SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2014] QCA 315
PARTIES:	**R** **v** **SMITH, Garry Calvin** (appellant)
FILE NO/S:	CA No 101 of 2014 DC No 1944 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2014
JUDGES:	Holmes, Muir and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the conviction on each of Counts 1, 2, 3, 5 and 7.** **3. Enter an acquittal on each of the said counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the complainant children were attending school swimming lessons with the appellant instructor – where the appellant allegedly indecently touched the complainants as they were swimming – where the appellant was charged with seven counts of indecent treatment of a child under 12 years of age – where the appellant was convicted of five charges and sentenced to a total of twelve months' imprisonment, to be suspended after four months with an operational period of two years – where after the jury retired they asked to view again the complainants' pre-recorded evidence in relation to three counts – where the learned trial judge directed the jury not to place undue weight upon that evidence because they had seen it twice – whether the direction was sufficient CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where there

were inconsistencies in the complainants' evidence – whether there was a sufficiently reliable basis for the jury to be satisfied beyond reasonable doubt of the appellant's guilt

Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v FAE [2014] QCA 69, cited
R v MCC [2014] QCA 253, cited
R v SCG [2014] QCA 118, cited

COUNSEL: J R Hunter QC for the appellant
B J Power for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **MUIR JA:** I agree with the reasons of Gotterson JA and with the orders he proposes.

[3] **GOTTERSON JA:** At a trial in the District Court at Brisbane which concluded on 17 April 2014, the appellant, Garry Calvin Smith, was found guilty on five counts in a seven count indictment. Each of the seven counts alleged an offence against s 210(1)(a) of the *Criminal Code* (Qld) ("the Code") of indecent treatment of a child under 12 years of age. For two of the counts on which the appellant was convicted, Counts 1 and 5, the complainant was ER ("ER"), and for the other three on which he was convicted, Counts 2, 3 and 7, GK ("GK") was the complainant. The appellant was found not guilty of the other two counts, Count 4 which concerned ER and Count 6 which concerned GK.

[4] On 28 April 2014, the appellant was sentenced to 12 months' imprisonment for each offence of which he had been convicted. The terms of imprisonment were to be served concurrently and suspended after four months with an operational period of two years. The suspension had commenced by the time that the appeal was heard on 20 October 2014.

Circumstances of the alleged offending

[5] The offending the subject of each of the seven counts was alleged to have been committed at the Dunlop Park Memorial Swimming Pool at Corinda on Thursday, 27 February 2013. Both complainants attended a primary school at Inala. ER was nine years old and in a composite Year 4/Year 5 class. GK was 10 years old. She belonged to the same composite class. The class, and several other classes from the school, attended the pool that morning for a regular swimming lesson. They travelled by bus each way.

[6] The appellant who was 56 years old at the time, qualified as a swimming coach in Victoria. He returned to coaching after moving to Queensland from Victoria in 1997. He had worked at various venues in the Brisbane area, including the Dunlop Park Pool for three years, before resuming coaching there in 2013.

[7] The appellant who testified at his trial, gave the following description of the pool, the patronage and his coaching method, all of which was not challenged in cross-examination. The main pool at Dunlop Park is 50 metres long. It has eight lanes which at the time were separated from one another by ropes. A painted black centre line runs the length of each lane. The pool was fairly busy that morning between 9.30 and 10.30 am. Children from another primary school were in lanes 1 and 2 assisted by four teachers from that school. Less experienced swimmers from the complainants' school who were wearing yellow caps, were in the shallow end of lane 7 with a coach. Those who were better swimmers wore blue or red caps and were in lane 8. As well, members of the public were using other lanes and other pool staff were in the vicinity.

[8] For the lesson involving children from the complainants' class, the appellant was in lane 8. He was positioned about halfway along the length of the lane, standing on the black centre line. He was coaching children with red or blue caps. That morning the group was practicing freestyle, then backstroke and then breaststroke. For part of the lesson, the children would swim in a circuit in lane 8. They would swim from the deep end on one side of the centre line, pass the appellant, make a complete turn and then return to the deep end, passing the appellant again on the way. The appellant himself would turn 180 degrees to watch the child on the return swim. Later, as the shallow end of lane 8 freed up, the children would swim to that end of the pool and get out. The appellant's practice was to give instruction as necessary to each child as he or she passed him in each direction.

