SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAK* [2016] QCA 306
PARTIES:	**R** **v** **FAK** (appellant/applicant)
FILE NO/S:	CA No 51 of 2016 DC No 100 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bundaberg – Date of Conviction & Sentence: 12 February 2016
DELIVERED ON:	22 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2016
JUDGES:	Morrison and Philip McMurdo JJA and North J Separate reasons for judgment of each member of the Court, Morrison JA and North J concurring as to the orders made, Philip McMurdo JA dissenting in part
ORDERS:	**1. The appeal is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where the appellant was found guilty, after trial, of one count of maintaining an unlawful sexual relationship with a child, with a circumstance of aggravation, one count of rape, and three counts of indecent treatment of a child, under 16, under 12, under care – where the appellant was the complainant's step-grandfather – where the Crown alleges that the appellant committed these offences against the complainant when she was aged between six and 14 years old – where a friend of the complainant gave preliminary complaint evidence – where the friend recounted things the complainant had told her, including this alleged exchange between the complainant and the appellant: "what are you doing, poppy, and he would say [your sister] lets me do it" – where an application was made by defence counsel to discharge the jury because of the potentially prejudicial effect of the reference to the complainant's sister – where the learned trial judge ruled against discharging the jury, and gave

a direction to the jury to disregard the evidence – where on appeal, it was said that this was highly prejudicial and amounted to a miscarriage of justice which was not avoided by the direction given – whether the judge erred in not discharging the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where it is alleged that the complainant went into her grandparent's bedroom – where the grandmother was in the shower and the appellant was in the bed – where it is alleged that the appellant kissed the complainant, using his tongue – where it is also alleged that the appellant rubbed the complainant's vagina, and inserted his finger, penetrating her vagina, amounting to the count of rape – where it was contended, on appeal, that the complainant's evidence revealed sufficient uncertainty about whether penetration had occurred, such that it was not open to the jury to be satisfied beyond reasonable doubt – whether the verdict of guilty on the count of rape was unreasonable or insupportable having regard to all of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where all of the counts of indecent treatment included the aggravating circumstance of the complainant being "under care" of the appellant at the time of the offences – where the appellant contends that this was an unreasonable finding in two of the counts – where the complainant's parents were in the house for two of the alleged offences, in the same room for one, and in the next room for the other – where the appellant contends, on appeal, that if the complainant's parents were both in the house at the time of the offence then it was not open to the jury to find that the complainant was under the appellant's care at the time of the offence – whether the verdict that the complainant was "under care" of the appellant at the time of two of the indecent treatment offences was unreasonable or insupportable having regard to all of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – MISDIRECTION – where at trial, evidence was given by the complainant of uncharged acts regarding the appellant touching the complainant, but not the subject of any charged offences – where the learned trial judge gave a direction to the jury that they could only use evidence of an uncharged act if they were satisfied beyond reasonable doubt that the act had occurred – where the appellant contends that the direction failed to adequately convey the necessity for the jury to be satisfied beyond reasonable doubt that one or more of the acts occurred

– whether the learned trial judge erred in failing to adequately instruct the jury about the use of evidence of uncharged acts

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where evidence of incidents not the subject of the charges appeared in the transcript of the s 93A statement of the complainant in the Appeal Record Book – where the appellant contends this evidence should have been rejected – where the appellant also contends that if it were shown to the jury, then the learned trial judge should have adequately instructed the jury as to the use they could make of this propensity evidence – whether the propensity evidence should have been rejected, or whether the learned trial judge should have made a direction to the jury about the use they could make of the propensity evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to five and a half years imprisonment for the count of maintaining a relationship with a child, two and a half years imprisonment for the count of rape, and 18 months imprisonment for each count of indecent treatment of a child under 16, under 12, under care, to be served concurrently – whether the sentence was manifestly excessive in all the circumstances

Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, applied
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
R v C [2000] QCA 145, discussed
R v HAN (2008) 184 A Crim R 153; [2008] QCA 106, discussed
R v Pearson [2015] QCA 157, cited
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, cited
R v WAH [2009] QCA 263, discussed

COUNSEL: D R Wilson for the appellant/applicant
S J Farnden for the respondent

SOLICITORS: Guest Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** Mr FAK was the step-grandfather of the complainant. She alleged that he committed several sexual offences against her in the period between 1 May 2003 and 15 September 2011, when she was aged between six and 14 years old.

[2] He was charged with the following offences:

(a) count 1 – maintaining an unlawful sexual relationship with a child, with a circumstance of aggravation; between 1 May 2003 and 15 September 2011;

(b) count 2 – rape; at Narangba;

(c) count 3 – indecent treatment of a child, under 16, under 12, under care; at Narangba;

(d) count 4 – indecent treatment of a child, under 16, under 12, under care; at Mt Tamborine; and

(e) count 5 – indecent treatment of a child, under 16, under 12, under care; at Narangba.

[3] He was convicted on all counts after a trial.

[4] He was sentenced to the following concurrent terms of imprisonment: on count 1 for five and a-half years; on count 2 for two and a-half years; and on each of counts 3, 4 and 5, for 18 months.

[5] Mr FAK appeals against his conviction and seeks leave to appeal against his sentence. The grounds of his appeal against conviction are:

(a) the learned trial judge erred in not discharging the jury after a preliminary complaint witness stated in part "she would say what are you doing poppy, and he would say [PLM] lets me do it";

(b) the finding by the jury on the count of rape that there had been "penetration" was unreasonable and cannot be supported having regard to the evidence;

(c) the finding by the jury that the appellant had the complainant "under his care" at the time of counts four and five was unreasonable and cannot be supported having regard to the evidence;

(d) the learned trial judge erred in failing to adequately instruct the jury about the use that could be made of evidence of uncharged acts; and

(e) The learned trial judge erred in admitting evidence of the incidents not the subject of the charges ("the propensity evidence") which is set out at:

i. ARB 213, line 31 to line 36; and

ii. ARB 251, line 46 to ARB 252, line 7;

Alternatively

(f) The learned trial judge erred in failing to adequately instruct the jury as to the use they could make of the propensity evidence.

[6] The ground of his application for leave to appeal against the sentences is that they are manifestly excessive.

Circumstances of the offending

Count 1

[7] The complainant was born on 15 September 1997, and was therefore between about six years old and 14 during the period that it was alleged that the maintaining occurred.

[8] The acts relied upon for the maintaining count were those in counts 2-5, as well as other uncharged acts. On the appeal there was no separate challenge to the verdict on count 1, if the other verdicts were sustained, and the directions in respect of the uncharged acts were adequate. They are dealt with below.

Count 2

[9] The complainant participated in two interviews, the first on 9 June 2014, when she was about 17 years old. The second was three days later on 12 June. They were admitted under s 93A of the *Evidence Act* 1977 (Qld). She also gave oral evidence under s 21AK of the *Evidence Act*.

[10] As opened, the Crown case on this count was as follows: the complainant went looking for her grandmother; the grandmother was in the shower; the complainant was in bed with Mr FAK who started kissing her, using his tongue; he started to rub her vagina; she tried to clamp her legs together; he said something to the effect of "[o]pen your legs for poppy"; he continued rubbing her vagina and inserted a finger, penetrating her vagina, which hurt.

[11] In her first interview the complainant said:

(a) "it happened to me when I was like, I don't even know what age, like seven-ish. I don't know, I just grew up … I can't remember a first time. Like, I don't know. It just, I just I grew up with him being like that. Like he didn't like rape or anything, but just like grew up with him being like that. And then, but I was like really, I was really dominant, bossy kid. So I was like no, stop. … And then as I got older I just pretended that I, like to him I was pretended that I didn't remember or something";[1]

(b) "He didn't rape me or anything. But he would just like, a lot of touching and you know, fingers … he would just like touch me and stuff and … say really, like just dirty things…";[2]

(c) when asked to explain the touching, she said "well he fingered. Stuff like that.";[3]

(d) she could not remember how old she was;[4]

(e) it was in Brisbane when her parents were out;[5]

(f) the complainant went into the grandparents' room looking for her grandmother; Mr FAK was there; she asked where her grandmother was and he said she was in the shower;[6]

(g) the complainant could see the light coming from under the bathroom door;[7]

(h) he made her get in the bed; she was not sure if he told her to get into bed or if she just jumped in; she was pretty sure he pulled the covers over; she was not sure just how they were positioned on the bed;[8]

(i) he was kissing her with his tongue, holding the kiss;[9]

(j) "basically he was … touching me and stuff"; "he was like going down there and like touching";[10]

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1 AB 210.
2 AB 212.
3 AB 212.
4 AB 210, 223.
5 AB 212, 213.
6 AB 213, 218, 219.
7 AB 218.
8 AB 212, 213, 219.
9 AB 213, 220.
10 AB 212, 213.

(k) "he didn't like pull my pants down or anything. I just remember him like going up because … you didn't have to like take them off to get there … I just remember him … going up because it wasn't tight"; he was "Putting his fingers through, up my pants";[11]

(l) she described the touching: "It was mainly, he would just like touch a lot inappropriately, and … it was mainly he just touched that area. Like I didn't have boobs or anything so I don't think he, think he might've like touched there but I didn't have anything so I wasn't worried about that. But you know, no one in like there before, so I was like what are you";[12]

(m) "I think he was … hugging me ...";[13]

(n) she said no and was trying to get away;[14] she put her legs together, clenched tight;[15]

(o) "I remember him saying can you open your legs for Pop?", "open your legs for Poppy";[16]

(p) she didn't say anything; "And then I just did it. And then I just let it happen, like I just … lied (sic) there and, and then I just like must've like, I just was trying to go. Like I was trying to … and then … I just went before Nana got out of the shower";[17]

(q) she was asked to explain what she meant by saying she "let it happen", and she said:

> "… he put his hand up there. And then I shut my legs tight. And then he said that. And I don't know what else he said or don't know what I did, but I just relaxed them 'cause … I was just stuck in that position. … And then I just sort of relaxed … my legs. And then … he kissed me and then I don't know how it ended or anything, but I'm not sure what he said, but I think he just like stopped … I don't think I said anything to make him stop. I think he just stopped. And then just walked away. But I remember … squirming. You know, being like, like no";[18]

(r) she was asked to explain what she meant when she said he was doing stuff, and she said:

> "Just like fingering. Like he didn't get that far because I was young and I didn't know stuff could even go up there. Like didn't know, people put their fingers up there"; "… he was just up that area and … I think he was trying to look for where he could, where it was that he could put his finger up. But you know, I was so tiny and he couldn't really, so he was just like playing there and"; she said "that area" meant her vagina;[19]

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11 AB 219, 220.
12 AB 220.
13 AB 220.
14 AB 212, 219.
15 AB 212, 219, 220.
16 AB 212, 213, 219, 221.
17 AB 212, 213.
18 AB 221.
19 AB 222.

