SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maddison* [2016] QCA 279
PARTIES:	**R** **v** **MADDISON, Steven Robert** (appellant)
FILE NO/S:	CA No 1 of 2015 DC No 285 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich – Date of Conviction: 21 November 2014
DELIVERED ON:	2 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2016
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted after a re-trial of one count of rape, having earlier been convicted of three counts of indecently dealing with a child under his care – where the appellant submitted that various aspects of the complainant's evidence and evidence given by other witnesses was inconsistent – whether the jury's verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted after a re-trial of one count of rape, having earlier been convicted of three counts of indecently dealing with a child under his care – where the appellant submitted that a miscarriage of justice had occurred as a result of the jury not being discharged after two witnesses gave evidence that was both inadmissible and prejudicial – where the trial judge gave directions addressing this evidence – whether the jury ought to have been discharged *Criminal Code* (Qld), s 668E(1) *Crofts v The Queen* (1996) 186 CLR 427; [1996] HCA 22, cited

Greensill v The Queen (2012) 37 VR 257; [2012] VSCA 306, cited
Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Maddison v The Queen [2014] HCASL 118, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
R v Agius [2015] QCA 277, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited
R v Maddison [2013] QCA 132, cited
R v RAU [2015] QCA 217, applied
R v SCH [2015] QCA 38, cited
R v Thompson [1983] 1 Qd R 224, cited
R v Thomson [2016] QCA 259, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
G P Cash QC for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.

[2] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.

[3] **PHILIPPIDES JA:** The appellant was initially charged on indictment with four offences: one count of rape (count 1) which is the subject of this appeal; and three counts of indecently dealing with a child under his care (counts 2-4). After a trial in November 2012, the jury was unable to reach a verdict on the charge of rape. One count of indecent treatment was the subject of a nolle prosequi during the trial (count 3). The jury convicted the appellant of one count of indecent treatment (count 2)[1] and acquitted him of a further count of indecent treatment (count 4).

[4] In November 2014, after a retrial, the appellant was convicted of the count of rape. He seeks to appeal against the conviction on the basis that the verdict was unreasonable.

Summary of the evidence at trial

[5] Seven witnesses were called by the prosecution at the trial. The appellant elected neither to give nor call evidence. Of the seven witnesses called by the prosecution, three, including the complainant, were children. Their evidence consisted of interviews with police officers recorded on 5 December 2011, two days after the events the subject of the trial, along with evidence given in court and recorded before the trial.

[6] As the evidence of the children had been recorded, it was effectively the same as that presented at the first trial of the appellant. The only substantial difference was the removal of any reference to the events that had been the subject of count 3 (the

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[1] The conviction on count 2 was unsuccessfully appealed in May 2013: *R v Maddison* [2013] QCA 132. The appellant subsequently made an unsuccessful application for special leave to appeal to the High Court of Australia: *Maddison v The Queen* [2014] HCASL 118.

nolle prosequi) and count 4 (the acquittal). There was no disagreement that, otherwise, the taped evidence of the children relevant to this appeal was accurately summarised in the judgment of Muir JA as set out below:[2]

> "[2] The complainant, who was 12 years of age at the time of the alleged offences, gave evidence to the following effect. She slept over at the appellant's house on the evening of Saturday 3 December 2011. The appellant was referred to by G, a friend of the complainant of a similar age, as her father. He was not G's father but, because of his relationship with G's mother, assumed a parental role in relation to G. Also in the house were C, a girl of about 13 years of age, the appellant's five year old daughter, H, and a young boy, J, aged eight.
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> [3] The appellant told the complainant to hurry and get into the shower. The complainant told him to go out. The appellant told her again to hurry up and remained in the room. The complainant undressed and the appellant left but kept coming back and looking at her. The complainant accepted in cross-examination that the appellant had tried to get H out of the shower and had asked G to try and get her out.
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> [4] During the evening, the complainant played a game of 'wedgies' with the appellant and G. After 'playing around with [G] like giving her [wedgies]' the appellant 'pulled [the complainant's] pants up and then … dragged [her] onto the bed and … gave [her] a [wedgie] … he was lying down and … he was going to pull [her] pants down and [she] said no and [she] tried to get off him but he wouldn't …'. The complainant described how she was held by the appellant. She said:
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> > '… I then got away after that cause I called [G] out I kept calling [G] out for the whole night so and when he tried to do it well when he played with me um after he did and I told him to stop I went to the bathroom with [G] and told her about it and she told me to stay with her for the night …'
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> [5] The complainant described conduct engaged in by the appellant while G was present. She then said:
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> > 'I had long pants and he pulled them down in the bed but the well the [lounge room] bed thing and he tried to play with me well he did play with me and I told him to stop after that because he kept putting his finger up my rude part …'
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> [6] Under further questioning, the complainant expanded on her description of having her pants pulled down and her vagina penetrated digitally.
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> [7] The complainant spoke about being massaged by the appellant when they were under blankets and G, H, C and J were in the