[9] Each of the offences was alleged to have occurred when the appellant was supporting the complainant concerned for the purpose of instruction. The appellant testified that he used a method of keeping the child afloat and buoyant in the water while he would give verbal instructions to them. The method was to put one of his arms under the child's shoulder line and the other under the child's hip area. He said that he always kept the palms of his hands facing the bottom of the pool.[1] ER and GK were described by their class teacher as good friends who often played together at lunchtime. They were two of between fifty and sixty children from their school at the pool for the morning swimming session. They returned to the school with their teacher at about 10.40 am that morning. At about 12.30 pm, they approached the teacher together. They were apparently upset and indicated that they wished to speak to her in private about some events that had happened at the pool that morning. The teacher testified that ER did most of the talking. ER said that the swimming instructor had touched them on their private parts. Asked for detail, she explained that this happened when they were praised for swimming well. She pointed to her genital area when asked where she was touched. ER repeatedly said, "he kept patting us".[2] No other description of the touching was given by either complainant to the teacher.[3] In a statement given to police, the teacher described the discussion with the complainants as follows:

> "GK was trying to explain, but it looked like she didn't know what to say, so ER (sic) did most of the explaining and GK tended to agree with her. When ER was explaining, GK was nodding and using hand gestures to the same area as well."[4]

---

1 AB143 Tr3-9 L24-AB144 Tr3-10 L6.
2 AB110 Tr2-29 LL4-18.
3 AB117 Tr2-36 L20.
4 Cross-examination at AB116 Tr2-35 L32-AB117 Tr2-36 L8.

[10] A guidance counsellor at the school spoke to the complainants on 28 February 2013. According to her evidence, both complainants used the word "patting" to describe how they were touched and the word "privates" to describe where they were touched.[5]

The complainants' evidence of the alleged offending

[11] As a result of what the complainants had told their teacher and the guidance officer, they were interviewed separately by police on the afternoon of 28 February 2013. The interviews were video recorded in order to facilitate admission of the statements in them pursuant to s 93A of the *Evidence Act* 1977 (Qld). The recordings of the interviews were played to the jury at the trial.[6] The disc recordings were tendered and transcripts of the interviews made available to the jury. Each of the complainants gave pre-recorded evidence pursuant to s 21AK of the *Evidence Act*. That evidence was also played to the jury.[7] The disc recordings of this evidence were also tendered.

[12] The respective counts were particularised by the prosecution. The particulars document was tendered and made available to the jury.[8] A version of this document was made which referenced the particulars to statements made by the complainants in their s 93A interviews.[9] This document was not made available to the jurors. At trial, there was no issue that the appellant was the complainants' swimming coach at the time of the alleged offending.

[13] The appellant's written submissions set out the following summary of the accounts given by the complainants in the interviews and the pre-recorded evidence. The respondent accepts the summary as accurate.[10]

> "*<u>ER</u>*
>
> 12. ER said that "*he touched a place where I didn't want him to touch and I saw it happen to GK as well so once we finished … I said 'Hey did you see what he did to our private part?' and … she said 'Yeah, he touched it' … At one point the man lifted GK up by the private part and the chest, and she told me about that, too, but that didn't happen to me."*[11]
>
> 13. In terms of specific incidents, ER said
> " *… he would hold me up by the chest and then when he pushed me off to keep going he would pat me there three times and then just say oh good job or remember look at the bottom (**count 1**) … and the second time he patted me there and then he pushed there as well to get going* (***count 4***) *and I don't think he should push there because it's the wrong place.*"[12]
>
> …
>
> " *… the second time we were doing backstroke so he … pushed me like in between the legs up to there.*" (***count 4***)[13]
>
> …

---

5 AB120 Tr2-39 LL8-12.
6 AB73 Tr1-3 L32 (ER); AB80 Tr1-10 L13 (GK).
7 AB74 Tr1-4 L34 (ER); AB81 Tr1-11 L4 (GK).
8 Exhibit 7; AB307-8.
9 AB322-323.
10 Respondent's submissions para 6.
11 ER's s 93A interview transcript; AB257 LL113-125.
12 *Ibid*, AB258, LL154-161.
13 *Ibid*, AB259 LL188-191.