> "I just remember him … I think when he was trying to do it … it hurt a little bit. ... 'Cause it was like a little girl and you can't do that when she's undeveloped. Like you can't … he was like obviously around that area and … he … was … close. … I think he was hugging. … But he was just really close. … if you're that close, it's not hard to just put your hand up there"; "that area" meant her vagina;[20] he "put it where you … pee. So it hurt"; "… I was just like lying there. And he just went up there";[21]

(s) she got out of the room in shock;[22] and

(t) she described the house in detail and drew a plan of it.[23]

[12] In her oral evidence the complainant affirmed the interview. Her cross-examination elicited the following points relevant to count 2:

(a) she would exchange hugs with Mr FAK up to the time she went to the police;[24]

(b) she denied the suggestion that there was no sexual touching;[25]

(c) she could hear the shower running but the door to the ensuite bathroom was closed;[26]

(d) she was quite young, younger than year 7; it could have been in year 3;[27]

(e) her parents and three sisters were in the house but she was not sure where;[28]

(f) she was not sure when it happened, the time of day (though she thought night-time), the season, nor whether it was in school holidays;[29] and

(g) she denied the suggestions that the event never occurred.[30]

Count 3

[13] This incident occurred in Mr FAK's car on the way to shops. The complainant was staying with her grandparents at the time. The essence of the allegation was that Mr FAK reached over and touched the complainant on the vagina, on top of her clothing.

[14] The interview records the complainant's evidence as to this incident:

(a) she went with Mr FAK in the car to the shops because she expected that he would buy her a treat;[31]

(b) she described the car as Mr FAK's work car, and it had a number plate "POP 40 or something";[32]

(c) "… he was driving and he still did the same. Like he still put his hand in my [INDISTINCT]. … He wasn't actually like fingering. He just had his hand like

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20 AB 222.
21 AB 223.
22 AB 212.
23 AB 214-217.
24 AB 290.
25 AB 292.
26 AB 305.
27 AB 305, 320.
28 AB 306.
29 AB 306.
30 AB 307.
31 AB 229.
32 AB 229-230.

on my, yeah. Like he went into, like above my pants and was just like putting. … I didn't want to look at him. I just looked at the window …";[33]

(d) she was asked to explain what he was doing with his hand and said:[34]

> "… just, I think he might've had it on my leg for a little bit and then just like went, I don't know if he was rubbing or whatever, but I just, you know, just remember him going in there. And then I was just like shitting myself. And I just looked over out of the window, and I just kept, kept looking out the window. And I just wouldn't look at him. I didn't know what to do or say. It was just awkward." and
>
> "…he just went basically just down the top of my pants and, and touched my private part. He didn't actually get, finger or anything. He just had it there."

(e) when asked to clarify what he was touching, she said: "Well just on top there … he wasn't actually fingering up. He didn't, couldn't. Like I was sitting so he couldn't, like just had it down as far as he could. I'm not sure if he was moving or anything, as I said."; "I think he just had it there, just stayed there";[35]

(f) she said she could not recall what she was wearing, and she was not sure of what happened during the journey;[36] she could not recall which shops or the name;[37]

(g) she stared out the window; "I just wanted it to be over. It was just the weirdest, awkward-est feeling";[38]

(h) on the way home she ate the lolly she had been given and watched out the window;[39]

(i) she could not recall the time, date or season, or what they did before or after;[40] and

(j) she thought she may have told her friend VCX about this occasion.[41]

[15] The complainant's oral evidence included the following as to this incident, elicited in cross-examination:

(a) she denied that there was no sexual touching;[42]

(b) the first person she told about what happened was **LKJ**; she did not remember what she told her;[43]

(c) the second person told was **VCX**, in 2014, close to when she went to the police;[44]

(d) she still could not remember the name of the shops;[45]

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33 AB 229.
34 AB 230.
35 AB 231.
36 AB 230.
37 AB 231-232.
38 AB 231.
39 AB 232.
40 AB 233-234.
41 AB 234-235.
42 AB 31.
43 AB 33-34, 60.
44 AB 35, 61.
45 AB 46.

(e) she could not recall how the suggestion that she accompany Mr FAK in the car came about; however, she knew she wanted to go because she would then get a lolly;[46]

(f) she denied the suggestion that there was only ever one occasion when she and Mr FAK were alone in the car, and that was in Gin Gin;[47] and

(g) she was not sure which car he had at the time, or if it was a utility; and she was not sure if the number plates she referred to were, in fact, on the car at that time.[48]

[16] In the pre-text call the complainant referred to "the car incident", saying "why like why did you keep doing it", to which Mr FAK replied: "I don't know".

[17] In his evidence Mr FAK denied that he ever was alone with the complainant in a car at Narangba.[49] That had happened at Gin Gin when the complainant was 17 and they went to get some fish and chips.

Count 4

[18] This incident was said to have occurred at Mt Tamborine. The essence of the Crown case was: the complainant and her family were holidaying at Mt Tamborine on an Easter holiday; the complainant was watching a movie with the others present; Mr FAK came in, sat next to her, and pulled a blanket over them both; he touched and played with her.

[19] In her first interview the complainant did not mention this incident. The second interview was prompted by the complainant sending a letter to the police in which this incident was recounted. In the second interview she said the following about it:

(a) since the first interview she had recalled more occasions of sexual conduct;

(b) in her letter she had she described this incident as:[50]

> "Another, another time is when my family, [grandmother] and [Mr FAK] went on an Easter holiday to Mount Tamborine. I remember the house being very cottage like, however I don't really recall the design of the house very well. I just remember it was really big and lots of rooms. … I remember it was really cold. … that holiday, [Mr FAK] was being very inappropriate at every opportunity he could get. Even just walking out of a room as he was walking in, he would hit me on the bum or purposely look at my body in a seedy way, knowing I could see him doing it. Just little things like that. I remember that house had a lot of movies to watch in the cupboards. And one night as everyone was watching a movie, I can't recall what it was called, what movie, but I remember I was sitting on one of the couches with the blanket on me, and then he came and sat next to me and put the blanket on him as well. Then I remember him putting his hand in my pants during the movie and touching and playing with my vagina. Sometimes putting a finger up there, as in my vagina. … I never knew what to do. I just sat there frozen, feeling red faced and enormously

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46 AB 47.
47 AB 47.
48 AB 47, 48.
49 AB 133.
50 AB 251.

awkward. I think I did try to clench my legs together at times, but his hand would just get stuck in there."

(c) she did not remember how old she was at the time, but it may have been around Year 4 or 5;[51]

(d) her family was there for the Easter holiday with the grandparents;[52]

(e) they were watching television at night; her sisters and mother were in the room; at first she could not recall if her father or grandmother were in the room;[53]

(f) she could not recall what she was wearing, nor what the blanket looked like;[54]

(g) she described what he did under the blanket: "well he didn't do it straight away, but like just gradually as we were watching a movie he would just, he just like put his hand on there and he would just like, he put his hand in my pants and undies and would just like touch my vagina and play with it. And like sometimes he would like try and put like his finger up there";[55]

(h) she was asked whether he actually put his finger in her vagina, and she said: "I think he did at times … I think I was trying to like push him away. I think I was … squirming and being … weird, … awkward",[56]

(i) she could not recall if they watched the movie to the end;[57] and

(j) she did not tell anyone what happened.[58]

[20] In her oral evidence the complainant was cross-examined about the Mt Tamborine incident:

(a) she confirmed she had only told police in June 2015 and had told no-one else;[59]

(b) she said she thought her mother was in the room at the time; she also thought her father and grandmother were, too;[60]

(c) at the time she was being touched she "just froze", and "didn't say anything";[61] and

(d) she denied the suggestion that there was never any sexual touching.[62]

[21] In his evidence Mr FAK said there was only one trip to Mt Tamborine with the complainant's family, in 2007. He denied the event occurred at all.[63]

Count 5

[22] This count alleged that Mr FAK used an electric massager to touch the complainant. The incident was mentioned in the complainant's first interview:

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51 AB 256.
52 AB 256.
53 AB 257, 258.
54 AB 258.
55 AB 258.
56 AB 258.
57 AB 258.
58 AB 259.
59 AB 315, 316.
60 AB 316.
61 AB 316.
62 AB 292.
63 AB 136, 137.