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2 [2013] QCA 132.

room. Asked what part of her body was massaged by the appellant, she said:

> '…it was on my tummy first and I think he was trying to roll me over to do my back when I think he didn't want to do that and then he would stop and then he would go up more until he got sort of over the private part and that [was] when he wouldn't stop.'

[8] Asked what she called 'that other private part', she said 'my breasts'. Count 1 concerned the alleged digital penetration of the complainant's vulva or vagina while they were on the sofa bed under the blanket and was based on this evidence.

[9] Later in the police interview, the complainant said that she thought 'it was numerous times' that the appellant put his finger in her 'rude part'.

[10] …

[11] …

[12] Under cross-examination, the complainant gave the following evidence. She spoke to G about the appellant's conduct on the evening of the incident. Then she told another classmate about it at school. The complainant was called up to the principal's office and asked by the principal about a rumour. Questioned about what she understood by the word 'rape', she replied, 'That it's sexual intercourse when someone's touched you when you don't like it'. The complainant accepted that she told the principal that G was it making up. She accepted also that when asked by her sister about being inappropriately touched by the appellant, she initially denied it. She said she initially denied the allegations as to the appellant's conduct because she did not want a particular teacher to find out. She also said that she did not tell her sister because she did not think she was going to believe it.

[13] When interviewed by police officers on 5 December 2011, G gave the following account.

[14] The weekend before the interview, she and the complainant started 'mucking around playing around' at the appellant's house. The appellant gave them wedgies. She, the complainant, C, J, H and the appellant were sitting around watching movies. H, J and C slept for a time. In the course of the evening, the complainant and G went across the road to the house of a friend of the appellant. After their return, they watched another movie, played a game where they threw a ball at each other and were told by the appellant to go to bed. She 'went onto the computers' as did the complainant. The complainant asked the appellant for help to fix a computer. The appellant 'went down there … and [G didn't] know what happened in between there'.

[15] Asked if they had a wash, G said they had a shower and that the appellant 'walked into the bathroom … cause I was in there with [H] and … he come in he didn't … like get naked and come in he … stood on the outside washing [H's] hair and I told him to get out and he didn't listen'. She and H were in the shower at the time. After washing H's hair, the appellant left the bathroom.

[16] The complainant asked her to stay with her in the bathroom to make sure the appellant did not come in. The appellant, however, walked back into the bathroom but the complainant 'didn't tell him to get her (sic) out or anything'. G spoke of subsequently being in the lounge room watching a movie with J, C, H, the appellant and the complainant. She was on one side of the complainant on a sofa bed and the appellant was on another. The complainant and the appellant were under blankets. She was not. She did not feel any movement on the sofa bed.

[17] The appellant massaged C's, the complainant's and her heads. At around this time, the complainant 'started cuddling into' her and the appellant moved from the bed and lay on the floor with G and the complainant. At around this time she could hear the complainant's 'shirt go up and down' and she thought the appellant was rubbing the complainant's back. This continued for a substantial period of time. There was an occasion on which the appellant was 'over near the piano' and the complainant was in front of him. The complainant 'told him to stop it and … that's what felt weird'. The appellant asked 'why' and the complainant replied 'because I don't like it'. The appellant said 'Okay'.

