SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAH* [2016] QCA 82
PARTIES:	**R** **v** **LAH** (appellant)
FILE NO/S:	CA No 121 of 2015 DC No 1855 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 3 June 2015
DELIVERED ON:	Orders delivered ex tempore 10 March 2016 Reasons delivered 5 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2016
JUDGES:	Margaret McMurdo P and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 10 March 2016:** **1. The appeal against conviction in so far as it relates to count 2 (indecent treatment of a child under 12); count 5 (rape); count 6 (attempted rape); count 9 (the alternative verdict of attempted rape to the charged count of rape) and count 10 (rape) is allowed.** **2. The verdicts of guilty on those counts are set aside and retrials are ordered.** **3. The appeal against conviction in so far as it relates to count 3 (rape) and count 4 (attempted rape) is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was charged on a 10 count indictment with maintaining a sexual relationship with a child (count 1), indecent treatment of a child under 12 (count 2), five counts of rape (counts 3, 5, 7, 9 and 10), two counts of attempted rape (counts 4 and 6) and indecent treatment of a child under 16 (count 8) – where the appellant contended that it was not open to the jury to accept the complainant's evidence beyond reasonable doubt because of

its many weaknesses – where the complainant did not give evidence of instances of abuse about which she complained to police – where there were inconsistencies between the complainant's evidence and the evidence of other witnesses whom she had told about the abuse – where the jury were entitled to reject the appellant's evidence – whether it was open to the jury to accept the reliability of the complainant's evidence beyond reasonable doubt on each count

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant contended that the judge failed to adequately give a direction in terms of *Robinson v The Queen* (1999) 197 CLR 162 – where the appellant highlighted the inconsistencies between the complainant's evidence and that of preliminary complaint witnesses – where the judge directed the jury that they should consider that the complainant told a number of people different things about her complaint – where the judge directed that if the jury had a reasonable doubt concerning the truthfulness or the reliability of the complainant's evidence in relation to one or more count they must take that into account when assessing her truthfulness or reliability generally – where the judge warned the jury of the difficulties arising from the long delay between the alleged offending occurring and the complainant's police complaint – where the judge's directions sufficiently drew to the jury's attention the principal matters which may undermine the reliability and truthfulness of the complainant's evidence – whether there was a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the complainant was aged between seven and 16 years at the time of the alleged offending – where the judge directed the jury that for counts of rape, where the complainant was over 12 but under 16, she could not give consent – where the judge erred in his direction as to consent under s 349 *Criminal Code* – where neither counsel brought the error to the judge's attention – whether there was a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was aged 13 years at the time of count 2 – where the judge failed to direct the jury under s 29(2) *Criminal Code*, as to criminal responsibility of a person under the age of 14 – where neither counsel addressed the jury on the issue of criminal responsibility – where the jury did not consider if the appellant had the capacity to be criminally responsible for count 2 – whether there was a substantial miscarriage of justice

Criminal Code (Qld), s 29(2), s 349, s 668E(1A)

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, 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 Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL:	A Hoare for the appellant G P Cash QC for the respondent
SOLICITORS:	McMillan Criminal Law for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was charged on a 10 count indictment with maintaining a sexual relationship with a child (count 1), indecent treatment of a child under 12 (count 2), five counts of rape (counts 3, 5, 7, 9 and 10), two counts of attempted rape (counts 4 and 6) and indecent treatment of a child under 16 (count 8). Following legal argument on the fourth day of the trial, the judge directed the jury to return a not guilty verdict on count 7 (rape) but left for the jury's consideration the alternative count of unlawful sexual assault. Additionally, the judge directed the jury to return a verdict of not guilty on count 8 (indecent treatment) but left for the jury's consideration the alternative verdict of unlawful sexual assault. In respect of count 9 (rape) the judge also directed the jury to return a not guilty verdict but left for the jury's consideration the alternative charge of attempted rape. The following day the judge directed the jury to return a not guilty verdict on count 1 (maintaining a sexual relationship with a child) and count 7 (unlawful sexual assault). On the sixth day of the trial the jury found the appellant guilty of indecent treatment of a child under 12 (count 2); three counts of rape (counts 3, 5 and 10); and three counts of attempted rape (counts 4 and 6 and the alternative charge to count 9). They found him not guilty of unlawful sexual assault (the alternative charge to count 8).

[2] The complainant was born in July 1992, was aged between seven and 16 years at the time of the alleged offending and was 22 years old at trial. The appellant, her cousin, was aged between 13 and 22 years at the time of the alleged offending and was 29 years old at trial.

[3] He appealed against his convictions on the following grounds:

> "a. That the verdicts were unreasonable and cannot be supported having regarding to the evidence;
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> b. That the learned trial judge failed to properly direct the jury in respect of the *Robinson* direction;
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> c. There was no evidence by which the jury could be satisfied that the Appellant was criminally responsible for count 2;
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> d. The evidence of the preliminary complaint to Hetty Johnston was inadmissible."