(a) her father's aunt and uncle were visiting the grandparents' house; the complainant was lying on her stomach on the floor in the second lounge room, watching television;[64]

(b) Mr FAK had an electronic machine, "a vibrating thing", for his neck;[65]

(c) he was on the floor; he started putting it on her feet, then went up her leg and "put it … just under my bum";[66] it was between her legs, under her bottom, "basically on my private part";[67] "he just like put it there while it was vibrating and just held it there";[68]

(d) she described her reaction: "I was like what the … I didn't like tense my legs or anything though 'cause… it was already there … it was just weird because they were vibrating";[69]

(e) she thought it occurred when she was in Year 5;[70] she could not recall what she was wearing;[71] she could not recall what she was watching; it was at night;[72]

(f) the uncle walked in and spoke to Mr FAK; Mr FAK's sitting position would have blocked the way so the uncle could not see;[73] the uncle asked Mr FAK what he was watching, and was "just chatting to Pop";[74]

(g) she described the massager as yellow and black, with a cord; it was like a stick, with a flat top;[75]

(h) the others (including her family) were in the dining room (the next room), talking;[76] and

(i) she thought she told VCX about it, but not in detail.[77]

[23] In cross-examination the complainant was asked about this incident. Apart from the denials of the general suggestion that there had never been any sexual touching, she said:

(a) she thought it occurred closer in time to when she was in Year 7;[78]

(b) Mr FAK was sitting right next to her;[79]

(c) the machine was a massager, not a vibrator; she denied a suggestion that it was circular;[80]

(d) the others, including her mother, were in the dining room or the other lounge room;[81]

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64 AB 235, 237.
65 AB 235, 236, 239.
66 AB 235, 236, 237, 239.
67 AB 239.
68 AB 240.
69 AB 236.
70 AB 236, 242.
71 AB 239.
72 AB 241.
73 AB 236.
74 AB 240.
75 AB 237.
76 AB 237, 238, 244.
77 AB 241, 244.
78 AB 309.
79 AB 312.
80 AB 310.
81 AB 310.

(e) the use of the massager continued while the uncle was in the room;[82]

(f) she was asked why she did not try to get away, and answered: "Well, I would have obviously tried. … I would have said - done something … it's just hard to get out of awkward situations";[83] it ended when she went into the other lounge;[84] and

(g) it was put to her that the event did not occur, specifically Mr FAK holding a massager to her bottom; she said it did occur.[85]

[24] In his evidence Mr FAK admitted he owned a massager but denied that the event had ever happened.[86]

Preliminary complaint evidence

[25] Two friends of the complainant, VCX and LKJ, gave evidence as to what the complainant had told them. Their evidence was given under s 93A of the *Evidence Act*.

[26] VCX said that the complainant told her:[87]

(a) in Easter 2014 she said her poppy had "done stuff to her"; that was all she said at that point;

(b) in further discussion, she was touched when she was little; by that she meant primary school age;

(c) "one occasion where she was with her poppy and she was on her bike, and she must have stood up and started riding, and he said something about having a nice bum";

(d) on "another occasion when she was out mustering with her poppy and her dad … and her poppy said to her do you have a boyfriend, and she said, no, poppy, and he said that's right, poppy [is] your boyfriend, isn't he"; and

(e) "she used to lay in her top bunk and he used to come and tuck her in, and she said that he touched her… he would go into her pants and touch her vagina"; one of her sisters, **PLM**, was in the bunk below; she recalled that what the complainant said was that when she was asleep he would come in and touch her.

[27] LKJ gave evidence that the complainant spoke to her during sleepovers when they were in primary school:[88]

(a) she thought the topic at the complainant's place one time, when she brought up that her grandfather had sexually abused her; she thought that was in late primary school or early high school; she could not recall how the topic came up;

(b) "one occasion when he was giving her a piggyback, and while he was holding her, he was also touching her vagina, and that was the only situation where she's given me specific details about what had happened"; she did not tell her any other stories;

(c) "it wasn't like a one-off thing … she said that he had done it - like, he had done it before on other occasions"; and

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82 AB 311.
83 AB 311.
84 AB 312.
85 AB 312.
86 AB 134, 135.
87 AB 98-100.
88 AB 94-96.

(d) at the end of 2014 she was really upset and said there was a case about it.

Evidence of Mr FAK

[28] Mr FAK gave evidence in his defence. He denied that any of the incidents occurred at all. The only contact he acknowledged was that in about 2006 when he would let the complainant slide down his knee, and while that was happening held her between her legs, touching her on her groin.[89] He said that in the pre-text call he referred to his wife being devastated if she found out he had touched the complainant on her groin.[90] However, he said in cross-examination that "Quite often, she would slide down my legs when we were watching TV in front of the family".

[29] It may be noted that it was not put to the complainant during cross-examination[91] that she engaged in sliding down Mr FAK's legs while he held her in the groin area. What was put by way of physical contact was specific, and limited to:[92]

(a) they would hug when greeting, leaving or going to bed; the complainant agreed with that;

(b) he would kiss her on the cheek when saying hello and goodbye; she agreed with that;

(c) she would sit on his lap when young; she could not recall but agreed it was possible when she was very young, say eight;

(d) while sitting on his lap he would have his arms around her tummy or on her knee or thigh; she agreed with that; and

(e) he would throw her around in the pool; she agreed with that.

The pre-text call

[30] On 12 June 2014 a pre-text call with Mr FAK and the complainant was recorded. It was admitted that Mr FAK knew the complainant was calling to discuss allegations that he had touched her indecently.[93] The call records Mr FAK saying the following:

(a) "I know it was wrong. Alright? I know it was wrong, what happened";

(b) "… it was something that accidentally happened about eight years ago, and I regret it every day that … it happened. So I regret it, whatever happened, yes, every day";

(c) "And … I regret it, whatever's happened. yes. And I can't, the thing is, I can't change it now darling. I just can't change it. And I can't do anything about it";

(d) the complainant asked if her grandmother knew about her, to which he replied; "No. No. Because Nana would be devastated";

(e) the complainant asked "why did you do it", to which Mr FAK replied: "because I don't know. I don't know darling. I really don't know. And that's why I want to try and put it behind me, but if it becomes a real issue … well, I'll just move away";

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89 AB 139.
90 AB 139 line 44.
91 Which took place over a year after the pre-text call.
92 AB 290-292.
93 Formal admissions, AB 205.

(f) "I've apologised for what I've done but I can't do anything about it. I can't take it back. … It's something I've regretted happening";

(g) the complainant became more specific in her questions:

> "[complainant]: "Well why did you do it so many times?
>
> [Mr FAK]: I do not know.
>
> [complainant]: Like there was the car incident, there was and why like why did you keep doing it?
>
> [Mr FAK]: I don't know."

(h) the expressions of regret and apologies were repeated, and then:

> "[complainant]: I don't know why you had to go that far and actually touch my private part. I don't understand.
>
> [Mr FAK]: Nor do I."

[31] Mr FAK gave evidence about the pre-text call. He did not know the call was being recorded, nor that the police were involved.[94] His evidence was:

(a) when he initially spoke about "something that accidentally happened about eight years ago", that was "talking about when she used to sit on my knee, and that quite often she would slide down, just probably mucking around, and I would hold her between – between her legs … [touching her] groin";[95]

(b) he did not have the view that was wrong when it occurred but he had decided it was after hearing comments on TV later about people being accused of things;[96]

(c) the expression "regretting it every day" was a figure of speech and he "never ever thought about it every day";[97]

(d) the reference to his wife being "devastated if she knew" was a reference to his touching the complainant on the groin;[98] and

(e) when the complainant referred to touching "my private part", the long pause was because he was trying to work out what she was talking about, but he did not challenge her.[99]

[32] In cross-examination Mr FAK said the following in respect of the call:

(a) he agreed there were a number of occasions when he had held the complainant by the groin, that is the area of her vagina; he also agreed they were not accidental;[100]

(b) he denied understanding what the complainant was referring to in the "my private part" comment;[101] and

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94 AB 138, 139.
95 AB 139 line 20.
96 AB 139 line 30.
97 AB 139 line 41.
98 AB 139 line 44.
99 AB 140 line 11.
100 AB 141 line 12.
101 AB 142 line 37.

(c) he denied that what he was saying in the call was that he did not understand why he had touched her; and denied he was expressing his knowledge and understanding that what he had done was wrong.[102]

[33] The transcript of the pre-text call does not adequately convey the true nature of the questions and responses in it. Having listened to it, it was plainly open to the jury to reject the explanation given by Mr FAK, i.e. that he was only referring to the times when the complainant slid down his legs, and conclude that he made a number of admissions as to the fact of previous sexual touching, that it occurred on more than one occasion, and as to its nature (on her vagina or vaginal area).

Discussion

Ground 2 – failure to discharge the jury

[34] Evidence was called from a preliminary complaint witness, VCX. In the course of her evidence in chief she recounted that the complainant had told her various things about Mr FAK's conduct, including: "he had done stuff to her"; "she didn't want to get her poppy into trouble"; "he touched her when she was little"; one occasion was when she was on a bike and he said something about her having a nice bum; another occasion was when she was out mustering and he said "poppy's your boyfriend, isn't he".

[35] At that point the following exchange occurred:[103]

> "All right. Now, did she tell you about any other occasions where anything of a similar nature happened between her and her poppy [Mr FAK]?---She told me that she used to lay in her top bunk and he used to come and tuck her in, and she said that he touched her.
>
> All right. Did she give you any detail about how she was touched?---Yes. He - - -
>
> What did she tell you about how she was touched?---So he would go into her pants and touch her vagina, and she would say what are you doing, poppy, and he would say [PLM] lets me do it."

[36] PLM was the name of the complainant's sister. The evidence of VCX was completed, as was that of the next witness (the complainant's mother). Then the pre-text call was played to the jury and they were informed of the admission that at the time of the call Mr FAK knew the complainant wished to talk to him about allegations that he had touched her indecently. After that an application was made to discharge the jury because of the potentially prejudicial effect of the reference to PLM.

[37] In the course of submissions on the issue the learned trial judge indicated that she was reluctant to discharge the jury:[104]

> "It is just that single isolated comment from a preliminary complaint witness whose evidence is led for a very limited purpose. … it might have been different if it had come, perhaps, even from the mother – certainly if it had come from [the complainant] herself. I'm not minded to discharge the jury. I'm reluctant to do so, Mr Courtney, in the circumstances."

