with her fanny for two or five seconds. The complainant said that it happened every weekend and it was always the same but, "… we kiss a different way too". The complainant said that they kissed "like on T-V … and we have to cuddle each other and we do it like we're marrying each other … you just don't kiss very quickly, you kiss a bit for a while". The complainant said this happened in the computer room

and in the complainant's bedroom as well as the lounge room. This happened when her brother was away from the room. The complainant referred to a time when she kissed the appellant and he touched her fanny and tickled her bum in the lounge room, the bathroom, and her bedroom.

[7] The police officer asked the complainant whether she had spoken to anyone about what the appellant had been doing and the complainant said that she had told her mother about it and that was the only person she had told. That was on the night before the police interview.

[8] In the second police interview, the complainant was asked whether she remembered what they had talked about last time and she responded that she couldn't remember anything. She said that the appellant was not allowed at her house because he would get in trouble by the police officer; "'cause I keep dreaming about him but he's okay in my dreams … [a]nd I'm not allowed to think about him …". The complainant was asked to tell the police officer everything that happened at the appellant's place the last time she went there and she responded that "[i]t all started when it was a very nice day but it got worse. And then, but it was just fine when I came over, but then it got worse when I came over the last couple of times. And um, now I went for a couple of years … [b]ut now I stopped … [s]o I cannot go any more …". The police officer told the complainant that on the last occasion she had told the police officer about the appellant tickling her bottom. The complainant said, "yeah, that was annoying". The police officer again asked the complainant to tell him more about what the appellant actually did and the complainant responded that she "can't remember really". She said she that couldn't remember the time on the couch: "I, I, I forgot all about my dad". The complainant went on to say that she couldn't remember anything about particular matters put to her which she had told the police officer on the last occasion. The transcript of this interview subsequently records the following passage:

> "[Police officer] Yeah? So tell me more about the same thing he does [Complainant] Like, he tickles my bottom and he's just a shit-for-brains".

The respondent submitted without contradiction that the words "a shit-for-brains" are not clearly audible on the tape.

[9] When asked about how the appellant tickled the complainant's bottom when she was in her bed, she responded, "He does well, he's making it all yucky … [w]ell, it feels all gooey and stuff". The complainant said that she didn't know where it felt "gooey". Subsequently the complainant said that the appellant yelled at her about her crying about her mother, that she missed her mother, and that she did not want to go to the appellant's anymore because he was "very mean", "he grunts, he snores and it's a bit loud and I can't even … watch T-V … I still don't like my dad. It's annoying when I get dreams about him … well he really had fully in my dreams, but not all the, all the time he's really just getting me insane …". The complainant said "… he was punching in the face. I'd whack him in the face, I'd kick him in the face." When the police officer observed that was not very nice, the complainant responded the appellant was not nice. The police officer again pressed the complainant to tell what had happened when the appellant had tickled her bottom and the complainant responded "… he doesn't know what he's doing … [h]e just goes off and do it, but I tell him not to and he keeps going … he like, uses his hand … In the private area, where he's not supposed to use … [w]ell, he just like, gently um, like, rubs it … it doesn't feel nice …".

[10] When the police officer asked the complainant where it was that the appellant rubbed her private parts, she said, not responsively, "[o]nly for probably two days … [o]ne day actually … He did it … [a]t my dad's house … in the lounge room." At the end of the interview the following exchange occurred:

> "[Complainant] Well um, to go to the toilet
> [Police officer] Mm-hm
> [Complainant] But he doesn't stop. He does it for two things
> [Police officer] Yeah? What's that?
> [Complainant] For like, tickling my bottom and that, that's it
> [Police officer] Okay. So when you're referring to your private parts that dad tickled
> [Complainant] Well I don't, I don't do it to him
> [Police officer] No, no, but when he done it to you, which private parts was he touching?
> [Complainant] Um, I don't know. I can't remember that …".