" *... breath (sic) stroke ... I think this was the last time but with breath stroke ... I was doing it and then he came up to me and held me by the chest and said remember big arms, big arms and then he did something with my feet to show how to do frog kick. And then he said start off the kicks then he tapped me and then let his hand go where he was hold (sic) my chest ... he tapped me like this on the rude part ... three times ... I think that was the last time. (***count 5***)*[14]

14. Police did not explore with her what she allegedly saw the (appellant) do to GK.

15. ER's evidence concerning the charged incidents was given on 5 March 2014. In relation to **count 1**, she described the (appellant's) conduct as "tapping".[15] In relation to **count 4**, she said that she was swimming *breaststroke* … and he "tapped" and "pushed" her.[16] In relation to **count 5**, she was not sure about where the (appellant) had touched her whilst she was swimming backstroke.[17]

16. She was asked about what she saw the (appellant) do to GK. She claimed that whilst she (ER) was underwater and about 8 metres away, she saw the (appellant) hold GK up, then put her underwater and "tap" her on the vagina.[18]

GK

17. In her interview with police, GK said " *... we were told to do freestyle first and I was at the end of the line with my friend ER, and we, when he went to fix us up, he started touching our private parts*".[19]

18. Specifically, she said:
"*Well, when I went past he wanted to fix me up, but then he touched my private ... he stopped me then like made me do it again like he showed me how to do it, then he touched my private ... He just touched it there and then he just took it away.*" (***count 2***)[20]

…

"*[Q: Tell me about the next time it happened] Umm he rubbed it ... with his hand umm then a weird feeling ... like I got butterflies*. (***count 3***)[21]

…

"*[Q: Ok and you said this happened many times, describe another time for me.] Umm, all the other times he just kept tapping on me for well done ... like giving me a pat on my vagina to say like that I'm doing a good job.* (***count 6***)[22]

---

14 *Ibid*, AB260 LL234-251.
15 ER's pre-recorded evidence at AB23 LL42-43 and AB25 LL11-43.
16 *Ibid*, AB27 L10; AB28 L22 and AB35 LL6-11.
17 *Ibid*, AB35 LL35-40.
18 *Ibid*, AB29 L46; AB31 L5.
19 GK's s 93A interview AB268 LL77-80.
20 *Ibid*, AB268 L109-AB269 L169.
21 *Ibid*, AB270 LL176-181.
22 *Ibid*, AB271 LL197-203.

…
"*We were doing breath stroke (sic) and um I was doing it well so when I went past he went well done and tapped my (sic) on the vagina*. (***count 6***)[23]
…
[Q: Ok, and tell me about the second time.] Umm, he did the exact same … we were doing butterfly then … and I was doing it good and he tapped me again … under the water." (***count 7***)[24]

19. GK also gave evidence on 5 March 2014. In relation to **count 2**, which was particularised as a "touching", she said that she was doing *backstroke* at the time … and described what the (appellant) did as "rubbing".[25] When it came to **count 3**, which was particularised as "rubbing" she said that the (appellant) had "poked" her vagina with a finger and that it hurt a bit.[26] For **count 6**, particularised as "tapping", she variously described it as "another poke" and "rubbing".[27] In relation to **count 7**, also alleged to be a "tapping", she said that she could not recall what stroke she was doing but did not recall any butterfly … and described the conduct as "rubbing"."[28]

[14] As the respondent fairly observes, neither complainant said that she saw the appellant's hand touch her. The evidence was that of contact by the hand was felt.

[15] At all times, the complainants were wearing swimming costumes. GK said that she was also wearing board shorts and a rashie.[29] At trial, the complainants' evidence was understood to mean that they were touched on that part of the swimming clothing as was directly above their external genitalia.

Other prosecution evidence

[16] Both of ER's parents testified that after school on 27 February 2013, she spoke to them of what had happened. To her parents, she used the words "patted" on her "privates".[30]

[17] On the same day, GK told the mother of a school friend of hers that she had been "tapped … maybe one or two times".[31] She told her mother that she had been "inappropriately touched" and described it as "rubbing and patting".[32] The word "pat" was used by her in a description given to her grandmother.[33]

The defence case

[18] In his evidence the appellant denied the offending. He did not specifically recall coaching either complainant that morning. His denial was premised upon his

---

23 *Ibid*, AB275 LL348-350.
24 *Ibid*, LL351-362.
25 GK's pre-recorded evidence at AB41 LL31-32; AB42 LL34-35; AB43 L8-AB44 L20.
26 *Ibid*, AB45 L1-AB46 L8.
27 *Ibid*, AB46 LL12-28.
28 *Ibid*, AB46 L40-AB47 L8.
29 Section 93A interview, AB270 LL151-2.
30 AB122 Tr2-41 LL40-50; AB124 Tr2-43 LL41-43.
31 AB126 Tr2-45 LL32-43.
32 AB128 Tr2-47 L31.
33 AB130 Tr2-49 L38.

invariable use of the support method he had described, with his palms facing downwards. He said that he wore a watch on his left wrist. Children would swim from his left to his right in each direction. It was always the back of his left arm and wrist that would be in contact with a child's hip area as he was supporting them for instruction.