[38] The learned trial judge ruled against discharging the jury, giving these reasons:[105]

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102 AB 143 line 1.
103 AB 98 lines 36-45.
104 AB 118 lines 21-29.
105 AB 117 line 38 to AB 118 line 20.

> "I must bear in mind the impact on – I think, on all the witnesses, and also on your client of a retrial, if I'm not persuaded it's necessary. I have to bear in mind the obvious distress that [the mother] had in giving her evidence, and take that into account in weighing in the balance. I think it is something that could be dealt with a light touch by saying something to the jury at an early stage, perhaps before we go too much further in the case. I would have in mind saying something along the lines of, "You might have noticed that there was, you know, a reference to a girl called [PLM] when [VCX] talked about what [the complainant] had told her. Of course, the Crown case is a case involving [the complainant], and what is said about anyone else is simply not relevant to this case, and you must set it aside. And [the complainant] hasn't said any such thing in her evidence before you."

[39] The learned trial judge proposed to give the direction at the end of the evidence. That was done just over two hours later the same day, in these terms:[106]

> "You'll recall that this morning, you heard from two friends of [the complainant] about what they said she told them at various times. I want to refer to the evidence that you heard from [VCX], and what I'm about to give you is a legal direction, so if you remember what I said about the demarcation of functions, what I say as to the law, you must apply in your deliberation. So this is a legal direction that you must observe.
>
> You might recall that [VCX] said that [the complainant] told her Mr FAK said something about [PLM]. As you know, this is a case about what [the complainant] says Mr FAK did to her and any reference to any other person is not relevant, and you must disregard it. I can see you understand that. It's of no – it's no relevance, you must disregard it entirely and you'll recall that [the complainant] hasn't said anything of that nature in her evidence before you either. All right. So I just wanted to make that clear before we move to addresses."

[40] On the appeal counsel for Mr FAK submitted that the reference to PLM was highly prejudicial and of little or no probative value, and should not have been admitted. The failure to discharge the jury, it was said, lead to a substantial miscarriage of justice, that was not avoided by the direction given.

[41] In *Crofts v The Queen*[107] the High Court dealt with the question of whether a jury should have been discharged because of the introduction of evidence of other sexual acts, contrary to the ruling of the trial judge that such evidence should not be admitted. The majority said:[108]

> "The Court of Criminal Appeal rejected this submission. It acknowledged that the trial judge had a discretion; that the criterion for its exercise was the maintenance of the fairness of the trial; and that the test for discharge of the jury was one of necessity:
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> > 'The question is whether in the circumstances … there was such a high degree of necessity for the jury's discharge that the failure

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106 AB 145 lines 1-14.

107 (1996) 186 CLR 427. See also *R v Pearson* [2015] QCA 157 at [14].

108 *Crofts* at 440-441.

> to have ordered such a discharge has resulted in a mistrial. That is to say, was the discretion wrongly exercised in that the judge was bound to discharge the jury? …
>
> His Honour obviously thought that any prejudice to the applicant which the complainant's answer might have aroused could in the circumstances be overcome by the warnings which he in fact gave to the jury. We cannot say that he was wrong in so concluding.'
>
> It may be accepted that the Court of Criminal Appeal approached the matter with the correct principles in mind. No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. As the court below acknowledged, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading the transcript.
>
> Nevertheless, the duty of the appellate court, where the exercise of discretion to refuse a discharge is challenged, is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind. The appellate court must also decide for itself whether, in these circumstances, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice. In other words, can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable? In our view, in the particular circumstances of this case, that could not be said."

[42] It is important to note the test endorsed in *Crofts*, namely that there must be "such a high degree of necessity for the jury's discharge" that the judge was "bound to discharge the jury". Further, that the question depends on (i) the seriousness of the occurrence in the context of the contested issues; (ii) the stage at which the mishap occurs; (iii) the deliberateness of the conduct; and (iv) the likely effectiveness of a judicial direction designed to overcome its apprehended impact.

[43] In dealing with this issue this Court must decide for itself whether, in the circumstances of the wrongly admitted evidence, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice.

[44] There are a number of reasons why I conclude that the discretion exercised by the learned trial judge did not miscarry.

[45] First, the evidence was not sought by the question asked by the prosecutor. That question was: what did the complainant say about **how** she was touched. Therefore the evidence was unsolicited and inadvertently put before the jury. Further, it was a passing reference.

[46] Secondly, it came from a preliminary complaint witness whose evidence was being led for a restricted purpose, and whose evidence could only be used for a restricted purpose, namely going to the credibility of the complainant. VCX's evidence could not establish the truth of what was said in the phrase "he would say [PLM] lets me do it".

[47] Thirdly, no such thing had been said by the complainant in her evidence, which had been completed at the time this evidence was given.

[48] Fourthly, the contested issues were what Mr FAK had done in respect of the complainant. Assuming, as was right to do, that the jury would follow the directions they were given,[109] the evidence they would focus on in their deliberations was the evidence of the complainant. The complainant said nothing of the kind reflected in the phrase relied upon.

[49] Fifthly, the application to discharge was left until after the close of the Crown case. That was only about two hours later, but after the complainant's mother had given evidence and, more importantly, the jury had heard the pre-text call and the admission that it occurred when Mr FAK knew that the complainant wanted to discuss her allegations of his indecent touching of her. In that call the complainant asked Mr FAK to step outside his house, which he did. He then turned the loudspeaker function off and confirmed that his wife (the complainant's grandmother) was not listening. In the conversation, which the jury heard, Mr FAK:

(a) said repeatedly, that what he did was wrong, he regretted it, and apologised for it, and he did not know why he did it;

(b) said that his wife did not "know about me" (being a reference to the complainant) and that she "would be devastated" if she did;

(c) admitted, or did not contradict, the complainant's reference to "the car incident";

(d) admitted, or did not contradict, the complainant's reference to his having touched "my private part"; and

(e) (arguably) accepted that what he did was "not what pops are supposed to do".

[50] The pre-text call was a powerful piece of evidence in the Crown case. Mr FAK's responses in that call are entirely inconsistent with the defence case, namely that there was never any inappropriate or sexual touching, and that the car events never happened.

[51] Sixthly, seen against the background of the matters above, the inadmissible evidence was not a critical matter in a fragile Crown case.[110]

[52] Seventhly, in my view, the direction given by the learned trial judge was effective to overcome the apprehended impact of the inadmissible evidence. The direction was given just over two hours after the impugned evidence. It commenced by reminding the jury of what they had been told about the demarcation of functions between judge and jury, and said in the plainest terms that what was about to given was a legal direction and that they were obliged to follow. The direction then explained why the piece of evidence was of no relevance, and that they "must disregard it entirely". In my view, it is reasonable to assume that the jury followed what they were told, especially considering the strict nature of the direction.[111]

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109 *Gilbert v The Queen* (2000) 201 CLR 414 per McHugh J at 425.
110 *R v Pearson* [2015] QCA 157 at [15]-[16].
111 *Gilbert v The Queen* (2000) 201 CLR 414 per McHugh J at 425.

[53] *Crofts* posed the task of the appellate court as being to "decide for itself whether the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice". That was then posed another way as a question: can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable? That question will always be asked in the context that the jury have returned a verdict of guilty. In other words, the question will always be asked in a situation where the evidence has been found by the jury to be sufficient to return a guilty verdict. In my view it would be wrong to approach that question as though the appellate court was to grapple afresh with the task that the jury are assigned. That would be to turn trial by jury into trial by the appellate court.

[54] That being so, and noting that the question was posed as another way of expressing the court's task, the question can be rephrased as: can the appellate court say with assurance that the admission of the inadmissible evidence did not adversely affect the likelihood of a conviction.

[55] That question can be answered affirmatively with assurance here. The complainant's evidence received some support from the preliminary complaint evidence, but powerful support from the pre-text call, and plainly was accepted by the jury I am unpersuaded that the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice.

[56] This ground of appeal fails.

Ground 3 – finding of penetration on count 2

[57] The contention on appeal was that the complainant's evidence revealed sufficient uncertainty about whether penetration had occurred that it was not open to the jury to be satisfied beyond reasonable doubt of Mr FAK's guilt.

[58] The complainant's evidence is summarised in paragraph [11] above. The way she expressed what was done was that: he "fingered" her; that he was "fingering" her; he "didn't get that far because I was young", and she said she "didn't know people could put their fingers up there"; she "was so tiny and he couldn't really so he was just ... playing there"; and he had put his finger "where you … pee" and it hurt.

[59] That evidence was, in my view, sufficient of itself to enable the jury to draw the conclusion that penetration had occurred. However, when one has regard to what the complainant meant when she used the phrase "finger" or "fingering", the position is even stronger.

[60] At several points of her interview the complainant drew a distinction between touching in the sense of putting his hand on her vagina or vaginal area, and fingering:

(a) "Just like fingering. Like he didn't get far because I was young and I didn't know stuff could even go up there. Like didn't know, people put their fingers up there.";[112]

(b) "Like he still put his hand in my [INDISTINCT]. He was, yeah. He wasn't actually like fingering. He just had his hand like on my …";[113]

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112 AB 222 lines 13-15.
113 AB 229 lines 38-40.

(c) " … I think he did have his hand there for a little bit and then he just went basically just down the top of my pants and, and touched my private part. He didn't actually get, finger or anything. He just had it there.";[114] and

(d) as to being touched on her private parts, and asked to explain where he was touching: "I just remember the hand being there … just remember it being there … Well just on top there, on, he wasn't actually fingering up."[115]

[61] In context the jury were entitled to understand the complainant as using the phrase "finger" or "fingering" to refer to an act where penetration occurred, as opposed to touching which was only on the surface.

[62] In my view, it was open to the jury to find that the complainant's evidence on count 2 was that the act involved digital penetration of her vagina.