[11] In the complainant's pre-recorded evidence the complainant agreed that she had watched the police interview of 4 August 2012 and that what she said in that interview was true. In cross-examination the complainant said that she could not remember what she had told the police officer at the second interview. She could not remember the police officer asking her at the second interview whether she remembered what she had talked about at the previous interview and she could not remember responding at the second interview that she could not remember anything then. She agreed that she told the police officer the truth at the second interview. She agreed that when she arrived at court on the day before this cross-examination and saw herself on television she could remember going to the appellant's place. When asked what she did when she went to the appellant's place she responded that she watched television and played with toys if there were enough toys. She agreed that before she had watched herself on television on the previous day she could remember that the appellant had tickled her. When asked how he had tickled her she said that she couldn't really remember. She remembered having baths at the appellant's place. When asked whether she bathed on her own or with her brother she said her brother was with her. She again said that she could not remember what she told the police officer about the appellant. When asked why she had stopped going to visit the appellant she said it was because she had told the police and her mother, but she said that she could not remember what she told her mother. She agreed with the suggestion by defence counsel that she told her mother that the appellant would sometimes tickle her and put his hand near her bottom. When asked if she remembered why she told her mother she answered "'Cause it could get worse".

[12] The complainant was again asked why she told her mother and answered that she didn't know. When asked whether she remembered that when she was at the appellant's place it would sometimes hurt her when she went to the toilet to urinate she said that she couldn't understand defence counsel. She said that she did not know what "going to the toilet" meant and she did know what "doing a wee-wee" meant. Subsequently she agreed that sometimes when she did a "wee" at the appellant's it hurt. She denied that she spoke to the appellant about that. She agreed that the appellant came and washed her when she was having a bath and that sometimes he washed her "rude part". She denied that he told her to drink a lot more water so that it wouldn't sting. She could not remember telling the police officer that the appellant spoke about washing her fanny to keep it clean and so it

wouldn't get sore. She did not remember telling the police officer about drinking more. She could not really remember seeing herself on TV on the day before her cross-examination.

[13] The complainant specifically didn't agree with the suggestion that the appellant told her to drink more water so that her "wee-wee" wouldn't get sore. She said that her mother was now telling that. The complainant agreed that she had seen a doctor about her burning or hurting a bit when she went to the toilet. The complainant said that she couldn't actually remember being in the bath at the appellant's place and she couldn't remember the appellant talking to her about being clean and not being sore.

[14] The complainant said that she did not remember the appellant tickling her, she did remember the appellant putting her to bed and saying goodnight, the appellant did give her a kiss goodnight, and she said "[i]t was on TV that they usually do when they get married I think". She said that she didn't know what happened when two people who got married kissed. She agreed that she would always give the appellant quite a big kiss. When asked whether that would be on the cheek, the complainant said that she didn't think so but she didn't really know where she kissed him. When it was suggested to her that her mouth was always closed when she kissed, the complainant said that she didn't know and she didn't know whether the appellant's mouth was always closed when the complainant kissed. The complainant said that she did not remember cuddling the appellant on a couch or his bed. She did remember hopping into bed with the appellant sometimes when she was at his place.

[15] The complainant remembered telling the police officer about the appellant touching her bottom but said that she did not know whereabouts on her bottom he touched her. When asked where the appellant would tickle her she said, "[f]orgot". When it was put to the complainant that the appellant never took off the complainant's clothes, she answered, "[d]on't know". She did not remember saying to the police officer that the appellant was "a shit-for-brains", she said that she had not heard that word, but that her mother had said it, but not about the appellant. The complainant remembered telling the police officer of dreams about the appellant including that he did something that he shouldn't have with her; "he put the … roof on the door". The complainant said that she did not have dreams about the appellant touching her rude parts and never had dreams about that.

[16] The complainant answered that she did not remember when asked a series of questions: whether it was true that the appellant washed her in the bath every now and then, whether she agreed, disagreed, or didn't remember that the appellant washed her private parts from time to time in the bath, that the appellant told her to make sure that she was clean so that she would not be sore when she went to the toilet, that she sometimes told the appellant that it hurt when she urinated, that the appellant told her to drink a lot of water so that her wee-wee wouldn't be as strong and burn her, and that her father tickled her when she was on the couch. There was then the following exchange:

> "And he's told me that sometimes he would tickle on the cheek of your bottom, do you-----?-- Disagree.
>
> You disagree with that. Are you saying - you know what a cheek - you know what the bottom cheek is?-- Yes.