[4] The Court, having raised concerns about the trial judge's directions as to consent, gave the parties leave to make submissions as to whether the appellant should be permitted to add the further ground of appeal that the learned trial judge misdirected the jury with respect to consent. The Court also gave leave to make further submissions as to this proposed additional ground of appeal. As I explain in these reasons, that ground of appeal has merit. Leave to add this ground of appeal should be given to avoid a miscarriage of justice.

[5] On 10 March 2016 this Court ordered that:

1. The appeal against conviction insofar as it relates to count 2 (indecent treatment of a child under 12); count 5 (rape); count 6 (attempted rape); count 9 (the alternative verdict of attempted rape to the charged count of rape) and count 10 (rape) is allowed.

2. The verdicts of guilty on those counts are set aside and retrials are ordered.

3. The appeal against conviction in so far as it related to count 3 (rape) and count 4 (attempted rape) is dismissed.

4. The Court's reasons for these orders will be published shortly.

[6] I joined in orders one to three for the reasons which follow.

The complaint to Hetty Johnston

[7] During the appeal hearing the appellant abandoned ground (d), conceding that defence counsel at trial may have agreed to the admission of a complaint by the complainant to Hetty Johnston for forensic purposes.

The particulars of the charges

[8] A useful starting point in discussing the appellant's remaining contentions is an understanding of the particulars of the offences which occurred on four discrete occasions. It is common ground they were as follows.

[9] Count 2 was particularised as occurring when the complainant, a young gymnast, was attending a training camp and staying with her aunt in Brisbane. She fell asleep in the lounge room. She woke up on the appellant's bed. He touched her on the area of her vagina on the outside of her clothing. He told her she had asked to come to his room. He kissed her on the lips.

[10] Counts 3 and 4 were particularised as occurring when the appellant was visiting the complainant's family at their home in suburban Brisbane. He was playing with toy cars on a mat in a bedroom. The complainant and her brother C were also present. When C left the room, the appellant reached over and put his hand between the complainant's legs and up into her underwear. He put his finger into her vagina (count 3). He then attempted to put a toy plastic parking cone into her vagina (count 4).

[11] Counts 5 and 6 were particularised as occurring when the appellant later visited the complainant at her family home in outer Brisbane. The complainant was lying on a sofa watching television with a blanket over her. The appellant lay down behind her. The complainant's brother C was sitting on the floor close to the television. The appellant reached behind the complainant and put his fingers into her vagina (count 5). He unzipped his pants and pulled her underwear aside. He used one hand to lift her leg. She felt his penis between her legs. He unsuccessfully attempted to penetrate her vagina with his penis.

[12] Counts 7, 8, 9 and 10 were particularised as occurring on the evening the complainant, her sister and the appellant were watching the movie "Transformers" in the lounge room of another home in which the complainant's family lived, this one near the bay. They were sitting on an L-shaped couch in the lounge room. The complainant was wearing black shorts over a leotard. She had pulled the top of the leotard down to the waist and was wearing a T-shirt. She fell asleep. When she woke the TV was off, the room was dark, her sister had gone and the appellant had pulled her leotard to one side. He put his fingers in her vagina. He continued to rub her vagina until she had an orgasm (count 7). The complainant then rolled over to face the back of the couch and crouched into a ball. The appellant took hold of her left hand, placed it on his erect penis and moved her hand up and down (count 8). The appellant removed her shorts and leotard. He pulled her on top of him before rolling on top of her. He attempted to insert his penis into her vagina. She tried to resist. He told her to relax and open her legs. He persisted for some time but only managed to achieve partial penetration (count 9). He then took hold of her head and put his penis into her mouth, moving her head up and down until he ejaculated. He told her that she could go and spit it out (count 10).

[13] Count 1 was particularised as the appellant, by then an adult, carrying on a sexual relationship with the complainant whilst she was aged between 12 and 15 years old. This count relied on the offences particularised in counts 5 to 10.

The evidence at trial

[14] It is sensible to next set out the aspects of the evidence at trial relevant to the grounds of appeal, particularly those aspects emphasised by the appellant.

[15] The complainant gave evidence that the appellant committed each of the offences of which he was convicted. She did not give evidence of any penetration in respect of counts 7 and 9. She first came to Brisbane for gymnastics training when she was seven years old in 1999. On her evidence count 2 occurred at her aunt's Brisbane home; the remaining offences occurred at her family's various Brisbane homes. She denied telling psychologist, Georgia Ridler, that there had been 10 years of sexual abuse but no penetration.