[63] This ground of appeal fails.

Ground 4 – "under care" for counts 4 and 5

[64] The Bench book refers to what "under care" means:[116]

> "[it] is an ordinary English expression. It means at the time alleged the defendant was responsible for the control and supervision of the child. It does not require any formal legal process to have occurred such as an order for custody. In determining that the jury should take into account such things as the age of the child, how the child came to be with the defendant and why the child was with the defendant."

[65] The learned trial judge directed the jury on the meaning of "under care":[117]

> "Now, the final question is was she under FAK's care at the time. That really means did he have responsibility for her. Was he standing almost in the place of a guardian or a parent at the time of the act? If so, that makes it a more serious type of offence."

[66] The jury were directed that if they were satisfied of all elements of the offence except that of being under care, they would return a verdict of guilty to the alternate charges of indecent treatment of a child under 12.

[67] The jury sent a question to the learned trial judge after they retired, concerning the question of "under care". It asked: "Clarification of being under 12 under care. If parents are in the presence, who is in charge?"

[68] The learned trial judge directed the jury as follows:[118]

> "The concept of a child being under somebody's care is that they've been entrusted with the responsibility for the care and protection of the child for the time being. If you form the view that the parents were in the near vicinity at the time, you would find yourself, I think, in a position of having a reasonable doubt about whether or not Mr FAK had [the

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114 AB 230 lines 55-58.
115 AB 231 lines 5-14.
116 Chap 119, footnote 8.
117 AB 171 line 10.
118 AB 177 lines 9-19.

> complainant] under his care and protection for the time being. So if that's the position that you find yourself in, you must return a verdict of "not guilty" to the count – to a count of indecent treatment of a child under 12 under care and – but if you are satisfied beyond reasonable doubt of the other four things that were set out on that sheet for indecent treatment, 1, 2, 3 and 4, then you could return an alternate verdict of "guilty" to indecent treatment of a child under 12. Have I satisfactorily clarified that matter for you? All right."

[69] Count 4 was the occasion when everyone was watching TV whilst on holiday at Mt Tamborine. Mr FAK was sitting beside the complainant and pulled a blanket over both of them, then touched her. Count 5 was the occasion when Mr FAK used a massager on the complainant while she was watching TV, and the others were in the next room.

[70] The contention on appeal was that if the complainant's parents were both in the house at the time of the offence, and in the case of count 4 in the same room, then it was not open to the jury to find that the complainant was under Mr FAK's care at the time of the offence.

[71] Accepting that the meaning of "under care" is that the person in question is "responsible for the control and supervision of the child", several things can be noted.

[72] First, the paramount consideration in respect of responsibility for the care and control of a child is the welfare of the child. That encompasses not only material matters such as provision of food, clothing, shelter and medical attention, but also matters to do with the mind and spirit, such as furthering education, nurturing a sense of self-worth, aiding emotional growth, empathy, compassion, fostering of individual development, encouragement of creativity and happiness, and moral support. The foregoing is not intended as a comprehensive list but serves to indicate the breadth of relevant aspects of having a child under one's care.

[73] Further, a central element is the requirement to protect the child from harm. That means protection from harm whether from accidental, careless or deliberate causes, and whatever the source of potential harm. It certainly includes protection against psychological harm and moral degradation.

[74] Secondly, it is not necessary that the accused be the only person responsible for the control and supervision of the child. A good example of that is a married couple with a child. Undoubtedly each of them is responsible for the child, regardless of whether they are together at the one place and time. Thus the necessary responsibility does not have to be exclusive responsibility.

[75] Thirdly, as a corollary of the first point, responsibility on the part of X does not start and stop merely because Y, another person also responsible for the child, happens to come into, or out of, the presence of X. A central aspect of responsibility for the care and control of a child is the requirement to keep them from harm, whether from accidental, careless or deliberate causes. That cannot be rendered meaningless by the changing combinations of persons at a place or time.

[76] Fourthly, responsibility for a child's control and supervision does not have to be of the same quality, or to the same extent, as the responsibility of another adult in the same place. An example might be the joint presence of a grandparent and a parent of a child. The parent might be responsible in a more specific or detailed way, or for more specific needs, than is the grandparent. Nonetheless each can be seen to be responsible for the control and supervision of the child.

[77] Fifthly, responsibility is not a concept tied to physical proximity or a particular location. For example, one does not cease to be responsible for a child just because the child is sent down the street to a shop, or on a bus to somewhere else. Thus physical proximity cannot be the sole determinant of whether a child is under the care of a person. Nor can the particular place where the adult and child are located at the time be the sole determinant. However, that is not to say that proximity and location may well have a bearing on the assessment of whether a person is responsible or a child.

[78] Sixthly, responsibility is not something that needs to be specifically conferred, by words or actions. It can arise (at least in part) from the relationship that exists between the adult and the child. The prime example is that of parent and child. Another is a grandparent and child. Yet another is one adult sibling to their child-age sibling. However, that relationship will not necessarily be enough of itself. Questions of proximity and location can intervene. Thus if the parent or grandparent was remote from the child, either because of physical separation or because of dislike for one another, such considerations may well influence the assessment of responsibility.

[79] The foregoing is sufficient to show that consideration of whether the parents were in the same house at the time will not necessarily be enough to determine the issue.

[80] As to the relationship between Mr FAK and the complainant, the evidence was that she regarded him as her grandfather, whilst acknowledging that he was not her biological grandfather. The evidence also established that there were many indicia of his acceptance of a role in supervision of the complainant:

(a) he instructed the girls where to sleep on one holiday;[119]

(b) she grew up with him as Pop; he gave them money, and bought them things; when she went in the car with him he usually bought her a treat; they went with him to a farm, mustering;[120]

(c) he took her on bike rides;[121]

(d) she stayed at his house;[122]

(e) even in 2015 they exchanged hugs on greeting and leaving; she would sit on his lap and they exchanged kisses;[123]

(f) the families went on joint holidays;[124]

(g) he would play with the children in the pool;[125] and

(h) from time to time he piggybacked her.[126]

Count 4

[81] At the time of count 4 the family was on holiday at Mt Tamborine together, staying in the one holiday house. Thus the complainant's parents were in the same house at the time of the offences; indeed, the complainant's mother was in the same room. On

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119 AB 259.
120 AB 211, 224, 239, 241.
121 AB 212.
122 AB 213.
123 AB 245, 290, 291.
124 AB 251.
125 AB 260.
126 AB 296.

that basis the submission for Mr FAK was that it was not open to the jury to conclude that the complainant was under his care at the time of count 4.

[82] Generally speaking, where a family goes on a joint holiday and both parents and grandparents are present, one obvious purpose is that the grandparents and their grandchildren have time to develop and maintain a personal relationship. Part of that is the inevitable interaction between the grandparents and the grandchildren. That interaction is usually something desired by the parents, as part of providing an environment where the children have the chance to develop family relationships that will assist their own growth as individuals.

[83] The mere fact of the grandparent/grandchild relationship, and the fact that they are together on a holiday, staying in the same house, is enough to show that the grandparent is still in the position where the grandchild is under their care. Of course the grandparent has an obligation to protect their grandchild from harm, in the sense used above, and to do so notwithstanding that the parents might be there at the same time. It is not the case here, but one of the parents might be the source of harm to the child. It cannot be seriously thought that the grandparent could ignore that prospect of harm on the basis that the child was not under their care simply because the parent was physically there at the same time.

[84] In my view, the responsibility of a grandparent to protect their grandchild from harm, whatever its form and whatever its source, cannot be avoided simply because the parent happens to be at the same place at the same time. It is a joint responsibility that does not shift and change because one person walks through one door as opposed to another.

[85] Mr FAK was one of the adults accompanying the complainant and her sisters on a family holiday. He was one of the grandparents of the children. His very relationship and presence in the house meant he was responsible for protecting the complainant, who was, as a result, under his care. That responsibility remained on him even when the parents were in the same room. His responsibility extended to protecting the complainant from harm in the form of an attempt by anyone else to sexually assault her. How could it rationally be different when he was the source of the harm?

[86] The direction given by the learned trial judge was that if the jury formed the view that the parents were in the near vicinity at the time, "you would find yourself, I think, in a position of having a reasonable doubt about whether or not Mr FAK had [the complainant] under his care and protection for the time being". That direction was too narrow in terms of conveying the nature of being under care, as described above. However, there was no ground of appeal that contended that the direction was incorrect. The jury plainly concluded that the complainant was under his care at the time. On the meaning of under care as analysed above that conclusion was open, and no miscarriage of justice flows from the jury drawing that conclusion in the face of the direction.

[87] In my view, it was open to the jury to find that the complainant was under his care for count 4.

Count 5

[88] At the time of count 5 the complainant's family were staying at Mr FAK's house. Where a child is staying at the grandparent's house it is easy to conclude that the child

is under the care of the grandparent. In that case the child is living temporarily at the grandparent's house, and the grandparent is responsible for supplying all the things that go with that, such as shelter, a bed, the use of the kitchen to make food, bathroom and toilet, security at night, to name but a few.

[89] Counsel for Mr FAK submitted that the presence of the parents in the next room meant the jury could not conclude that the complainant was under Mr FAK's care at the time of the offences. That submission accepted that Mr FAK could be responsible in the sense required to conclude the complainant was under his care, but to displace that depended solely on the proximity of the parents to the place where the complainant and Mr FAK were.

[90] I do not accept that mere proximity determines the question here.

[91] First, the matters set out above in respect of the issue on count 4 are applicable here: see paragraphs [71] to [80] above.