> Is that the part - the fleshy part on your bottom?-- Yes.
>
> Did he ever touch you there?-- No.
>
> Did he ever tickle you there?-- No.
>
> Did he ever touch you at all anywhere on your bottom … ?-- Can't remember.
>
> Your dad's told me that he never put his finger - you know where you poo from, it's the bit between your two bottom cheeks?-- Yeah.
>
> Your dad's told me he never put his hand there in the – on your bed or in the couch or anywhere in the house, do you agree or disagree with that or don't remember?-- Don't remember.
>
> He's told me that he would wash your bottom and your rude part when you were [in] the bath, do you remember that or disagree with that or don't remember it or agree … ?-- I think I remember.
>
> All right. Well tell me what you remember?-- I meant I can't remember.
>
> You can't remember. All right. And he's told me - your dad has told me that he never put his finger in your bottom hole, is that - did that happen or didn't happen or you can't remember?-- Did happen.
>
> It happened?-- Yep.
>
> Tell me when that happened?-- I think when I came - I think when it was my last time I came and a few weeks before.
>
> Was he tickling you at the time?-- Not all - but only sometimes when I was not near him.
>
> Sorry?-- When I was not near him he didn't do it.
>
> All right. When you weren't near him he wouldn't do it, is that what you said? I just didn't quite understand what you said there … ?-- Don't know.
>
> See your dad's told me that he didn't put his finger between the cheeks of your bottom, other than when he was washing you in the bath, is that true or is that not true or-----?-- Don't-----
>
> -----you don't remember?-- Don't remember."

[17] At the end of cross-examination, when the complainant was asked if she knew why she did not visit the appellant anymore, she answered, "[b]ecause he done something bad."

[18] The complainant's brother did not give any relevant evidence in his police interview. The complainant's mother gave evidence that the custody arrangements between herself and the appellant after their marriage ended in 2010 was that she had the children otherwise than when the appellant had the children on weekends once a fortnight. In August 2012 she noticed the complainant was upset and asked her why she was upset. The complainant responded that she couldn't tell her and it was a secret. When the complainant's mother told the complainant that "mummy

can keep a secret", the complainant said that, "[d]addy comes into my room at night and tickles my bottom"; the complainant said "No" when her mother asked her whether she meant the appellant pinched her bottom. On the following morning the complainant spoke to her mother a bit more about what had been happening. The complainant said that "when I'm watching TV with daddy he touches my bottom and makes it slimy and sticky"; "[h]e pulls my pants down". The complainant's mother asked the complainant where her brother was at the time and the complainant responded that he was playing with his toys. That was the extent of the conversations. The complainant's mother took her children to see the police on 4 August 2012, and both were interviewed.

[19] In cross-examination, the complainant's mother agreed that on the evening of the conversation in which the complainant's mother had asked whether the complainant meant that the appellant pinched her on the bottom, the complainant's mother rang the appellant. The complainant's mother agreed that she put to the appellant on that night what the complainant had told her. What the complainant's mother put to the appellant was, "I need to ask you whether or not you stick your fingers near your daughter's bottom".

[20] The complainant's mother did not recall any conversation about the complainant between her and the appellant on the last occasion upon which she picked the children up from the appellant's place. She did not recall whether or not the complainant complained of any soreness or drinking any water or anything like that. The complainant's mother agreed that she had taken the complainant to hospital about dehydration issues but said that this occurred when the complainant was a baby. The complainant's mother agreed that she would encourage the complainant to drink a lot of water. When it was put to her that the complainant sometimes had difficulty with toileting, the complainant's mother said that this was when the complainant was a baby. She denied that it occurred when the complainant was older.

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

Ground 1: the verdict was unreasonable or cannot be supported having regard to the evidence

[22] The question raised by ground 1 is whether, upon the whole of the record, the Court is satisfied that it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[2] The appellant argued that, with reference to *M v The Queen*,[3] the evidence in the Crown case contained such marked discrepancies and manifest inadequacies, and was so lacking in probative force that, even making full allowance for the advantages enjoyed by the jury, there was a significant possibility that an innocent person had been convicted; that the complainant's evidence was so unreliable that it was not reasonably open for the jury to have accepted her evidence beyond reasonable doubt. The appellant emphasised the statements made by the complainant in her second police interview, in which she stated both that she could not remember what the appellant had done and that she could not remember what she had told the police officer in the first

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2 *M v The Queen* (1994) 181 CLR 487 at 494-495; *MFA v The Queen* (2002) 213 CLR 606 at 614-615; *Michaelides v The Queen* [2013] HCA 9 at [3]-[4].

3 (1994) 181 CLR 487 at 494.

police interview which was only 26 days earlier, and the complainant's pre-recorded evidence, which very largely consisted of the complainant saying that she did not remember what the appellant had done and what she had told the police officer.