[16] By contrast, Ms Ridler, who made contemporaneous notes during their sessions, wrote to the complainant's general practitioner stating that the complainant had reported to her 10 years of sexual abuse with no penetration. Ms Ridler confirmed that the complainant told her this. She told Ms Ridler, she had traumatic flashbacks and representations. Whenever she heard the noise of coins in a pocket it reminded her of the belt being undone or the belt sliding out of the jeans; this caused her trauma and made her shake and feel fearful. She told Ms Ridler that the appellant abused her from the ages of five to 16, mainly at her aunt's house when either no-one was home or when everyone was asleep. He would sneak into her room, pull his pants down and put his penis in her mouth.

[17] When giving evidence about count 6, the complainant said that she felt the appellant trying to put his penis into her vagina. She knew it was his penis because she had felt it before when he had made her give him "hand jobs", masturbating him with her hand. She also said that she heard his jeans unzip.

[18] She said she told Ms D-B, the mother of a friend, that the appellant had sexually molested her from when she was about five years old. She denied telling her that she had been sexually molested for about five years.

[19] Ms D-B gave evidence that the complainant told her that these events went on for about five years, mentioning an incident when she was 12 or 15 years old at her cousin's house. The complainant told her that they were watching television on the couch when everyone else was in bed and he had sex with her. Around April or May 2011 she told Ms D-B that she had deliberately cut herself with a razor. Ms D-B saw the cuts to the complainant's arm which she treated.

[20] Psychologist Bradley Johnston first saw the complainant in June 2011 on referral from Ms Ridler and made contemporaneous notes of the consultations. The complainant said the appellant had forced her to provide oral sex and manual stimulation from the ages of five to 15. She said that he unsuccessfully attempted penetration on four occasions but she was "too tight." She reported that the abuse initially only occurred during holidays. Between the ages of 11 and 13, she said it occurred two to three times per week. He observed scars on her arms during consultations in 2011 and 2012.

[21] The complainant, whilst agreeing she told Mr Johnston the abuse occurred from the ages of five to 15, said she could not remember telling him it initially occurred only during holidays. She denied telling him that between the ages of 11 and 13 it occurred two to three times per week. She also denied telling him of any rapes. He said she told him that the appellant made her give him "head jobs" and manual stimulation. She did not know why she did not tell him about the appellant's penile penetrations of her vagina; it was not easy to talk about.

[22] The complainant's parents gave evidence that the complainant was selected to attend gymnastic training camps conducted in Brisbane. She travelled to Brisbane for these camps for the first time in 1999 during the September school holidays. The complainant's mother confirmed that the complainant struggled with her school work and that the school was in contact with her about this. The mother agreed in cross-examination that when the appellant visited, it was with his family.

[23] The complainant gave evidence that in 1999 in Brisbane her aunt took her to and from gymnastics training and that it was during this period that the appellant first touched her. By contrast, the complainant's mother gave evidence that the aunt obtained a new job and telephoned the mother, requesting she come to Brisbane immediately because the aunt's new job meant she was unable to take the complainant to training. The complainant's mother came to Brisbane and used the aunt's car to drive the complainant to and from training.

[24] When cross-examining the complainant about counts 3 and 4, the following exchange occurred:

> "…you get on well with your siblings, don't you?--- Yes.
>
> …Yeah. Never anything happened between your brothers and sisters and you?--- No."[1]

[25] The complainant later agreed that Dr Deacon was her current clinical psychiatrist and they had a good rapport. He had been treating her since February 2015 for major depressive and anxiety disorders. Defence counsel asked: "Do you recall telling him that you were unsure whether you'd been sexually abused by your brother?"[2] She seems to have become upset as the judge adjourned the court for eight minutes. When court resumed and after she assured the judge that she was composed, the jury

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1 T 2-29, lines 12-17, AB 90.

2 T 2-48, lines 9-10, AB 109.

returned and the cross-examination continued. She agreed that on 17 February 2015 she told Dr Deacon that she was unsure if she had been sexually abused by her brother, K. She denied stating earlier that day on oath that nothing had ever occurred between her and her brother or her other siblings. She denied being asked that question. She agreed that there was some prospect that her brother had sexually abused her. The judge interrupted, stating that he may have missed hearing the earlier questioning referred to by defence counsel but he had no note of it. She then said she was unsure whether she had been sexually abused by her brother because she always disassociated herself from what had happened. She denied that she was substituting the appellant's sexual abuse for her brother's abuse. She said that on 17 February 2015 when she spoke to Dr Deacon, she knew her brother K had sexually abused her on one occasion. She did not know why she said she wasn't sure, adding "he's my brother." She did not remember exactly where K abused her but thought it was in a Central Queensland town.