[92] Secondly, the complainant was in Mr FAK's house, enjoying the facilities that Mr FAK offered to her and her family. The mere absence of the parents from the room in question does not mean that he ceased to be responsible for her control and supervision. A few examples will suffice to make the point. If the complainant tried to put her finger in a light socket, it could hardly be said that Mr FAK was not responsible for her control and supervision, so that he did not have to try to prevent that. Similarly, if she started to choke on some food or other obstacle in her throat, or if she tried to drink alcohol, or smoke a cigarette. Or if she started to watch pornographic material on the TV. Or if the child started to self-harm.

[93] Thirdly, the parents left the complainant alone with Mr FAK. That shows that they reposed trust in Mr FAK to be responsible for her control and supervision while they were absent. Mr FAK was, in their absence, the only adult with the complainant in sight. The passing presence of the uncle does not alter that, as he departed after a few comments.

[94] In my view it was open to the jury to conclude that the complainant was under care at the time of count 5.

Ground 6 – misdirection on uncharged acts

[95] This ground concerned the evidence from the complainant that Mr FAK touched her or digitally penetrated her on occasions apart from counts 2-5. They were:

(a) she was in bed with him at his house;

(b) piggy backing her;

(c) saying good night at the house in Gin Gin;

(d) in the spa;

(e) hitting her on the bottom; and

(f) in the pool with her (and others) at Treasure Island, Brisbane, at her home and the neighbour's home.

[96] The contention was that the prosecution relied upon those acts in three ways: (i) to prove that Mr FAK had a sexual interest in the complainant; (ii) that he was willing to act on that interest; and (iii) they proved more than one sexual act occurred, for the

purpose of proving the maintaining charge on count 1. In that circumstance it was contended that it was necessary for the jury to be directed that they could only use that evidence if they were satisfied beyond reasonable doubt that one or more of those acts occurred. Reliance was placed on *HML v The Queen*.[127]

[97] The submission was that the direction actually given failed to adequately convey that essential consideration.[128]

[98] The learned trial judge directed the jury in these terms:[129]

> "I want to turn now to evidence that you've heard about some things that Mr FAK is said to have done that have not been charged as offences. So I'll call them – I'll call it other sexual conduct or discreditable conduct.
>
> Sometimes some of the evidence is about actual touching which could, if there were enough specific details, could have formed the basis of discrete charges. But other things that [the complainant] talked about involved what I would call discreditable conduct. So the comments that he is said to have made about her bum, the conversation that's said to have happened about being her boyfriend. These are things that the Crown asks you to look at in assessing whether Mr FAK is guilty of any of the counts on the indictment. And where we're talking about the acts, not the comments but incidents of touching – whether it was in the pool or in the spa or in a car or in a bedroom or in a piggybacking incident – any of those acts of touching, Mr Finch has put that evidence before you for two purposes and I'll identify the two purposes and I'll probably come back to one of those purposes later when I hand out the jury sheet.
>
> So the first reason that Mr Finch says that evidence of the acts, as well as the comments, is relevant is that he says it demonstrates that Mr FAK had a sexual interest in [the complainant] and he was willing to act on that interest because he did those acts or said those things. The second reason relates only to the charge of maintaining and only to the acts, the non-specific acts of touching. And Mr Finch relies on those other acts as proving there was more than one unlawful sexual act that occurred during the maintaining period charged and that that demonstrates the unlawful sexual relationship maintained over some time. And I will come back to that second purpose when I talk about the maintaining charge. Let me go back to the first one about it being an indication of having a sexual interest and his willingness to act upon it.
>
> If you do accept [the complainant's] evidence that these other acts of a sexual nature took place, then you can only use that against Mr FAK if you are satisfied that those acts, that evidence demonstrates he had a sexual interest in her and was willing to give effect to it by doing those acts, okay? If you're not satisfied of that, then you can't have regard to the evidence at all in relation to counts – you know, in that way in relation to any of the counts. Now, whether any of those acts occurred,

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127 (2008) 235 CLR 334.
128 Appellant's outline paragraphs 30-32.
129 AB 167-168; emphasis added.

> and if they did, and whether those occurrences make it more likely that, on a different occasion, Mr FAK did the acts that he is charged with, it's a matter for you to determine. **Remember, even if you are satisfied that some of those non-specific, I'll call them, sexual acts occurred, that doesn't – even if you're satisfied of that beyond reasonable doubt, you can't leap to a conclusion that he is guilty of one or all of the charges.**
>
> You have to be satisfied beyond reasonable doubt of all of the elements of the charges. It's just a piece of evidence that you would be able to use in reasoning to your conclusion on the specific charge. **So let me illustrate. If you were satisfied beyond reasonable doubt that there was a piggybacking – touching during piggybacking, that doesn't mean that you can conclude from that that he was guilty of the rape charge, but it's a piece of evidence that you would then look at when you consider – it's something that you would consider when you were looking at the evidence relating to the specific count of rape. All right?** So you must always decide each count with reference to the specific evidence relating to that count, and you must be satisfied beyond reasonable doubt that all of the elements necessary for that count have been proved."

[99] In my view, the passages highlighted above adequately directed the jury that they could only use an uncharged act if they were satisfied beyond reasonable doubt that the act had occurred. In the first passage the learned trial judge immediately corrected what she was saying to make it specific. The second passage starts by telling the jury that what follows is an illustration of the approach they have to take. It then specifically directed that what was required was satisfaction beyond reasonable doubt that the act occurred.

[100] Further, that was reinforced a short time later, when the learned trial judge dealt with the question of the maintaining charge in count 1. In the course of that her Honour referred to the need to find more than one unlawful sexual act:[130]

> "So **if you are satisfied beyond reasonable doubt that one or more of those uncharged acts occurred**, then they would constitute an unlawful sexual act. Okay?
>
> If you have a doubt about the specific offences in counts 2, 3, 4 or 5, then you could only convict using evidence about these uncharged nonspecific acts if carefully scrutinising the evidence that [the complainant] gave **you're satisfied beyond reasonable doubt that Mr FAK did those acts during the period that is alleged in the indictment**. So that is between the 1st of May 2003 and the 15th of September 2011. Okay? So you have to be satisfied beyond reasonable doubt that the act, even though it's not specific that the act occurred and that it occurred in that period before you could rely upon it. Of course, depending upon your view of counts 2, 3, 4 and 5 – depending upon the verdicts that you reach on that you may not need to look at the other acts, but if you do, then you must observe the direction I've just given you."

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130 AB 172.

[101] I am unpersuaded that the jury were left in any doubt as to what was required before they could use any of the uncharged acts. The ground of appeal fails.

Grounds 7 and 8 – propensity evidence, admission and misdirection

[102] Grounds 7 and 8 were added in a Further Amended Notice of Appeal. They were raised as a consequence of questions from the Court as to the impact of certain passages in the transcript of the s 93A statement of the complainant, appearing at pages 213, 216 and 252 of the appeal record book.[131]

[103] However, once the Court compared the video recording that was actually played to the jury, with the passages raised, it became apparent that the relevant passages had actually been deleted from the video recording.[132] How it was that they were not deleted from the transcript in the appeal book is not clear.

[104] Thus the relevant passages having not been before the jury, there is no basis for grounds 7 and 8.

The sentence application

[105] The nature of the offending is set out in detail above. A short summary[133] is that Mr FAK maintained a sexual relationship with his granddaughter from when she was about six years old until she was about 14 years old. During that time he committed the following acts:

(a) digital rape on at least one occasion; this occurred while she was staying at his house; he was on a bed with the complainant, kissing her on the mouth and rubbing her vagina;

(b) he touched the complainant on the vagina, on top of her clothing; this occurred while driving with the complainant, and he reached over to her;

(c) he touched and played with her vagina; this occurred while they were holidaying; the complainant was watching a movie with the others present; he came in, sat next to her, and pulled a blanket over them both;

(d) he used a massager to touch the complainant on her vagina; this occurred while she was lying on the floor at his house, watching TV.

[106] There was evidence of other uncharged acts, largely touching her on the vagina or on the vaginal area, and digitally penetrating her. These were said to have occurred on multiple occasions apart from counts 2-5. They occurred at his house, her house, in various swimming pools, on holidays, while he was piggybacking her, and when she was in bed at night.

[107] Mr FAK was between 51 and 59 at the time of the offences, and 63 at the time of sentence.

Approach of the learned sentencing judge

[108] The learned sentencing judge proceeded upon the basis that the jury accepted the complainant's evidence. That meant that on the maintaining charge (count 1) the

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131 Specifically, AB 213 lines 27-35; AB 216 lines 43-46, and AB 251 line 46 to 252 line 5 (the crux of this passage was that at AB 252 lines 2-5); appeal transcript T1-8 to T1-12 and T1-26 to T1-30.

132 Those at AB 213 and 216 in full, and the passage at AB 252 lines 2-5, which rendered the balance from AB 251 line 46 as neutral.

133 Which is not to be understood in isolation from the detailed description of the offending.

sentence was on the basis of the offending as described in the police interviews and in her evidence.[134]

[109] Her Honour said that the important features on sentence were:[135]

(a) the complainant's age when the offending started (six), and the lengthy period over which it occurred (more than eight years);

(b) whilst not daily, the contact was repeated and frequent, and had an habitual aspect about it;

(c) the relationship of grandfather to granddaughter, which was a protective relationship; the significant breach of trust involved;

(d) the absence of penile penetration, violence, threats, intimidation or conduct towards more than one child;

(e) the charges of indecent treatment and digital rape were at the lower end of offending for each of those offences;

(f) the impact on the complainant and the wider family, reflected in the complainant's victim impact statement, which revealed the significance of the breach of trust;[136] the fracturing of the relationship between the complainant and her mother, on the one hand, and the grandmother, on the other; and

(g) Mr FAK's age (63), that he had been a worker until the trial, the loss of his relationship with his wife, and the fact that their home was on the market; the absence of any health issues that would make his time in prison harder than usual.

[110] The learned sentencing judge referred to *R v HAN*,[137] describing it as the most useful of those cases which had been referred to the court.