[19] As he had done in a police interview on 1 March 2013, in evidence-in-chief, the appellant denied deliberately touching the genital area of each complainant.[34] On both occasions, he ventured the possibility that his watch could have come into contact with a child's genital area during instruction.[35] A recording of the interview was played to the jury in the prosecution case. A transcript of the interview was tendered.[36]

[20] The appellant called several witnesses who testified as to his good character and reputation as a swimming coach. One of them, a very experienced coach herself, confirmed that the use of outstretched arms "with palms down generally speaking", to support a child for instruction purposes had been conventional coaching practice for many years.[37]

[21] The entire defence case occupied one hour and 10 minutes on the morning of the third day of the trial. The defence case concluded at 11.10 am.

The course of the trial after the conclusion of the evidence

[22] The following summary of the course of the trial after the conclusion of the evidence is given in the appellant's written submissions. It, too, is accepted by the respondent as accurate.[38]

> "27. Addresses commenced at 12.21 pm on 16 April (day 3). The summing-up commenced at 3.08 pm and continued into the next day. They retired to consider their verdicts at 11.13 am.[39]
>
> 28. At 2.34 pm on 17 April, the court reconvened because the jury had sent a note asking to hear the evidence concerning counts 4, 6 and 7.[40] A little time was required to identify the relevant passages, however commencing at 3.28 pm, the evidence concerning each of those counts was replayed.[41] That exercise was concluded at 4.44pm.[42]
>
> 29. After that evidence had been replayed to the jury, the learned trial judge said:
>
> "*Now, those are the passages, members of the jury. We covered all the matters you asked for there, although obviously if there's anything else you need, let me know. There's just a little warning. Obviously not all of the evidence is on video, and not all the evidence it's possible for you to hear and see*

---

34 AB144 Tr3-10 LL13-14; Interview AB375 LL46-54.
35 AB145 Tr3-11 LL1-9; Interview AB374 LL30-32.
36 AB360-382; Exhibit L.
37 AB154 Tr3-20 LL34-45.
38 Respondent's submissions para 6.
39 AB219.
40 AB220.
41 AB235.
42 AB243.

again so be careful not to place undue weight on video evidence because you heard it more than once, while other evidence you only heard once. That's just a general warning."[43]

30. The jury then retired to continue deliberating at 4.44 pm.[44] That was the only warning the judge gave concerning the replayed evidence. By that time, almost 30 hours had elapsed since the (appellant) had concluded giving evidence.

31. The jury returned with verdicts at 8.12 pm that evening, which was the Thursday immediately before the Easter long weekend."[45]

Grounds of appeal

[23] The notice of appeal as filed set out two grounds of appeal. Leave to add a third ground was granted to the appellant at the hearing of the appeal. As amended, the grounds of appeal are:

1. The verdicts of guilty are inconsistent and irreconcilable with the acquittals.

2. The verdicts are in any event unreasonable.

3. The learned trial judge erred when, after the jury were played recordings of the complainants' interviews and evidence concerning Counts 4, 6 and 7 for a second time, he omitted to:

   (a) repeat or summarise to the jury any of the evidence given or called by the appellant; or

   (b) direct them that they should remember that the evidence that had just been replayed had been contradicted by the sworn testimony of the appellant.

[24] In written and oral submissions, the appellant addressed Grounds 1 and 2 together, dealing separately with the counts concerning each complainant. It is convenient to deal with Ground 3 first since, on the appellant's approach to it, it has potential application to all convictions.

Ground 3

[25] The appellant contends that the direction given by the learned trial judge after the evidence concerning Counts 4, 6 and 7 was replayed to the jury, was deficient. The direction that was given at that point warned against placing undue weight upon that evidence because the jury had seen and heard it twice. Drawing upon observations in *R v FAE*,[46] *R v SCG*[47] and the very recent approval of them in *R v MCC*,[48] the appellant submitted that the direction ought also have reminded the jury of the evidence called by the appellant and that it contradicted the replayed evidence. The deficient direction, it is submitted, occasioned a miscarriage of justice.[49] In its taint,

---

43 AB243 LL1-13.
44 AB243.
45 AB244.
46 [2014] QCA 69 at [25].
47 [2014] QCA 118 at [35], [36].
48 [2014] QCA 253 at [37].
49 As the respondent correctly submitted, since the appellant had not sought and been refused the direction now proposed by him as the correct one, there was no wrong decision on a question of law for the purposes of s 668E(1) of the Code.

the miscarriage went beyond the conviction on Count 7 to the convictions on all other counts by the prejudice stirred up against the appellant in the minds of the jury by the replaying of the evidence.[50]