[23] There is some substance in that argument, but I would accept the submission for the respondent that it was open for the jury to conclude that by the time of the second police interview the complainant had become very reluctant to discuss the details of the appellant's offending which the complainant had truthfully and reliably recounted in the first police interview, and that in the complainant's pre-recorded evidence about nine months later, she genuinely had difficulty in remembering the details of what had occurred. The complaint made by the complainant to her mother was generally consistent with the complainant's statements in the first police interview. There was no significant inconsistency between that complaint and the complainant's mother's evidence of her discussion with the appellant, which, on the complainant's mother's evidence occurred before the complainant had mentioned on the following morning that the appellant pulled her pants down, "touche[d] [her] bottom, and ma[de] it quite slimy and sticky". Of more significance, however, is the apparently compelling account of the appellant's sexual misconduct which the complainant gave in her first police interview and the emphatic statement which the complainant made, under the pressure of cross-examination, towards the end of her pre-recorded evidence that it "[d]id happen".

[24] In summing up the trial judge reminded the jury of the very substantial difference between the statements made by the complainant in her first police interview and the statements she made to police 26 days later to the effect that she couldn't remember much and her statements in pre-recorded evidence. The trial judge directed the jury to take into account the consistencies and inconsistencies between her versions, and what she had said that she could not remember, directing the jury that these were important things in assessing credibility. It is apparent that the argument presented on appeal reflected submissions which were made on behalf of the appellant to the jury. The jury evidently accepted the credibility and reliability of the statements made by the complainant in her first police interview. That was open to the jury and it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

Ground 3: the learned trial judge gave insufficient direction to the jury regarding the meaning of unlawful sexual act relevant to a charge of maintaining a sexual relationship with a child

[25] For the purpose of the offence charged in count 1, "an unlawful sexual relationship is a relationship that involved more than one unlawful sexual act over any period": *Criminal Code*, s 229B(2). The appellant argued that the trial judge's directions about the offence of maintaining an unlawful sexual relationship with a child were inadequate because the directions did not include an instruction to the jury about the nature of the acts which would constitute an unlawful sexual act, save for the instruction given by the trial judge that it was an act that constituted an offence of a sexual nature. The appellant also argued that the trial judge should have identified how the sexual acts upon which the Crown relied were to be considered in accordance with the direction regarding acts that would constitute an offence of a sexual nature. These directions were submitted to be required by the circumstance that not all of the acts upon which the Crown relied to prove the offence was self-evidently of a sexual nature. It was submitted that the attention of the jury

should have been drawn to a distinction between innocent touching of the complainant's vaginal area during washing for legitimate bathing and hygiene reasons and kissing and annoying "tickling" of the complainant's bottom and the kind of indecent touching which would be necessary to constitute an offence of a sexual nature. The appellant argued that there was real risk that at least some members of the jury might have found that the appellant committed an act of a sexual nature simply because he kissed his daughter or tickled or touched her vagina during bath-time.

[26] Such a scenario is far-fetched. The relevant issue in this respect was made clear by the trial judge's reference to the final addresses by the prosecutor and defence counsel. On the one hand, the prosecutor submitted that the jury would accept the evidence of the complainant about "her father sexually touching her, rubbing her fanny in the lounge room, the bedroom, the bathroom, putting his finger in her anus, doing it all the time, happening every weekend over a long period, making her bottom go all gooey and yucky …". On the other hand, the defence case was that what occurred were "innocuous and normal things that happen between a father and a daughter". The trial judge reminded the jury of defence counsel's argument that these normal things "have been misinterpreted and reconstructed in a completely fantastic way … The allegations made against [the appellant] relating to the maintaining of the unlawful sexual relationship referred to things such as kissing, washing in the bath, touching her bottom, touching in the bath and in other places, touching the girl's genital area and her anus. [Defence counsel] then analysed each of those …". The trial judge went on to refer to defence counsel's arguments to the effect that the kissing and washing in the bath were normal things that a parent would do with a young child, and that "tickling or bum squeezing" was "the sort of thing that people would do and not think much about …".