[111] *HAN* involved a plea of guilty to charges on maintaining a sexual relationship with a child under 16, rape, two counts of indecent treatment and two counts of sexual assault, one with a circumstance of aggravation. The complainant was between 13 and 17 at the time, and the offender's daughter. The maintaining offence was that he got her to perform fellatio upon him, on an "almost daily" basis for three years. He also: (i) put her hand on his penis, rubbing it; (ii) raped her by pushing her head down so that his penis was in her mouth, directing her to move up and down until he ejaculated, and forcing her to swallow it; (iii) had her perform oral sex on two other occasions; and (iv) shaved off her pubic hair.

[112] He was sentenced to seven years' imprisonment on the maintaining charge, five on the rape and three years each on the other counts. No parole eligibility date was set and therefore he had to serve half the period, namely three and a-half years. The case was unusual in that the sentencing judge decided that the range submitted by the prosecution (four to six years) was inadequate. On appeal the sentences were reduced to six years on the maintaining, three on the rape count, and two years each on the others.

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134 AB 195.

135 AB 195-196.

136 The victim impact statement is at AB 334. It may be noted that it refers to Mr FAK (via his wife) offering the complainant money to drop the charges: AB 335. That aspect was not challenged on the sentence hearing.

137 [2008] QCA 106.

[113] This Court reviewed many of the comparable cases,[138] concluding that they supported a sentence between four and six years. In doing so the Court adopted what had been said in *R v SAG*:[139]

> "The authorities the sentencing Judge was referred to supported a sentence in the range of four to six years. In *R v SAG* [2004] QCA 286 Jerrard JA identified the factors that would lead to an increased sentence in cases of maintaining as:
>
> '▪ a young age of the child when the relationship thereafter maintained first began;
>
> ▪ a lengthy period for which that relationship continued;
>
> ▪ if penile rape occurred during the course of that relationship;
>
> ▪ if there was unlawful carnal knowledge of the victim;
>
> ▪ if so, whether that was over a prolonged period;
>
> ▪ if the victim bore a child to the offender;
>
> ▪ if there had been a parental or protective relationship;
>
> ▪ if the offender had been dealt with for offences against more than one child victim;
>
> ▪ if there had been actual physical violence used by the offender; and if not whether there was evidence of emotional blackmail or other manipulation of the victims.'"

[114] A number of those factors apply in the present case: the complainant was young when the maintaining started; it continued for a long time, about eight years; there was a protective relationship; and there was no physical violence but there was manipulation of the relationship.[140]

[115] The Court referred to a series of maintaining cases where six year sentences had been imposed: *R v MAH*,[141] *R v BAT*,[142] and *R v Schneider; ex parte Attorney-General (Qld)*.[143] They all involved penile and digital penetration and rape. The Court then said:[144]

> "[22] In the present case whilst offending occurred "almost daily" over a three year period, there was no penile penetration or violence and the offences had commenced when the complaint was a thirteen year old girl rather than a prepubescent child.
>
> [23] Accordingly even taking into account the frequency of the offending I consider a head sentence in the order of six years was the maximum sentence open on the authorities and a head sentence of seven years was manifestly excessive in the circumstances."

[116] The reduction in the sentence in *HAN* was because the sentencing judge had not adequately taken into account a number of factors in mitigation. They included full

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138 Including: *R v GY* [2007] QCA 103; *R v SAG* [2004] QCA 286; *R v MAH* [2005] QCA 13; *R v L* [2002] QCA 268; *R v SAH* [2004] QCA 329; *R v M* [2003] QCA 443; *R v C* [2000] QCA 145; *R v S* [2001] QCA 54; *R v R* [2001] QCA 488.

139 *HAN* at [13], per A Lyons J, Muir JA and White J concurring.

140 Signified by comments such as "open your legs for Poppy" and "you're Poppy's girlfriend".

141 [2005] QCA 13.

142 [2005] QCA 82.

143 [2008] QCA 25.

144 *HAN* at [22]-[23].

admissions, organising counselling, messages of remorse, and no cross-examination of the complainant.[145] None of that applies in the present case. Any expressions of remorse in the pre-text call have to be understood in light of the later evidence by Mr FAK that he was not apologising for any act of which he was convicted, and the defence case that the incidents never occurred. Further, in the present case the maintaining was for double the period in *HAN*, and the complainant was a much older girl when it started.

[117] In my view *HAN* supports the sentence imposed in the present case.

[118] In *R v C*[146] the offender was the step-grandfather to the complainant. He was sentenced after a trial to five years imprisonment on a maintaining charge, where the relationship was over a four year period when the complainant was six to 10 years old. That also involved touching, digital penetration and fellatio. The offender had shown no remorse, had no similar convictions and would suffer breakdown of friendships, and find prison particularly hard.[147] That case was decided before the maximum penalty was increased to life imprisonment.

[119] The present case is similar but involves double the period of the maintaining. *R v C* supports the sentence imposed here.

[120] *R v WAH*[148] involved a sentence of six years imposed after trial on four counts of digital rape, three of indecent treatment of a child, and one count of maintaining. The offender was step-grandfather of the complainant,[149] and the offences occurred over a three year period from when she was about seven years old. The offences involved digital rape, touching and licking the vagina, and numerous uncharged acts.

[121] This Court declined to interfere with the sentence:[150]

> "In my respectful opinion, the sentenced imposed on the appellant was distinctly moderate. Reference may be made to this Court's decisions in *R v UC* and *R v CX* which confirm that a sentence of six years imprisonment after a trial for the offence of maintaining was well within the appropriate range. It must be borne in mind that the maximum penalty for the offence of maintaining a sexual relationship with a child is life imprisonment. The appellant's misconduct in this case involved an appalling and persistent breach of trust over more than two years in respect of which he has shown no remorse."

[122] In my view, the present case has the hallmarks of *WAH*, in that it involves an appalling and persistent breach of trust, but whilst it did not involve the full extent of the offending behaviour that occurred in *WAH*, it is arguably more serious as the conduct was for longer period of time. In my view, *WAH* supports that the sentence imposed here cannot be found to be manifestly excessive.

[123] I am unpersuaded that the sentence imposed in this case is manifestly excessive, particularly in light of *HAN*, *R v C* and *WAH*.

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145 *HAN* at [25]-[26].
146 [2000] QCA 145.
147 *R v C* at [36].
148 [2009] QCA 263.
149 There were two complainants (sisters) but the single conviction for indecent treatment of the other was relatively minor compared to the offences in respect of the main complainant.
150 *WAH* at [69], per Keane JA, Chesterman JA and P Lyons J concurring. Internal footnotes omitted; the citations are *R v UC* [2008] QCA 194 and *R v CX* [2005] QCA 222.

Conclusion

[124] For the reasons expressed above, I would dismiss the appeal, and refuse the application for leave to appeal against the sentence.

[125] I propose the following orders:

1. The appeal is dismissed.

2. The application for leave to appeal against sentence is refused.

[126] **PHILIP McMURDO JA:** The evidence at the trial and the arguments in this court are set out thoroughly in the judgment of Morrison JA. I agree with his Honour's conclusions on the appeal against the convictions save for that on the question of whether the offences in counts 4 and 5 were committed in the circumstance that the appellant had the complainant under his care.

[127] The first of the grounds of appeal, as they were ultimately argued, was that the jury should have been discharged because of the evidence from a preliminary complaint witness which referred to similar conduct by the appellant towards the complainant's sister. Absent a direction from the trial judge, the evidence was clearly prejudicial to the appellant and conducive to a miscarriage of justice. But her Honour gave the direction which Morrison JA has set out at [39]. The jury was told that they had to disregard the evidence entirely and were reminded that the complainant had not said anything to that effect in her evidence. As a general rule, appellate courts should assume that juries understand and follow the directions they are given by trial judges.[151] There is nothing in the present case which displaces that assumption. The direction was clear and explained to the jury why they were to disregard the evidence. It is inherently likely that this direction was understood and followed. There was no risk of a substantial miscarriage of justice from the judge's refusal to discharge the jury.

[128] For the reasons given by Morrison JA, it was open to the jury to find that the appellant was guilty of count 2, the offence of rape, it being open to them to conclude that there had been penetration. Again for the reasons given by Morrison JA, the jury were adequately instructed about the use that could be made of evidence of uncharged acts. And I agree also with his Honour's reasons for disposing of what he describes as grounds 7 and 8.

Was the complainant under the applicant's care?

[129] As the trial judge remarked when sentencing the appellant, he was regarded as a trusted family member and effectively as a grandparent. The complainant's family, by which I mean the complainant, her parents and her siblings, lived in the country and far from the house near Brisbane where the appellant and the child's grandmother lived. The evidence of the complainant was that about twice a year, the appellant and her grandmother visited the complainant's family and again about twice a year, the complainant's family would visit them at their house near Brisbane. The complainant's family would spend every Easter with the appellant and the grandmother. Count 4 occurred during one of the Easter holidays and count 5 during one of the visits to the appellant's house.

[130] According to the complainant's evidence therefore, each of these offences occurred at a time when the complainant was with her family including her parents. Count 4

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151 *Gilbert v The Queen* (2000) 201 CLR 414, 420 [13].

occurred when the complainant's mother was in the same room and count 5 when her parents were in an adjoining room.

[131] By s 210(1)(a) of the *Criminal Code* (Qld) a person who unlawfully and indecently deals with a child under the age of 16 years is guilty of an indictable offence. By s 210(3), if the child is under the age of 12 years, the offender is guilty of a crime and is liable to imprisonment for 20 years. The presently relevant circumstance of aggravation is described within s 210(4) as follows:

> "If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 20 years."

The *Code* contains no relevant definition for what is meant by a "child under his or her care" in this provision.