[18] Asked in cross-examination if the complainant said anything about the appellant touching her that night, she replied 'She did ask me in the toilet room to stay with her just in case someone was going to come in'. It was clarified that this was when the complainant was having her shower.

[19] This exchange occurred in the course of her cross-examination:

> 'All right. And you never saw him on that sofa touching [the complainant] did you?-- No, I wasn't paying attention.
>
> Well, you were sitting bedside her? Or lying beside her. Was it lying or sitting?-- We – I was lying and then [the complainant] was in the middle and [the appellant] was at the end.
>
> All right. And he was right on the edge of the sofa wasn't he?-- Yep.
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> …
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> And you say you weren't paying attention, but you saw nothing between him and [the complainant] did you?-- No, I didn't.

> All right?-- I was watching the movie called Mean Girls.
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> And [the complainant] never got up and moved off that bed at any point? Off that sofa?-- She got off and moved to go to the toilet and she told me to go with her.
>
> Yes?-- She said that he was touching her, but I didn't believe it at the time.'

[20] C, who was 13 at the time of the interview, gave the following account to police on 5 December 2011. She was at the appellant's house with his daughter H and other children. When she was having a shower in the appellant's ensuite, the appellant, wearing a shirt and underpants, came in and asked if he could shower with her. She told him to get out. After she had showered and started reading a book, the complainant arrived. Before then, when she and her sister, G, were sitting watching television, the appellant came to give them a kiss. He kissed G twice on the cheek or lips but she 'didn't really get a good view of it'. C was kissed on the forehead and after the appellant 'just stood there', she 'pushed him away'. She later observed the complainant, the appellant and G on the sofa or couch; there was a blanket over the three of them. One of the appellant's hands was under the blanket, the other was outside it."

[7] Dr Gavranich gave evidence that he examined the complainant on 7 December 2011. His examination of the complainant's genitals revealed no injury or abnormality. His evidence was that there can be two reasons for not finding an abnormality; firstly, that nothing happened or, secondly, that if something did happen it did not leave any evidence of trauma, either because the trauma completely healed or the event did not result in trauma. As to the latter situation, he gave the example of "touching and that won't leave evidence of entry".[3]

[8] Ms P, the principal of the school the complainant attended, gave evidence that she knew the complainant and G. On 5 December 2011, she spoke to the complainant at school regarding a "rumour" that was going around the school at the time. The complainant replied that she had been raped by G's "father" (the appellant). The complainant indicated that she knew what raped meant and that she understood it was a serious allegation. She said she had been touched over the weekend.[4] In cross-examination, Ms P agreed that the complainant had initially told her that G was making up the rumour.[5] She recalled that G had come to her, quite upset and told her that there was a rumour going around that the complainant had said she had been raped by G's father. After speaking to the complainant in her office, Ms P telephoned Ms K (who she knew to be a guardian of the complainant) on speaker phone. She heard the complainant tell Ms K that she had been raped by G's father. Ms K asked why the complainant had not told her and the complainant replied that she was going to.

[9] Ms K, the partner of the complainant's older sister, gave evidence that they had legal guardianship of the complainant. She had allowed the complainant to stay

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3 AB 72; 7.15.
4 AB 78.17 – AB 79.30.
5 AB 80.35-42.

over at the appellant's house. The next morning she saw the complainant running home at about 8.00 am and the complainant went straight upstairs. About 10 to 15 minutes later, the appellant drove around to her house and asked if the complainant was there because she had not said goodbye. Ms K called out for the complainant to come downstairs to say goodbye. The complainant refused to do so but, after some insistence by Ms K, the complainant opened a window and "quickly said bye" to the appellant.[6] Ms K stated that, when she asked the complainant why she returned so early, the complainant said she wanted to come back and later explained that the other kids had been picked up. The following Monday she spoke by phone with Ms P and also spoke to the complainant on speaker phone. She said the complainant kept saying that the appellant had "touched me down there".[7]