[26] She agreed that she had mental health issues. These arose just before she first told people about what the appellant had done to her. She accepted that from 2005 to 2011 she had a lot of problems with her Russian gymnastic coaches who were very mean to her. She reported on numerous occasions that she was "emotionally tired" and she cried a lot. She was involved in long hours of gymnastics training and was falling behind in her school work. She did not have problems with her memory; it was good. In August 2006 she saw a psychologist, Andrea, as "a normal part of being an elite athlete." She denied being mentally unwell for the 12 months preceding August 2006. She denied that she had then stopped training properly and given up all her school work. She loved her sport; some times were good, some bad. She did not tell Andrea about any sexual abuse. She left school at the end of Year 11 to concentrate on gymnastics. She continued with the gymnastics program at a private Brisbane school until 2011, when she left because of the Russian coaches.

[27] During cross-examination about count 3, she was asked whether lubrication was used. She said for the first time, "From memory, [the appellant] spat on his fingers."

[28] The complainant said that counts 7, 8, 9 and 10 occurred at the family's bayside house where they moved in 2006, one night when the appellant, the complainant's sister N and she were watching "Transformers". She gave evidence that she sent a text message to her friend, Ca, telling her that her cousin had raped her. About a week and a half later the complainant said she sent a text message to N stating that she was scared and needed to tell her something. N came into her room and asked if it was her semi-formal partner. She answered, "no". N then asked if it had anything to do with the appellant. The complainant responded affirmatively. N asked if she could tell their mother. N returned to the room with their mother. Within a few days their mother took the complainant to the doctor and then to the police.

[29] Ca gave evidence that in 2009 the complainant was upset and sent her a text message, along the lines of, "my cousin raped me." She told the complainant to tell her family about the abuse.

[30] N gave evidence that she asked the complainant if the appellant had sexually abused her. She did not respond verbally but nodded her head. She did not want N to tell their mother but N decided that their mother should know. N said that while the family was living in a bayside house, she watched the movie "Transformers" with the appellant and the complainant. The appellant was lying on the sofa with the complainant lying down behind him. N was sitting on the floor. By the time the movie finished, the complainant and the appellant were asleep in the same positions and N went to

bed, leaving the room in darkness. N did not return to the room and the next morning the appellant had left the house. She was unable to give an approximate date as to when this happened.

[31] The police officer to whom the complainant reported the offending said that she told him counts 7, 8, 9 and 10 occurred when she was watching "Transformers" on Foxtel in early 2008.

[32] There was a formal admission aspect of the prosecution case that for the period from the start of 2008 to the end of 2009 the movie "Transformers," was broadcast 60 times between 31 August 2008 and 29 July 2009 on the Foxtel Showtime channel.[3]

[33] The appellant gave evidence that he did not commit the offences. He said that, in the 1999 September school holidays, he and his sister visited his father in Rockhampton for the whole holiday period. He recalled watching a "Transformers" movie with the complainant and her sister at their bayside home but said others were also present. It was not suggested to the appellant in cross-examination that he did not go to Rockhampton during those school holidays. In re-examination he said that there were many different "Transformers" movies.

Were the verdicts unreasonable?

[34] The appellant contended that the guilty verdicts were unreasonable or could not be supported by the evidence.[4] A determination of this issue requires this Court to consider whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[5] It was not in contention that the complainant gave evidence, which, if accepted by the jury beyond reasonable doubt, was sufficient to establish the offences of which he was convicted. The appellant contended, however, that it was not open to the jury to accept her evidence beyond reasonable doubt as reliable because of its many weaknesses.

[35] The appellant particularly emphasised the following matters. The complainant did not give evidence of instances of abuse about which she complained to police and the appellant was acquitted on counts 1, 7, 8 and the rape aspect of count 9. There were many inconsistences between her evidence of what she told others about the abuse and the evidence of those witnesses. Their evidence should be preferred, particularly the police officer, Mr Johnston and Ms Ridler who all took contemporaneous notes. Though claiming in her evidence that the appellant penetrated her vagina with his penis, she told others that there was no penetration and that the offending commenced when she was five years old. The evidence demonstrated that it could not have commenced until she was seven years old. She told some that the offending occurred over 10 years and others over five years. In her evidence she made a general claim of discreditable conduct relating to her being made on a number of occasions to masturbate the appellant, but she provided no details upon which these claims could be tested. She was a disturbed young woman who self-harmed and she suffered from depression and anxiety. Her complaints about the appellant's conduct varied so much they were fanciful, or at best, unreliable. She claimed her brother K had sexually abused her and that she disassociated herself from this memory. For the first time, in cross-examination at the trial, she embellished her account with a detail that the appellant had spat on his fingers as a lubricant.

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3 Exhibit 3, AB 383; AB 291.

4 See s 668E(1) *Criminal Code*.

5 *M v The Queen* (1994) 181 CLR 487, 493-495; *MFA v The Queen* (2002) 213 CLR 606, [25], [59]; *SKA v The Queen* (2011) 243 CLR 400, [12].