[26] The appellant argued by analogy with *SCG*. In that case, Morrison JA (with whom Jackson J and I agreed) observed:

> "[35] *Gately*, *GAO* and *FAE* do not lay down immutable standards. Each case depends upon its facts. In each case, the overriding consideration must be fairness and balance, giving rise to the need to guard against the risk that undue weight might be given to a complainant's evidence where it is played a second time without a warning, or where no reminder is given to the jury about the competing evidence. In making a judgment about that question various factors will be relevant, including: the time that has elapsed after completion of the defence evidence; the time that has elapsed since the conclusion of the summing up; the character of the complainant's evidence, including the manner in which it is given; the course of the trial, in particular the stage of deliberations that the jury has reached; and the length of time that the relevant evidence occupies. In terms of the need to remind the jury of the defence evidence, one factor might be the manner in which that evidence was given; where that is relevant it is likely to have been a matter referred to by the Crown in their address. No doubt there are other matters that may arise.
>
> [36] However, these are all merely points for consideration in assessing the overall question which is whether fairness and balance requires that the warning be given and/or a reminder given to bear in mind and appropriately weigh the defence evidence. In circumstances where those warnings will be necessary because all or part of a complainant's evidence will be replayed a second time, the need to remind the jury of the competing defence evidence may well require, depending upon the circumstances, repetition or summarising of relevant parts of that evidence, and possibly comment upon the manner in which the evidence was given."

[27] His Honour then identified factors that were decisive in allowing the appeal.[51] They were that:

(a) the period of time that had elapsed between the conclusion of the defence case at the end of the second day of the trial and the request to have all of the complainant's evidence replayed which was made on the morning of the fourth day of the trial;

(b) the period of time occupied in replaying the evidence which was "a far greater length of time than the entirety of the (defence case)";

---

50 Tr1-8 L46-Tr1-9 L7.

51 At [37].

(c) the likelihood that the emotions involved in listening to a 13 year old child giving evidence of sexual offences would be stirred again; and

(d) the jury had been grappling with the concept of "word against word".

[28] In reasoning towards a conclusion that there had been a miscarriage of justice, his Honour said:

> "[40] I do not accept the respondent's contention that the learned trial judge's directions set out in paragraph [23] above were sufficient to overcome the risk of unfairness. First, those directions were given late on day three. True it is that the directions emphasised that the prosecution case depended entirely on the complainant's evidence, and that the complainant's evidence had to be carefully assessed by the jury, and that the jury had to be satisfied, beyond reasonable doubt, of all the elements of the offence on the basis of the complainant's evidence and her evidence alone. It is also true that those directions were given in response to the jury's request for advice on "word against word" evidence. However, they preceded the jury's request to hear all of the complainant's evidence again, which was not made until the following day.
>
> [41] Secondly, I am unpersuaded that the directions, given by the learned trial judge at the end of day three, dealing with onus of proof, and directed to reminding the jury that the case depended entirely upon the evidence of the complainant, can be seen as being directed to the risk that unfair weight might be given in the process of replaying the complainant's evidence. That is the risk identified in *Gately*, *GAO* and *FAE*. Repeated directions of the same kind were urged in *FAE* as meeting the questions of fairness and balance posed by the risk that the jury might give undue weight when hearing the complainant's evidence a second time. Just as that argument did not succeed in *FAE*, it does not succeed here.
>
> [42] In my view the trial miscarried because the learned trial judge did not warn the jury that they should not give the replayed evidence of the complainant undue weight merely by virtue of its repetition, and there was no repetition or summarising to the jury of any of the evidence given by the appellant."

The appellant placed particular reliance upon the second limb of the omitted direction described in the last of these paragraphs in support of the argument that a like direction was required here.

[29] At a factual level, the appellant identified the following points of some similarity with *SCG*:

(a) an interval of 27 hours and 24 minutes between the end of the defence case and the request that the evidence on Counts 4, 6 and 7 be replayed; and

(b) the replaying of the evidence took one hour and 16 minutes, some six minutes longer than the entirety of the defence case.

It was submitted that the present was a "stronger" case for the direction proposed given that there were two complainants both younger in age than the one complainant in *SCG*. As well, it was suggested that there was no apparent advantage for the defence in not seeking a further direction which would have addressed the deficiency alleged by the appellant.

[30] The respondent emphasised that neither *Gately v The Queen*[52] nor any decision of this Court required the jury to be reminded of the appellant's denial of the offending or that he called character witnesses whenever a complainant's evidence was replayed. The respondent submitted that in the circumstances of this case, there had been no irregularity in the trial by reason of the direction now proposed by the appellant not having been given, much less an irregularity which occasioned a miscarriage of justice.