[27] The trial judge directed the jury that: the prosecution undertook to prove that there was "an ongoing relationship of a sexual nature" and "not just isolated incidents"; that there was continuity or habituality "of sexual conduct"; that what had to be proven was an ongoing relationship "of a sexual nature between the [appellant] and his daughter"; that "an unlawful sexual relationship is one that involves more than one unlawful sexual act over any period, and an unlawful sexual act is an act constitutes an offence of a sexual nature"; and that the prosecution had to prove "that the relationship of a sexual nature was unlawful, that is, not authorised, justified or excused by law …". The trial judge directed the jury that each of the 12 jurors must be satisfied beyond reasonable doubt that the evidence established "that an unlawful sexual relationship with the child involving unlawful sexual acts existed …". After referring again to the onus on the prosecution of proving the elements of the offence beyond reasonable doubt, the trial judge directed the jury that what was required was "continuity of sexual conduct, habituality of sexual conduct, not just isolated incidents", and that whilst all jurors did not have to be satisfied about the same unlawful sexual acts, all had to be satisfied beyond reasonable doubt "that there were unlawful sexual acts and that they occurred with some continuity or habituality …".

[28] In the context of the issues in the case, the trial judge's directions were sufficient to avoid any risk that any member of the jury might think that the appellant was guilty of the offence merely upon the basis of acts which were not sexual and indecent in their nature but were merely annoying or unwanted.

Ground 4: the learned trial judge erred, or a miscarriage of justice was otherwise occasioned, in permitting the jury to have the recordings of the complainant's s 93A interviews in the jury room to replay during deliberations

Ground 5: the learned trial judge erred, or a miscarriage of justice was otherwise occasioned, by his Honour's failure to warn the jury not to give the complainant's s 93A interviews disproportionate weight when replaying them in the jury room

[29] The recordings of the police interviews of the complainant were made exhibits, as was the pre-recorded evidence of the complainant. Those recordings were played to the jury in sequence. The jury retired to consider their verdict late on the second day of the trial. On the morning of the third day the jury requested copies of the recordings of the complainant's police interviews, the pre-recorded evidence, and a copy of the complainant's mother's statement. The solicitor who then appeared for the appellant acquiesced to the recordings being allowed into the jury room so that the jury could view them. In addition to telling the jury that the videos would be provided, the trial judge told the jury that a copy of the complainant's mother's police statement was not in evidence so could not be provided but that her evidence could be re-read to the jury if they so required. At 10.40 am the jury retired to view the recordings and consider their verdict. They reached a verdict by 2.30 pm.

[30] The appellant argued that this chronology compelled the conclusion that whatever doubts the jury might have had were dispelled once they had the opportunity to view the complainant's evidence in the jury room. The appellant argued that allowing the recordings to go into the jury room, or the failure of the trial judge to warn the jury that they should not give the recordings of the police interviews disproportionate weight when viewing them for a second or subsequent time, was an error of law. In circumstances in which the complainant's evidence was the sole basis for the Crown case, significant issues had been raised with respect to her reliability, effective cross-examination of her was impaired because of her inability to recall what she had told police in the police interviews when she gave her pre-recorded evidence, and she had refused to be medically examined, a miscarriage of justice was submitted to have occurred by the provision to the jury of the recorded police interviews and the absence of directions to the jury about them.

[31] Section 99 of the *Evidence Act* 1977 empowers a court to order that a statement in a document admitted in evidence under Pt 6 of that Act, which comprehends s 93A, be withheld from the jury during their deliberations if "it appears to the court…they might give the statement undue weight". It has been held that as a general rule, at least in the absence of the consent of both the Crown and defence, video recordings admitted in evidence under s 93A should not be permitted to go into the jury room during deliberations; if the jury wish to hear such evidence that should generally occur only in the context of a direction warning the jury that hearing the evidence-in-chief of the complainant again and well after all the other evidence was given required the jury to guard against the risk of giving a disproportionate weight simply for that reason and that they should also bear in mind the other evidence in the case.[4]

[32] It may be assumed that there was a material irregularity in the decision to permit the s 93A recordings to go into the jury room, just as it was irregular to permit the

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4 *R v GAO* [2012] QCA 54 at [20], referring to *R v H* [1999] 2 Qd R 283 and *R v DAJ* [2005] QCA 40.