[10] Ms D, was a teacher at the complainant's school, and knew the complainant and G. She was present (at Ms P's request) for a group conversation (with Ms P, the complainant, G, G's parents and Ms K) where the complainant spoke about the "wedgie game" they had been playing. Ms D said that Ms P asked a number of times whether the appellant had touched her. After initially making denials, the complainant agreed that that the appellant touched her.[8]

[11] The police officer who investigated the complaint made by the complainant against the appellant gave evidence, including in relation to various photographs of the appellant's house, and described the course of the investigation.[9]

Unreasonable verdict

Relevant principles

[12] As explained in *R v RAU*,[10] the ground of appeal against conviction raised is to be regarded as a contention pursuant to s 668E(1) of the *Criminal Code* (Qld) that the jury's verdicts were "unreasonable, or cannot be supported having regard to the evidence". It is, therefore, necessary for this Court to review the appeal record and determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt. The relevant principles were summarised in *R v RAU*,[11] in the following passages, that have been adopted on subsequent occasions:[12]

> "In *MFA v The Queen*,[13] McHugh, Gummow and Kirby JJ noted that a review of this kind:
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> > '… involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials.'

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6 AB 90.27 – AB 91.34.
7 AB 91.38-48.
8 AB 101-102.
9 AB 104-107.
10 [2015] QCA 217 at [5]-[6].
11 [2015] QCA 217 at [5]-[6].
12 *R v Agius* [2015] QCA 277 at [6] per Fraser and Philippides JJA and Bond J; *R v Thomson* [2016] QCA 259 at [5] per Boddice J, with whom Gotterson JA and Douglas J agreed.
13 (2002) 213 CLR 606 at 624.

In *R v SCH*,[14] the relevant principles were summarised as follows:

> '"In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty."[15] In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred.[16] However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.[17]
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> This Court must, therefore, undertake "an independent assessment of the evidence, both as to its sufficiency and its quality"[18] in accordance with [these] principles …'"

[13] The long established approach referred to in *M v The Queen*[19] and *MFA v The Queen*[20] as to the primacy of the jury in criminal trials was recently reiterated in *The Queen v Baden-Clay*,[21] where the High Court observed: [22]

> "It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact.' Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way …
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> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is

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14 [2015] QCA 38 at [7]-[8].
15 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.
16 *MFA v The Queen* (2002) 213 CLR 606 at 623.
17 *M v The Queen* (1994) 181 CLR 487 at 494-494; *MFA v The Queen* (2002) 213 CLR 606 at 623.
18 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at 406.
19 (1994) 181 CLR 487.
20 (2002) 213 CLR 606.
21 [2016] HCA 35.
22 [2016] HCA 35 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

> an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'"

The appellant's submissions

[14] The appellant submitted that the evidence against him "relie[d] on two points, the medical evidence and the evidence of the complainant". In that regard, the appellant referred to the trial judge's statement in the summing up that "the case … with respect to the offence of rape, relies wholly and solely on [the complainant's] evidence. No one else saw it happen".[23] Reference was also made to the direction to the jury that "at the end of the day, you can only convict … in this case if you're satisfied beyond reasonable that [the complainant] was telling you the truth and was accurate when she said that she was penetrated by [the appellant's] fingers".[24]

[15] The appellant submitted in his written outline that "[t]he evidence given throughout the trial was contradicted between witnesses and more so not consistent with the complainants (sic) evidence, this was often inconsistent within itself". It was said that that proved the complainant "to be unreliable and that she was not credible" and that there was no evidence presented that met the burden of proof placed on the prosecution. It was argued that, looking at the whole of the evidence, there was "no consistency between witnesses or the complainant's own evidence" and the verdict was "therefore unreasonable".