[31] The following points of difference with *FAE* and *SCG* were identified by the respondent:

(a) in the present case, a warning was given to the jury not to give undue weight to the replayed evidence on account of its having been replayed, whereas no such warning was given in those cases;

(b) here, the jury requested to hear the evidence in relation to three counts only whereas in the other cases, all of the complainants' s 93A interview and pre-recorded evidence was replayed or given to the jury to take with them for their deliberations; and

(c) here, the jury acquitted on two of the three counts on which the evidence was replayed.

[32] In order for the appellant to establish this ground of appeal, he must satisfy this Court that the failure to give the direction proposed was an irregularity and that a miscarriage of justice was caused by the irregularity. Whether there was an irregularity or not is dependent upon the circumstances of this case. It cannot be determined merely by an assessment of degree of similarity or dissimilarity with the features of other cases.

[33] This was a relatively short case. The jury requested that the evidence on Counts 4, 6 and 7 only be replayed. They were directed not to give the replayed evidence undue weight. Ought they also have been reminded at that point that the appellant had given evidence denying those counts? In my view, in answering that question, it is relevant that each of those counts involved alleged conduct that was of short duration and comprised a single act. The conduct was alleged to have occurred at the one location during the same swimming lesson. The appellant's evidence had not traversed each alleged offence. He had not given evidence specific to the alleged conduct the subject of any of the individual counts. His denial that he deliberately touched either complainant in the genital area was general in nature and applicable to all counts. He had ventured the possibility that his watch may have come into contact with that area accidentally; he did not state that that actually happened.

---

52 [2007] HCA 55; (2007) 232 CLR 208.

[34] After the close of the defence case, the jury had been alerted to the appellant's denials and to the possibility to which he had adverted during both the addresses and the summing up. Furthermore, the jury had with them for their deliberations the transcript of the appellant's s 93A interview with the police which contained his denials of deliberate touching and his explanation of the possibility of contact with his watch.

[35] In all these circumstances, I am of the view that a further direction of the kind proposed by the appellant was not required. A direction of that kind could have comprised no more than telling the jury that the appellant denied deliberately touching either complainant in the genital area. The jury were plainly conscious of that. They needed no reminding of it. For these reasons, I conclude that the appellant has not established this ground of appeal.

Grounds 1 and 2

[36] The appellant makes dual submissions based on different tests in support of these grounds. One submission is that on the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. The verdicts are unreasonable on that account. The other is that the verdicts are an unacceptable affront to logic and common sense and strongly suggest compromise of the jury's function. They are inconsistent and cannot be properly reconciled. However, for application of the two tests, the appellant relies upon substantially overlapping features of the evidence of each complainant. It is appropriate to consider their evidence separately with in respect to these grounds.

[37] As to the complainant, GK, the appellant focuses upon the following aspects of her evidence.

Count 2: This count as particularised was that the appellant "touched her vagina on the outside of her swimmers with his hand". In her s 93A interview, she said that she was swimming freestyle when this incident occurred.[53] The appellant "touched her private".[54] However, in her pre-recorded evidence, she said that she was swimming backstroke and that the appellant "rubbed" her vagina.[55]

Count 3: This count as particularised was that the appellant "rubbed the complainant's vagina on the outside of her swimmers with his hand". She told police that what happened was "the exact same as the first time" and that he "rubbed it".[56] In her pre-recorded evidence, she said variously that she could not remember what stroke she was swimming and that it was "a stroke that requires you to be on your tummy".[57] She said that he "poked" her vagina "with a finger" and that "it hurt a bit".[58]

Count 6: This count as particularised was that the appellant "tapped the complainant's vagina on the outside of her swimmers with his hand". In her s 93A interview, the complainant said that she was swimming "breath stroke" (sic) at the time. The appellant "went well done and tapped my (sic) on the vagina".[59] In her pre-recorded

---

53 AB268 LL76-94.
54 *Ibid*.
55 AB43 LL18-40.
56 AB270 L176-AB271 L196.
57 AB45 LL5-27.
58 AB45 L43, AB46 L8.
59 AB275 LL375-359.

evidence, she said that she did not remember the stroke she was swimming, but that she was "on her tummy". She described the touching as "another poke" and "a poke with a finger".[60]