pre-recorded evidence of the complainant to go into the jury room. As the respondent submitted however, this was a case, like *Gately v The Queen*,[5] in which all of the critical evidence about which the jury had to be satisfied was given by the complainant. As in *Gately*, the complainant's evidence was not controverted otherwise than by cross-examination. Also as in *Gately*, the evidence of the complainant was allowed into the jury room with the concurrence of the appellant's legal representative and there was no ground of appeal that the legal representative acted incompetently. Since the three recordings comprised virtually the whole of the evidence against the appellant at the trial, the evidence was in very short compass, and the trial judge gave appropriate directions in the summing up, no miscarriage of justice resulted from the trial judge permitting the recordings to go into the jury room without giving further directions about them. There was no real risk that the jury would give disproportionate weight to that evidence. Theoretically, the jury might have played only the first police interview, but the jury would not have forgotten the essential content of the second police interview and the complainant's pre-recorded evidence, especially in light of the emphasis given to it by defence counsel in his closing address and the trial judge's references to it in summing up to the jury.

[33] In these circumstances, I would hold, as it was held in *Gately*,[6] that although it was an irregularity to permit the evidence to go into the jury room instead of it being played in open court, that did not produce any miscarriage of justice.

Ground 6: a miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury properly, or at all, in accordance with s 21AW(2) of the *Evidence Act*

[34] The appellant acknowledged that when the complainant's pre-recorded evidence was played to the jury the trial judge gave the jury the mandatory direction required by s 21AW(2) of the *Evidence Act* 1977. No issue was taken with the adequacy of that direction, which was given in the morning of the second day of the trial just before the pre-recorded evidence was played:

> "Before we play this, the procedure, ladies and gentlemen what is adopted with children giving evidence in cases like this is that their evidence is recorded before the trial. So you won't see [the complainant] come into the witness-box and give her evidence. The procedure that is adopted in all cases like this throughout Queensland, so it is standard procedure, is that the child comes into court, sits in a room, as it turns out in this court building for this trial, with a support person, that's standard, and there is a closed-circuit TV link from the room, the secure room to the courtroom so the girl can see – you can see the cameras around – the girl can see the barristers and the barristers can see her and she would have given some brief evidence and then would have been cross-examined by [defence counsel], and it doesn't have to have been me – I wasn't the judge, there was another judge sitting here, it doesn't have to be the same judge for these purposes.
>
> I am required by law to give you the following direction: this measure, the one that I have explained, is a routine practice of the

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5 (2007) 232 CLR 208.

6 (2007) 232 CLR 208 at [4] (Gleeson CJ), [76] (Hayne J, Heydon J and Crennan J agreeing).

> court. You should not draw any inference as to the defendant's guilt of it. The probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of this measure. Probative means affording proof or evidence, so say that the probative value of evidence is not increased or decreased because it is pre-recorded and played to you means it is not better evidence, or worse evidence than evidence given by a witness in the presence of the jury. So the long and short is, this is standard procedure in these types of cases. It is nothing to do with the defendant that's in cases like this, this is how the evidence is given. You don't draw any inference against [the defendant] because of this, and the probative value of the evidence is not increased or decreased because the evidence is pre-recorded this way. You don't give it any greater or lesser weight, it is as if the girl was in the witness-box."

[35] In summing up to the jury in the afternoon of the same day the trial judge emphasised that playing the complainant's pre-recorded evidence was "standard procedure", that this procedure was "completely normal in cases like this", that the presence of the support person in the room with the complainant was "standard procedure, as well", and that it was "just that children often feel more relaxed if there's someone sitting with them, and that's why our courts do that and it happens every day…". The appellant submitted that these remarks were not given as a direction with the force of the judicial office and did not comply in all material respects with s 21AW(2) of the *Evidence Act* 1977; the remarks were submitted to have the potential to undermine the force of the directions given when the pre-recorded evidence was played earlier.

[36] It is sufficient to observe in this respect that the trial judge, having complied with the statutory requirement by giving appropriate directions when the evidence was played, it was unnecessary in this short trial to give any further directions about it in the summing up. The trial judge's directions in the summing up were in any event sufficient to remind the jury of the essential components of the direction required by the statute. I would also not accept the appellant's further contention that the trial judge should have given further directions of the kind required by s 21AW(2) when the pre-recorded evidence was permitted to go into the jury room.

Proposed order

[37] I would dismiss the appeal.

[38] **MORRISON JA:** I have read the reasons of Fraser JA and agree with his Honour and the order he proposes.

[39] **APPLEGARTH J:** I have had the advantage of reading the reasons of Fraser JA with which I agree. I also agree with the proposed order.