[16] In his written outline, the appellant stated that "several remarks" were made by the trial judge "about the consistency of the evidence given by the witnesses highlighting concern with the accuracy and credibility of some evidence". It seems that this was a reference to the trial judge's summing up, where her Honour, as is orthodox, identified the inconsistencies raised by counsel in summarising the case for the defence. In his oral submissions, the appellant enumerated a number of matters said to demonstrate inconsistencies which ought to have raised a reasonable doubt in the jury's mind. The submissions made in that regard, which were discursive, in many respects dealt with small matters of difference in the evidence. None of the matters raised, in my view, indicated that the jury's verdict was not open. The more serious inconsistencies raised by the appellant included the following and were outlined by the trial judge in her summing up.[25] The complainant had initially denied that anything had occurred when speaking to her sister.[26] The complainant initially told Ms P that G was "making up the rumour" about her. In both cases, the complainant gave an explanation for her initial statements; she had not told her sister because she did not think she would believe her[27] and she had not wanted "the teacher to know about it".[28]

[17] The appellant seemed to place much store on the following evidence given by G as illustrative of inconsistency:

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23 AB 131.10.
24 AB 132.12.
25 AB 131.
26 TS 14-15.
27 TS 16; see AB 31.22.
28 AB 19.

> "After the movie had finished and that's when he told us to go to bed I jumped straight into bed [the complainant] was over near the piano so was [the appellant] – because I could see [the complainant's] colourful boxers and I could see a black Mini Mouse shirt and that's when [the complainant] said stop it I don't like it and that's when [the appellant] said why … because she said I don't like it."

[18] The appellant's submission was that evidence was inconsistent with the complainant's evidence that the complainant was wearing "long grey trousers" and a "BMX T-shirt". It is difficult to see how the passage was helpful to the appellant given that, while there was inconsistency in relation to the complainant's clothing, the passage of G's evidence draws attention to G having heard the complainant telling the appellant to stop and that she did not like what he was doing.

[19] The appellant submitted that the complainant had a history of making false complaints and gave different reasons as to why she had not complained about the appellant's conduct on the occasion. It is not apparent that the defence case centred on any contention of false complaint. Rather, the defence case was aimed at highlighting contradictions between the complainant's preparedness to talk of an event with her sister on an earlier occasion and her apparent reluctance to talk about the event that was the subject of the trial.

[20] The appellant also made submissions before this Court as to the witnesses' evidence of the incident concerning his conduct in the shower being consistent with innocence and regarding inconsistencies in the evidence as to whether the alleged touching occurred on the sofa. The appellant also pointed to inconsistencies between the evidence of Ms P and Ms K as to whether the appellant used the word "raped" when speaking with Ms K on speaker phone. The jury were entitled to view the inconsistency as two people remembering the conversation differently. A submission was made that Ms K gave inconsistent evidence about calling out to the complainant to come down to say goodbye to the appellant and going upstairs to see the complainant. However, the jury were entitled to view the evidence as referring to separate occasions, one occasion being when the appellant drove over and the other when she went to ask the complainant why she had returned home.

[21] Any inconsistencies in the evidence were matters for the jury to assess. The trial judge directed the jury of the need to scrutinise the complainant's evidence very carefully before they relied on it to convict the appellant and gave other standard and appropriate directions.

[22] The appellant argued that "[i]nnocence based on the medical evidence also required the jury to accept [that] as proof of innocence". The appellant's contention was that the jury "was bound by law" to accept the medical evidence as proof of innocence. Further, the delay in examining the complainant "also had an impact as if it had been done earlier the reasons given by the Doctor would have been better proven". The appellant's submissions are misguided. There was no medical evidence that the digital penetration described by the complainant was such as was likely to leave evidence of trauma on examination. Any delay in examination of the complainant could be of no importance. The jury were correctly instructed not to speculate as to the delay. The medical evidence itself was, therefore, effectively neutral evidence. It provided no assistance to the appellant and was certainly not capable in the

circumstances of this case of giving rise to a doubt in the jury's mind as to the appellant's guilt.

[23] The appellant also sought to draw support for his submissions from the directions given by the trial judge as to the use and drawing of inferences and that where there was "a reasonable possibility, consistent with innocence, then [the jury] must draw that inference".[29] The appellant relied on those directions in arguing that the evidence, by both the complainant and G, that there was "mucking about" and horseplay, was such that the jury ought to have had a reasonable doubt as to the appellant's guilt. In particular, the appellant argued that, while the prosecution based its case on an "unnatural interest in children", the matters the prosecution "focused on demonstrated the actions of a parent" and, in some cases, "as the judge pointed out … would be the expected behaviour of a responsible parent". The alleged conduct, of the appellant going into the bathroom while G was in the shower and asking to shower with C, was capable of showing the appellant had a sexual interest in young girls in general. The trial judge gave appropriate directions as to the use of that evidence. The appellant's arguments in this regard and his submissions concerning the drawing of inferences are also misguided, bearing in mind that this was not a circumstantial evidence case.