Count 7: This count as particularised was that the appellant "tapped at the complainant's vagina on the outside of her swimmers with his hand". She told police that she was swimming butterfly. The appellant "tapped" and said well done.[61] In her pre-recorded evidence, the complainant said that she did not remember the stroke she was swimming: she said she was "on her tummy". The appellant "rubbed it once with his hand".[62]

[38] This summary of the evidence of the complainant, GK, reveals a number of significant inconsistencies in it in respect of each count. For Count 2, there was inconsistency as to the swimming stroke and, importantly, as to the nature of the contact with her: one version was of touching, the other was of rubbing. For Count 3, there was consistency as to the stroke but one version of the contact was rubbing, the other was of poking with a finger to the point of hurting. Likewise for Count 6, except that the first version of the contact was of tapping. For Count 7, the complainant said variously that she was swimming butterfly and did not remember the stroke. The contact was described as tapping in one version and rubbing in the other. Her evidence that she was swimming butterfly was unsupported by the complainant ER who said that the class swam freestyle, breaststroke and backstroke that morning.[63]

[39] Inconsistency in evidence as to the nature of the contact is common to all four counts concerning the complainant GK. There is no plausible basis for distinguishing the inconsistencies as explicable in some instances, but not in others. This can be seen most sharply with Count 3 and Count 6 where the same transition in evidence from a rub or tap to a poke with a finger occurred. Yet, inexplicably, there was a conviction on Count 3 and an acquittal on Count 6. The respondent rightly concedes that there does not appear to be a satisfactory explanation for the differing verdicts on all four counts based upon the differences in evidence for each count.[64]

[40] The respondent ventures that the acquittal on Count 6 might be explained as a merciful verdict. In terms of what was said in *MFA v The Queen*,[65] the respondent suggests that it may have appeared to the jury "that, although a number of offences have been alleged, justice is met by convicting [the appellant] of some only". In my view, such an explanation of the acquittal is unconvincing. Count 6 alleged contact that was intrusive and caused some hurt. Of the types of contact alleged, it was the most serious. Why a jury would exercise mercy on a count where the most serious form of alleged offending is charged is puzzling in itself. It is all the more puzzling where, as here, the jury convicted on Count 3, the one other count of comparable seriousness.

[41] The reliability of the evidence of the complainant ER that she saw GK tapped on the vagina is considered later. It is sufficient for present purposes to observe that that evidence was not specific to any of the counts. Hence, even if it had been reliable, any corroborative effect it could have had would have been general in nature.

---

60 AB46 LL12-38.
61 AB275 L360-AB276 L371.
62 AB46 L40-AB47 L19.
63 AB21 Tr1-11 L36.
64 Respondent's submissions para 19.
65 [2002] HCA 53; (2002) 213 CLR 606 at [34].

[42] For these reasons, the convictions on Counts 2, 3 and 7 on the one hand and the acquittal on Count 6 are inconsistent. Moreover, the complainant GK's evidence on each of those counts was sufficiently inconsistent in a major respect as to preclude a jury from being satisfied beyond reasonable doubt that the appellant was guilty of intentionally dealing with her in an indecent manner. The convictions on Counts 2, 3 and 7 must therefore be set aside.

[43] With respect to the complainant, ER, the focus in the appellant's case is upon the following aspects of her evidence.

Count 1: This count as particularised was that the appellant "patted the complainant's vagina with his hand". The complainant told the police that she was swimming freestyle. She said that the appellant "touched a place I didn't want him to touch".[66] Twice, she said that he "patted (her) there three times".[67] In her pre-recorded evidence, she said she was swimming freestyle.[68] She repeated the word "tapped" to describe the contact by the appellant.[69]

Count 4: This count as particularised was that the appellant "put his hand between the complainant's legs and touched her on the outside of the vagina". In her s 93A interview the complainant said that she was swimming backstroke at the time.[70] She said that she was patted and pushed between the legs.[71] Her pre-recorded evidence was that she was swimming breaststroke.[72] She used the words "tapped" and "pushed his hand up to my vagina" to describe the contact.[73] In cross-examination, the complainant said, however, that she was not sure where the appellant touched her while she was swimming backstroke.[74]

Count 5: This count as particularised was that the appellant "tapped the complainant's vagina". The complainant told police that she was swimming breaststroke at the time[75] and that the appellant "tapped" her three times.[76] In her pre-recorded evidence, she said that when she swam breaststroke, she was both tapped and pushed but that when she swam freestyle and breaststroke she was tapped only.[77]

[44] This complainant's evidence concerning Count 1 was consistent as to both swimming stroke (freestyle) and the nature of the contact (patting or tapping three times in the vaginal area). However, for Count 4, there was inconsistency as to the swimming stroke. It was described variously as backstroke and breaststroke. The significance of this inconsistency was enhanced by the evidence that she gave that she was not sure where she was touched when she was swimming backstroke, yet in both the interview and the pre-recorded evidence, she said that she was patted and pushed in between the legs. For Count 5, there was a change rather than inconsistency with respect to her description of the nature of the contact. She described it in the interview as "tapping" and in her pre-recorded evidence as both "tapping" and "a push". She said that she was swimming breaststroke at the time.