[132] There are other provisions of the *Code* which proscribe (or in one case excuse) conduct by reference to the relationship between a child and a person having the care of that child: see s 208, s 215, s 280, s 286, s 363, s 363A, s 364 and s 364A. But none of those provisions either individually or considered with others, could be said to reveal a particular meaning of the relevant limb of s 210(4). Section 286 contains its own definition of the expression "person who has care of a child" which limits the relevant category to parents, foster parents, step parents, guardians or other adults "in charge of the child". At least for counts 4 and 5 (and perhaps also for count 3), the appellant would not fall within that category. But, as I have said, that definition is limited to s 286 which imposes a positive duty upon a person who has care of a child under 16 years.

[133] Every child requires care in the sense of the provision of food, clothing, medical treatment and accommodation. A person who assumes the responsibility of the provision of care in that general sense can be said to be a person who has the child under his or her care. A guardian of a child is an example of such a person. But there are many other circumstances in which a person will come to have a child under his or her care. An adult who is minding a child whilst her parents are elsewhere has assumed a responsibility to protect the health and safety of the child because in the absence of the parents, the child would be otherwise unprotected. In that circumstance, the child has come under the care of the adult although the parents remain responsible for the child's care in the more general sense which I have described. The evident intent of this being an aggravating circumstance of an offence under s 210 is that such an offence should be regarded as yet more serious for the fact that the offender had assumed the responsibility for the protection of the child.

[134] In her summing up, the trial judge directed the jury that the question was: "did he have responsibility for her?" or "was he standing almost in the place of a guardian or a parent at the time of the act?" In some cases, that second question might be too favourable to a defendant. In the present case, it was not inappropriate and neither the appellant nor the respondent is critical of the direction.

[135] The trial judge gave a redirection as follows:

> "The concept of a child being under somebody's care is that they've been entrusted with the responsibility for the care and protection of the child for the time being. If you form the view that the parents were in

> the near vicinity at the time, you would find yourself, I think, in a position of having a reasonable doubt about whether or not [the appellant] had [the complainant] under his care and protection for the time being."

The physical whereabouts of the parents could have been relevant, if they were away from the house where the offence occurred. In their absence, it could have been readily inferred that the child was under the care of the appellant and her grandmother. It is not so clear that the particular location of the parents within the house at the time could determine the answer to this question. But overall, her Honour's redirection adequately informed the jury that they had to be satisfied that the appellant had been entrusted with the responsibility for the care and protection of the child.

[136] On the occasion of count 4, the complainant's evidence was that she was "pretty sure my … mum was … in the room". On that evidence, the jury could not have reasonably concluded that the appellant had assumed the responsibility for the protection of the child and the finding of the circumstance of aggravation was not open.

[137] In respect of count 5, upon the complainant's evidence the offence occurred in the lounge room whilst her parents were in the adjacent dining room. It far from appeared that the complainant's parents had left the child under the appellant's care. The evidence did not prove, beyond a reasonable doubt, that he had assumed the responsibility for the protection of an otherwise unprotected child. The finding of this circumstance of aggravation was not open.

[138] The appellant does not challenge the finding of this circumstance of aggravation in relation to count 3. That is understandable because on that occasion, the complainant was being driven by the appellant to and from a shop in the absence of another adult. It was open to the jury to conclude that at that time, the child was under his care.

Conclusion and orders

[139] Because I would allow the appeal against the findings of a circumstance of aggravation on counts 4 and 5, on my judgment the appellant would have to be resentenced on those counts. According to the filed application for leave to appeal against sentence, the appeal would challenge each of the sentences. But as the case was argued, the challenge was focused upon the sentence for the offence of maintaining an unlawful sexual relationship. It is not a circumstance of aggravation of such an offence that the child was under the offender's care. But the judge took that fact into account in sentencing the appellant on each of the five counts. Consequently, there is a basis for interfering with the exercise of the sentencing discretion on count 1.

[140] I agree with the reasons of Morrison JA in respect of the proposed appeal against sentence. Of course, Morrison JA has considered whether the sentence was manifestly excessive. But I would adopt his Honour's reasoning in concluding that the appellant should not be resentenced upon count 1, because in my conclusion the appropriate sentence on count 1 is that which was imposed by her Honour.

[141] On counts 4 and 5, there should be some recognition of the fact that those counts, unlike count 3, was committed without the circumstance of aggravation.

[142] I would order as follows:

(1) The jury's finding of a circumstance of aggravation of the offences in counts 4 and 5 on the indictment, being that the appellant had the complainant under his care, be set aside.

(2) The appeal against conviction be otherwise dismissed.

(3) Grant leave to appeal against the sentence imposed for the offences in counts 4 and 5 and order that the appeal be allowed and that on each of those counts, the appellant be sentenced to a term of imprisonment of 12 months to be served concurrently with the sentences for the other counts on the indictment.

[143] **NORTH J:** I have read the reasons for judgment of Morrison JA and adopt his Honour's summary and analysis of the evidence and circumstances of the trial. His Honour also thoroughly summarises the arguments in this court. For this reason except in what follows it is unnecessary for me to make reference to the evidence or arguments.

[144] I have also had the advantage of reading the reasons of Philip McMurdo JA. I also join with his Honour in his concurrence with the reasons of Morrison JA concerning Counts 1, 2 and 3 on the indictment and all the grounds of appeal save the ground concerning Counts 4 and 5, whether the complainant was "under [the appellant's] care" within s 210(4) of the *Criminal Code* (Qld) at the relevant times.

[145] Noting Philip McMurdo JA's identification of the relevant and cognate provisions in the Code where the phrase or concept appears, "under care" is, as Morrison JA points out by reference to the Benchbook (see [64]), an ordinary English expression. I agree with Morrison JA, consistently with the Benchbook, that relevantly any consideration of whether at a relevant time a child was under the care of an adult is whether that person was responsible for the control and supervision of the child taking into account relevant circumstances.

[146] Care should be taken not to conflate the enquiry required by s 210(4) of the Code with that identified by s 286 which imposes a "duty" upon those identified, including an "adult in charge of [a] child" to provide necessaries of life and to take precautions and actions identified in s 286. While some of the general factors or circumstances informing, in any given case, the consideration of whether a child was "under the care" of another or whether an adult was "in charge" of a child may overlap there is a difference. This difference follows from two matters. The first is that the concepts are different. To be in charge of another involves a position of some authority, defacto or recognised by law, to make decisions, even affecting the child's future, about the child applying for the time being until countermanded by that person or another acting with the authority of the law. Whereas to have a child under one's care does not carry with it that authority. A second matter is that s 286 prescribes a positive obligation (termed a "duty") of action the failure to perform carrying with it a criminal sanction whereas s 210(4) imposes a criminal sanction in the circumstances of an act or dealing that is declared to be unlawful. There is a difference between a law that says do not do this and one that says, in general terms, you must do things so as to avoid a consequence. For these reasons the enquiry under s 286 concerning whether an adult is "in charge" of a child requires different and perhaps more demanding evidentiary threshold than that required under s 210(4).

[147] In the course of Morrison JA's helpful discussion of the meaning of "under care" and whether a person is "responsible for the control and supervision of a child" ([71]ff) his Honour makes passing reference to matters such as the provision of food, clothing and shelter and use the word "proximity". That latter word is well known in the discourse in tort law concerning the identification of a "duty of care". But I do not understand his Honour to be suggesting that the identification of a "duty of care" or for that matter the "duty" imposed by s 286 of the Code is a part of the enquiry whether one is "responsible for the control and supervision of" a child.

[148] The complainant was not a lineal descendant of the appellant. He was the husband of a grandmother of the complainant. But the evidence amply demonstrates that he was regarded by the complainant and the family for all relevant purposes as a grandfather. The complainant referred to him as "Pop". It was alleged that the dealing involved in Count 4 on the indictment occurred when the family including the complainant, her parents and the appellant together with the complainant's grandmother were holidaying together in the same house at Mt Tamborine. Concerning Count 5 the alleged dealing occurred on an occasion when the complainant was staying at her grandparent's house. On this occasion the evidence suggests that the parents were also present. It is a matter of common experience and one well open to members of the jury to take into account that on the occasion of family holidays where both parents and grandparents are staying together with the children both the parents and grandparents take it upon themselves to share some of the responsibilities and duties required and involved in the control and supervision of children. After all it is a holiday for all and thus often grandparents take it upon themselves some of the responsibility for the control and supervision of children from time to time in order to relieve the parents of all of the burdens associated with that responsibility. In like measure it is not uncommon when parents and children in a family visit and stay at the grandparent's home the rules of behaviour under that roof may differ significantly from those that apply at home. After all, it is the grandparent's residence and not infrequently either by express request or more subtlety by example grandchildren will find themselves subject to their grandparents rather than their parents' rules at home that concern control and supervision. One common example or feature of such a relationship is that often the parents complain that grandparents are more indulgent of the children permitting a greater latitude of behaviour than imposed by parents at home. Members of the jury in this trial were entitled to bear these considerations in mind and others, deriving as they do from their life experience, in the deliberation of the matters asked of them concerning Counts 4 and 5.

[149] On one view of the redirection given to the jury concerning the question of "under care" (see [68]) was generous to the appellant for the reasons identified by Morrison JA (see [86]). The evidence at the trial touching upon the relationship between the appellant and the complainant identified by Morrison JA, including those factors identified at [80], persuade me that it was open to the jury to conclude beyond reasonable doubt that the defendant was at the relevant times "responsible for the control and supervision" of the complainant. Subject to my observations above I agree with the reasons of Morrison JA and his conclusions concerning Counts 4 and 5.

[150] When regard is had to the totality of the evidence including the important evidence of the pretext phone call it can be said that this was a strong case. In the teeth of the evidence the appellant maintained his innocence and challenged the complainant's evidence. I agree with Morrison JA in his Reasons concerning the application for leave to appeal against sentence. I agree with the orders proposed by Morrison JA.