[36] The appellant contended that for all these reasons, even if the appellant's evidence was rejected, the complainant's evidence could not be accepted beyond reasonable doubt. In any case, as the appellant gave undisputed evidence that he was not in Brisbane when count 2 occurred, he argued that he should have been acquitted on that count.

Conclusion on this ground of appeal

[37] The jury's task in this case was difficult. The many issues raised by the appellant were matters which they needed to carefully consider in determining whether they could accept the complainant's evidence beyond reasonable doubt. This is the sort of case where different juries could reasonably reach different views as to the complainant's credibility. The judge was right to warn the jury to scrutinise her evidence very carefully before acting on it. The jury, however, were entitled to reject the appellant's evidence. The complainant, who was cross-examined at length, remained unshaken in her evidence that the appellant committed the counts upon which the jury convicted. As she did not make a complaint about the offending for many years, it is not surprising that she was confused as to when the offending began. There was also delay between when she reported the offending to others and the trial, so that it is not surprising that there were discrepancies between her recollection of what she told others and their recollection. Where contemporaneous notes were made of her statements, that record is likely to be more accurate than her recollection; but that did not necessarily mean she was unreliable in her recollection of the offences on which the jury convicted. Nor is it necessarily surprising that she told some professionals that there was no penetration. This may have been out of embarrassment, or for fear that they would have thought less of her if they knew the full extent of the abuse.

[38] In oral submissions the appellant made clear he was not submitting that her evidence was implausible because of her mental health issues which, on the evidence, did not affect her memory or reliability. Nor did the appellant suggest in this Court that she may have mistakenly thought the appellant abused her when in truth it was her brother K; K's abuse was said to have occurred in Central Queensland, and could not have been confused with the alleged offence concerning the appellant.

[39] Many of the matters relied upon by the appellant were minor. For example, it was not significant to her credibility that she mentioned that the appellant may have spat on his hands as lubrication only when asked in cross-examination if he used lubrication. The appellant emphasised that the complainant has given contradictory evidence about whether K had abused her. I am not persuaded of this. The question and answer relied on is set out at [24] of these reasons. The exchange which later followed set out at [25] of these reasons suggests that she did not understand the original question the way defence counsel intended.

[40] The fact the prosecutor omitted to suggest to the appellant in cross-examination that he was in Brisbane when count 2 was committed, did not mean the jury had to accept he was not in Brisbane then. The appellant had denied committing the offences, and gave evidence he was in Rockhampton when count 2 occurred. Obviously he would have denied being in Brisbane at the time of count 2 had the prosecution put this to him. The jury were entitled to reject his evidence. Subject to what I state later about the final ground of appeal, the confusing state of the evidence as to when counts 9 and 10 occurred did not mean the jury could not convict the appellant of those counts.

[41] The matters relied on by the appellant, whether alone or in combination, did not require the jury to reject the complainant's evidence on the counts on which they convicted. Having reviewed the whole of the evidence and subject to what I state later about the directions on count 2, 5, 6, 9 and 10, I am persuaded it was open to the jury to be satisfied beyond reasonable doubt of the reliability of the complainant's evidence and to convict the appellant on each count. This ground of appeal is not made out.

The judge's *Robinson* direction

[42] The appellant referred to *Robinson v The Queen*,[6] contending that the judge did not adequately direct the jury. *Robinson* requires trial judges, where there is a substantial risk of a miscarriage of justice arising from the circumstances of the case, to warn juries to scrutinise a complainant's evidence before convicting; judges should also carefully explain the particular reasons for the warning. Whilst the judge gave such a warning of sorts, the appellant contended it was inadequate. He should have explained, the appellant submitted, that the warning was necessary because of the stark inconsistencies between the complainant's evidence and that of the preliminary complaint witnesses, emphasising that Mr Johnston, Ms Ridler and the police officer all took contemporaneous notes of her complaint to them. The judge's direction, the appellant argued, did not provide sufficient detail of the critical inconsistencies between the complainant's evidence and the preliminary complaint witnesses and as a result the trial was unfair.

Relevant aspects of the judge's directions to the jury on this ground

[43] The appellant's contentions require a review of the judge's relevant directions to the jury. The judge reminded them that the complainant had said that the "Transformers" movie night (counts 8, 9 and 10) took place early in 2008 and that this was inconsistent with the admission that "Transformers" was played in the second half of the year, observing that, whilst this was a matter for the jury, they might think she was in error.[7] His Honour directed that they should consider that the complainant told a number of people different things about her complaint, adding:

> "Bear in mind that some of them made no notes and were asked to recall a conversation they heard years ago when recalling what their memories of what already [the complainant] complained of. Some of them did make notes. Beware of that difference because it may affect the accuracy of the persons who came to recall [the complainant's] complaints."[8]

[44] The judge explained, consistent with *R v Markuleski*,[9] that if the jury had a reasonable doubt concerning the truthfulness or the reliability of the complainant's evidence in relation to one or more count they must take that into account when assessing her truthfulness or reliability generally.[10] His Honour gave unimpugned directions as to how to deal with the evidence of discreditable conduct.[11] His Honour warned the jury against propensity reasoning. Before summarising the preliminary complaint evidence, his Honour further stated that the jury should:

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6 (1999) 197 CLR 162.
7 Summing-up, 4, lines 30-40, AB 327.
8 Summing-up, 5, lines 2-6, AB 328.
9 (2001) 52 NSWLR 82.
10 Summing-up, 6, lines 23-45, AB 329.
11 Summing-up, 6, lines 1-28, AB 330.