---

66 AB275 L113.
67 AB258 LL156-159; LL180-183.
68 AB23 L45-AB24 L2.
69 AB23 LL37-43; AB25 LL11-14; AB25 L40.
70 AB257 LL115-117.
71 AB258 LL159-167; AB259 LL191-201.
72 AB27 LL14, 15.
73 AB27 LL14-25; AB35 LL7-11.
74 AB35 LL35-40.
75 AB260 LL235-243.
76 *Ibid*, LL248-251.
77 AB34 L43-AB35 L15.

[45] There are inconsistencies with this complainant's evidence regarding Count 4 which are capable of explaining the acquittal on it. The jury may not have been satisfied beyond reasonable doubt of the appellant's guilt on that count having regard to the inconsistencies. Those inconsistencies also serve to distinguish that count from the other two where like inconsistencies do not appear. They also provide a basis for reconciling the acquittal with the verdicts on the other two counts concerning this complainant.

[46] The appellant also challenges the convictions on Counts 1 and 5 as unreasonable. Several manifestations of unreasonableness alleged by the appellant are related to aspects of the complainant's evidence on the counts. For one, it is argued that the addition of a reference to a "push" is indicative of elaboration and casts some doubt on the reliability of her account of the Count 5 offending.

[47] Another dimension of unreliability addressed by the appellant extends beyond her evidence on Count 5. It arises from the evidence that she gave that she saw GK tapped on the vagina by the appellant. According to her account, she herself was under water at the time and about 8 metres away. GK was swimming towards her at the time.[78]

[48] There is considerable force in the challenge to the reliability of the evidence of this complainant as given. In particular, her evidence concerning the other complainant is a very unreliable account of the contact she claimed to have seen. Given that her head was under water, her lack of a side-on view, her distance from the appellant and GK, and the disturbance of water adjacent to the surface caused by activity in the pool, she was not in a position to observe clearly any contact between the appellant and GK. That was so whether she was wearing swimming goggles or not. She was therefore not capable of giving a reliable account. Moreover, her preparedness to venture an account of what she thought she saw clearly, is apt to suggest the possibility of a creative imagination at play.

[49] I have viewed both the interview and pre-recorded evidence of this complainant. There are further aspects to her testimony which cast doubt on its reliability overall. In her pre-recorded evidence, she said that the appellant touched her only when she was swimming from the deep end towards the shallow end. A little later, she said that it occurred when she was swimming in each direction. In her interview, she said that the pushing up to her vagina occurred when she was swimming backstroke. In her pre-recorded evidence, she said that it was when she was swimming breaststroke. She was asked what the push was and she replied that she was unsure. Lastly, in her pre-recorded evidence, she described the method of support of the appellant as one in which his palms were up.[79] A little later in cross-examination, she agreed that the only time the appellant made contact with her upper body was with his arms stretched out supporting her with his palms down.[80]

[50] Beyond evidential unreliability, another manifestation of unreasonableness raised by the appellant is the unlikelihood of a scenario in which he would indecently touch children in the presence of many other people including teachers, pool staff and other instructors. For a swimming coach to have acted with such brazen folly, it was submitted, was most unlikely, the more so in the case of a swimming coach of the appellant's experience and good character.

---

78 AB29 L40-AB31 L32.

79 AB28 L40.

80 AB29 L30.

[51] There is no reason to doubt the honesty of the complainant ER. However, her evidence is unreliable in numerous respects. In my view, it failed to provide a sufficiently reliable basis for the jury to be satisfied beyond reasonable doubt that the appellant was guilty of Counts 1 and 5. The guilty verdicts on those counts were unreasonable.

Disposition

[52] For these reasons, the appeal must be allowed and the convictions on Counts 1, 2, 3, 5 and 7 be set aside. Having regard to the inconsistencies in evidence to which I have referred, it is, my view, appropriate that acquittals be entered on each of those counts.

Orders

[53] I would propose the following orders;

1. Allow the appeal.
2. Set aside the conviction on each of Counts 1, 2, 3, 5 and 7.
3. Enter an acquittal on each of the said counts.