[24] The appellant referred to several decisions: *Greensill v The Queen*[30] (an example of a case where well understood principles as to unsafe and unsatisfactory verdicts were applied to the facts of that case); *Crofts v The Queen*[31] (a decision which concerns fresh complaint, and is not of assistance here); *Libke v The Queen*[32] (a consideration of which does not advance the appellant's case); and *Klamo v The Queen* (which was unable to be identified). None of the decisions referred to further the appellant's submissions in any way.

[25] It is clear, as the respondent submitted, that the jury were entitled on all of the evidence to accept the complainant's account of being digitally raped by the appellant. It was open to the jury to consider that the complainant's account was generally, internally, consistent and was not implausible. The evidence of the complainant drew support from the testimony of other children, especially as to the events in the lounge room. The conduct of the complainant the following morning was also capable of suggesting she was avoiding the appellant and that something of concern had occurred. The question of what weight was to be given to the various inconsistencies raised by counsel was a matter for the jury to assess. In my view, on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. The jury's verdict of guilty cannot be said to have been unreasonable.

Miscarriage of justice in not discharging the jury

[26] The appellant submitted that a miscarriage of justice had occurred as a result of evidence given by two witnesses that was said to be both inadmissible and prejudicial. The appellant submitted that, notwithstanding the directions, "the fact it

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29 AB 130.41.
30 (2012) 37 VR 257.
31 (1996) 186 CLR 427.
32 (2007) 230 CLR 559.

was heard [by the jury] and that it happened twice during the trial meant the possible impact on the [appellant] was detrimental to the verdict".

[27] One of the concerns raised by the appellant related to a matter raised by the trial judge.[33] This concerned C pondering why G called the appellant "Dad". The jury were directed to ignore that aspect of the evidence.[34] No complaint was made about the inadequacy of the direction given in that regard. There is no basis to suppose the jury would have disregarded the direction given. Nor was any application made for the discharge of the jury.

[28] The second matter raised before this Court in oral submissions was a complaint that, when giving evidence, the police officer identified a photograph as showing that the ensuite bathroom in the appellant's house did not have a door. The appellant contended that that was incorrect, as there was a sliding door, and the jury may have drawn erroneous inferences from that evidence. The appellant was present at the trial and had the opportunity through his counsel to challenge the evidence. It was not, however, challenged for whatever reason. The issue of whether there was or was not a door was unlikely to have troubled the jury, given that it was not a matter that featured in the trial.

[29] There was also a submission made as to other evidence of the police officer which might have given the impression of non-cooperation by the appellant. The matter was the subject of discussion between the trial judge and counsel.[35] The respondent submitted that the evidence of the police officer was not such as to suggest the appellant was deliberately uncooperative or avoiding the police. In any event, the agreed course adopted after the discussion between the trial judge and defence counsel, was that the prosecution make an admission that it accepted that the appellant did cooperate with police and that there was no suggestion he evaded the police.[36] That admission was referred to by the trial judge in her Honour's summing up.[37] Her Honour made it clear that it was not an issue in the trial. The matter is of no moment.

[30] I accept the respondent's contention that the appellant has not shown that the trial miscarried as a result of the evidence.[38] In my view, there was no basis for the contention that the jury ought to have been discharged as a result of what the appellant described as inadmissible and prejudicial evidence.

Order

[31] The appeal against conviction should be dismissed.

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33 AB 107.12-16.
34 AB 128.40 – AB 129.3.
35 AB 116.5 – AB 117.35.
36 AB 117.6-44.
37 AB 121.22-25; AB 126.41-43.
38 *R v Thompson* [1983] 1 Qd R 224 at 227.