> "Bear in mind that each was being asked to recall a conversation that he or she had some years ago, though some did make notes. I tell you those things because you should bear in mind that a witness's memory of what [the complainant] said to them is not necessarily accurate."[12]

[45] His Honour directed the jury that:

> "…any inconsistencies between the accounts of [the complaint] witnesses and [the complainant's] evidence before you may cause you to have doubts about [the complainant's] credibility or about her reliability. Whatever consistencies or inconsistencies impact on the credibility or reliability of [the complainant] is a matter for you."[13]

[46] His Honour warned the jury of the difficulties arising from the long delay between the alleged offending occurring and the complainant's report to police, consistent with *Longman v The Queen*.[14] Later his Honour stated:

> "It is the case that you will need to scrutinise the evidence of [the complainant] with great care before you could arrive at a conclusion of guilt and that is because of the following circumstances.
>
> 1. The delay between the time of the alleged incidents and the late date when the [appellant] came to know of the complaint. That meant that the [appellant] really has had a lack of opportunity to prove or disprove the allegations by way of timely medical examination or forensic examination;
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> 2. Because of the different accounts that [the complainant] did give to various persons by way of preliminary complaint.
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> I refer in particular to, on the one hand, her – a disclosure to Constable Lambert that there had been penetration, her disclosure to [Ca] that she had been raped, her disclosure to [Ms D-B] that he had had sex with her. Bearing in mind that [the complainant] on other occasions has said that there was no penetration, it's important to bear that inconsistency in mind.
>
> Another reason for needing to scrutinise her evidence with great care is that there was no – it does seem to have been maintained a generally harmonious relationship between [the complainant] and [the appellant], until the time of the last set of alleged offences when he stopped being around and there has been no evidence of any threat or intimidation or force or physical manipulation other than perhaps the movements that were said to have been associated with counts 8 to 10. You should act only on [the complainant's] evidence if, after considering it with this warning I've given you and considering all the other evidence, you are convinced of [the complainant's] evidence being true and accurate."[15]

Later when summing up the defence case, the judge reminded the jury of defence counsel's emphasis on the complainant's "disclosure to Dr Deacon that she was unsure if she had been sexually abused by her brother."[16] The judge then reminded the jury

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12 Summing-up, 8, lines 31-35, AB 331.
13 Summing-up, 11, lines 34-37, AB 334.
14 (1989) 168 CLR 79; Summing-up, 19-20, lines 46-21, AB 342-343.
15 Summing-up, 34-35, lines 38-20, AB 357-358.
16 Summing-up, 36, lines 36-37, AB 359.

that the complainant gave evidence that: "[S]he was sure she had been sexually abused by [K] and that she had been sure of that at the time she spoke to Dr Deacon."[17]

Conclusion on this ground of appeal

[47] His Honour's directions sufficiently drew to the jury's attention the principal matters in the case which undermine the reliability and truthfulness of the complainant's evidence. The appellant does not contend that those matters included the complainant's mental health issues or that she may have confused the appellant with her brother K's abuse of her. It was by no means clear that the complainant was intending to say in cross-examination that her brother K had not abused her so that this did not require a discrete direction.[18] The jury understood that, because of delay, the many inconsistencies in her evidence, especially concerning what she told others about the abuse, and because she appeared on friendly terms with the appellant all through the period when she complained she was being abused by him, they must scrutinise the complainant's evidence with great care before acting on it. The jury also knew they could only convict the appellant if satisfied of the reliability of the complainant's evidence beyond reasonable doubt, after heeding the warning to scrutinise her evidence and the reasons for the warning. The judge was not required to refer to every inconsistency or to give further directions about the note-taking of some complaint witnesses. The jury returned directed not guilty verdicts on a number of counts about which the complainant gave no evidence. They must have appreciated, in light of the *Markuleski* direction[19] that this was another reason to scrutinise her evidence carefully. The directions, when considered in context, were sufficient to warn the jury of the dangers arising in this case of a miscarriage of justice from too readily accepting the complainant's evidence. The directions complied with *Robinson*. This ground of appeal is not made out.

Criminal responsibility for count 2

[48] Count 2 was charged as having been committed first in time, between 31 August and 1 October 1999 when the appellant was about 13 and a half years old. Section 29(2) *Criminal Code* 1899 (Qld) provides:

> "A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission."

[49] The judge did not direct the jury in terms of s 29(2) and regrettably neither counsel asked for a direction or re-direction on this issue. The appellant was not cross-examined about his capacity to know in 1999 that he ought not either touch the seven year old complainant on her vagina on the outside of her clothing, or kiss her lips. Neither counsel addressed the jury on this issue. The case was conducted solely on the basis that the complainant gave evidence the appellant committed count 2 and the appellant gave evidence denying it.

[50] The respondent contended that the omission of the judge to direct the jury as to s 29(2) did not result in a substantial miscarriage of justice so that, under s 668E(1A) *Criminal Code*, the appeal on this ground can be dismissed. It was inevitable, the

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17 Summing-up, 36, lines 38-39, AB 359.

18 See the discussion of this evidence at [38] of these reasons.

19 Discussed at [44]-[45] of these reasons.

respondent argued, that the jury would have concluded that, in 1999, the 13 year old appellant who appeared of normal intelligence and attended school, would have the capacity to know he should not behave in this way.

Conclusion on this ground of appeal

[51] There is some appeal in the respondent's contentions. A jury could have found that the only rational inference from the evidence was that the appellant had the necessary capacity under s 29(2). But the terms of s 29(2) are unequivocal. The appellant should not have been convicted of count 2 without the jury having considered that provision and whether they were satisfied beyond reasonable doubt of his capacity. The failure to direct the jury as to s 29(2) amounts to such a significant denial of procedural fairness that this is not an appropriate case in which to invoke s 668E(1A).[20] It follows that in respect of count 2 the appeal against conviction had to be allowed, the verdict of guilty set aside and a retrial ordered.

The misdirection as to consent

[52] The Court pointed out at the hearing apparent judicial misdirections on consent and allowed the parties to make submissions on this. In those subsequent submissions the parties agreed that the appeal in so far as it relates to counts 5, 6 and 9 must be allowed. The respondent, however, contended that the appeal against conviction in so far as it concerned count 10 should be dismissed.

[53] The offence of rape is defined in s 349 *Criminal Code* as:

> "(2) A person rapes another person if —
>
> (a) the person has carnal knowledge with or of the person without the person's consent; or
>
> (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of a person's body that is not a penis without the other person's consent; or
>
> (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
>
> (3) For this section, a child under the age of 12 years is incapable of giving consent."

[54] The judge gave the following relevant directions:

> "In particular in relation to counts 8, 9 and 10 I'm going to explain to you later that one of the elements that the Prosecution must establish in respect of those three counts is an additional element that need not be established in relation to any of the others. It is the element of whether [the complainant] did not consent. You see, it is only in respect of counts 8, 9 and 10 that [the complainant] is likely to have been aged over the age of 16.
>
> When a complainant is aged under 16 with respect, for instance, to a charge of rape or attempted rape, according to our law she cannot consent. Once a person reaches the age of 16 under our law then it is necessary for the Prosecution to prove the element of consent. I will

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[20] See *Weiss v The Queen* (2005) 224 CLR 300, [45].

> in particular with respect to counts 8, 9 and 10 remind you of what the evidence was because you'll have to consider it carefully to determine whether you are satisfied that [the complainant] did not consent."[21]

[55] When dealing with count 5 (rape) and count 6 (attempted rape) when the complainant was over 12 but under 16 the judge stated that:

> "…bearing in mind that at the particular date range [the complainant] was under 16 and her consent could not be given – that that element would not trouble you, and that if you accept these things happened as [the complainant] described them you would be satisfied of all the elements necessary to make up count 5."[22]

[56] His Honour, in explaining the elements of count 6, did not direct that absence of consent was an element. When his Honour returned to counts 8, 9 and 10, he stated that:

> "…one of the elements that the prosecution must prove is that the acts occurred without the consent of [the complainant]. This will be the first occasion in the series of counts that you must consider whether [the complainant] – whether the absence of consent has been established by the prosecution beyond reasonable doubt."[23]

[57] His Honour went onto explain the meaning of the concept of consent and there is no complaint about that direction. The respondent has listened to the audio recording of the summing up and confirmed the accuracy of this transcript.

Conclusion on this ground of appeal

[58] The directions as to consent were extraordinarily concerning. It is not and has never been the law in Queensland that consent is not an element of the offence of rape where the complainant is between the ages of 12 and 16. Consensual sexual contact with children under 16 is unlawful, but it is not rape under s 349.

[59] As the complainant was under 12 when counts 3 and 4 occurred and as the appellant was acquitted on count 8, this ground of appeal concerned only counts 5, 6, 9 and 10. The respondent rightly conceded that the appeal against conviction on counts 5, 6 and 9 must be allowed as the complainant was over 12 and under 16 for some of the charged time period. The respondent submitted, however, that, as at all times alleged in count 10 the complainant was over 16 years, this conviction should stand; the judge's directions on consent as to count 10 were correct.

[60] Whilst there at first appeared to be some attraction in the respondent's argument, there were insurmountable difficulties with it. The complainant's evidence was that counts 7,[24] 8,[25] 9 and 10 all occurred on the same evening when she, N and the appellant were watching the movie "Transformers," at the bayside house of the complainant's family. So much was recognised in the jury's note for redirection asking:

> "Are counts 8 and 9 on the same date as count 10? If so, should counts 8 and 9 be changed to reflect this?"[26]

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21 Summing up, 7, lines 30-45, AB 330.
22 Summing up, 23, lines 44-47, AB 346.
23 Summing up, 25, lines 25-28, AB 348.
24 Directed not guilty verdict, day 4 of the trial and directed not guilty verdict to the alternative count on day 5 of the trial.
25 Directed not guilty verdict on day 5 of the trial and a not guilty verdict from the jury to the alternative count on day 6 of the trial.
26 T 1-4, lines 30-31, AB 371.

[61] The judge responded to that question, with the concurrence of counsel, that the events charged in counts 8 and 9 were alleged to have occurred on the same date as count 10 and that "the prosecution is not seeking to change the indictment."[27]

[62] It is puzzling why count 10 charged a later time period than counts 7, 8 and 9 when the complainant's evidence was always that all four offences occurred on the same night. She said that her family moved in 2006 to the bayside house where these offences occurred. The police officer gave evidence that the complainant told him that the offences occurred when she was watching "Transformers" on Foxtel with the appellant and N in early 2008, but that was not evidence of the truth of what the complainant said. The complainant turned 16 in July 2008. The admissions before the jury made clear that the movie "Transformers" was broadcast on Foxtel between 31 August 2008 and 29 July 2009, that is, after the complainant had turned 16. The appellant, however, gave uncontradicted evidence that there have been many "Transformers" movies. Despite the dates charged in count 10, the unsatisfactory state of the evidence left open the possibility that counts 9 and 10 occurred when the complainant was under 16 so that, if the jury followed the judge's earlier directions, they may have concluded that absence of consent was not an element. The judge should have told the jury in respect of counts 9 and 10, even if the jury were not satisfied beyond reasonable doubt that the complainant was 16 years old at the time, the prosecution must prove beyond reasonable doubt that she did not consent. If, as the respondent rightly conceded, the appeal must be allowed and retrials ordered in respect of counts 8 and 9, it would be a miscarriage of justice not to make a similar order in respect of count 10 which occurred on the same day and is part of the same course of conduct. It was also noteworthy that the jury found the appellant not guilty of the alternative charge to count 8, sexual assault, where the prosecution was required to prove absence of consent. The jury may have convicted on counts 9 and 10 on the wrong basis that she was under 16 so that consent was irrelevant. The completely unsatisfactory nature of the directions as to consent and the shortcomings as to the evidence as to when counts 9 and 10 occurred required that the appeal against conviction insofar as it concerned counts 5, 6, 9 and 10 be allowed, with retrials ordered.

Summary

[63] The appellant did not establish that the guilty verdicts were unreasonable and against the weight of the evidence. Nor did he establish that the judge failed to properly direct the jury in accordance with *Robinson*. The contention that the evidence of the preliminary complaint to Hetty Johnston was inadmissible was rightly not pursued as the defence may have chosen to admit her evidence for forensic reasons. The judge, however, should have directed the jury as to s 29(2) *Criminal Code* in respect of count 2 when the appellant was 13 years old. The judge misdirected the jury as to the relevance of consent to count 5 (rape); count 6 (attempted rape); count 9 (the alternative verdict of attempted rape to the charged count of rape) and count 10 (rape).

[64] There is an especially disappointing aspect of this appeal. It is the duty of counsel in criminal trials to listen carefully to the judge's directions to the jury and to bring to the judge's attention any errors or shortcomings. Trial counsel in this case failed in that duty, both on the judge's directions as to consent and as to the s 29(2) point. Had they assisted the court as they should, it is likely that the errors would not have been made and this appeal against conviction would have failed.

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[27] T 1-4, lines 30-39, AB 371.

[65] For the reasons I have given, I joined in this Court's orders on 10 March 2016, allowing the appeal against conviction in so far as it concerned count 2 (indecent treatment of a child under 12); count 5 (rape); count 6 (attempted rape); count 9 (the alternative verdict of attempted rape to the charged count of rape) and count 10 (rape).

[66] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Margaret McMurdo P. They adequately reflect my own reasons for joining in the orders made on 10 March 2016, and I agree with them.

[67] **PHILIPPIDES JA:** I adopt the reasons given by McMurdo P. They reflect the basis for my joining in the orders made on 10 March 2016.