SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAL* [2017] QCA 22
PARTIES:	**R** **v** **FAL** (appellant)
FILE NO/S:	CA No 284 of 2016 DC No 210 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 13 October 2016
DELIVERED ON:	3 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2016
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of one count of maintaining a sexual relationship with a child and one count of indecent treatment of a child under the age of 16 years – where the appellant contends the verdict is unreasonable and cannot be supported by the evidence – where the central allegations in the complainant's evidence were not directly supported by other evidence – whether the complainant's evidence was sufficient to establish an unlawful sexual relationship CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – MAINTAINING UNLAWFUL RELATIONSHIP WITH CHILD – where the appellant was convicted by a jury of maintaining a sexual relationship with a child over a period of three years and nine months – where the appellant contends that "fleeting low level contact" of a sexual nature could not constitute a sexual relationship – whether a "relationship" within the meaning of s 229B(2) *Criminal Code* (Qld) requires a minimum degree of

invasiveness or a minimum frequency of sexual contact

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant did not seek a direction in terms of *Robinson v The Queen* (1999) 197 CLR 162 at trial – where the jury asked for a redirection on the maintaining a sexual relationship with a child offence – where the appellant contends that the failure to give a direction in terms of *Robinson* gave rise to a miscarriage of justice – where the complainant was a child and her evidence was uncorroborated – where the trial judge had addressed the inconsistencies between the complainant's accounts in the summing up – where there was no exceptional delay – where the complainant was not a very young child – where the complainant did not suffer any illness or disorder relevant to the assessment of her credibility – whether a miscarriage of justice occurred

Criminal Code (Qld), s 210, s 229B, s 668E(1)

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Baden-Clay (2016) 90 ALJR 1013; (2016) 334 ALR 234; [2016] HCA 35, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited

COUNSEL: S T Courtney for the appellant
G P Cash QC for the respondent

SOLICITORS: Butler McDermott Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA**: At a trial over four days in the District Court at Toowoomba, the appellant, FAL, was found guilty on 13 October 2016 of two sex offences. Count 1 on the indictment alleged an offence against s 229B of the *Criminal Code* in that between 14 January 2009 and 8 October 2012 at BM or elsewhere in the State of Queensland, the appellant, being an adult, maintained an unlawful sexual relationship with the complainant, W, a child under 16 years. The second count alleged an offence against ss 210(1)(a), (2) and (4) of the *Code* in that on a date unknown between 31 December 2011 and 6 October 2012 at BM, the applicant unlawfully and indecently dealt with the complainant, a child under 16 years.

[2] The appellant was sentenced to 18 months imprisonment on Count 1, suspended after serving four months with an operational period of two years. He was convicted and not further punished for Count 2.

[3] On 17 October 2016, the appellant filed a Form 26 notice of appeal against conviction.[1] At the hearing of the appeal on 29 November 2016, he was granted leave to amend his grounds of appeal.[2]

1 AB359-361.

The circumstances of the appellant's alleged offending

[4] The appellant is the step-grandfather of the complainant. They would attend camp drafts and ride horses together. It was on these outings that the offending was alleged to have occurred. During the period of the alleged offending for Court 1, the appellant was in his sixties and the complainant was aged between 11 and 14 years of age.[3]

[5] **Crown case**: The Crown particularised the alleged offending as follows:

> "Count 1: maintaining a sexual relationship with a child.
>
> That between 14 January, 2009, and 18 October, 2012, the accused maintained an unlawful sexual relationship with the complainant. The unlawful sexual relationship involved more than one unlawful sexual act over this period. The nature of which included:
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> - An act or acts of the accused touching the complainant on or around her genital area, and/or
> - An act or acts of the accused touching the complainant's leg or legs, and/or
> - An act or acts of the accused touching the complainant's breast or breasts, and/or
> - An act or acts of the accused touching the complainant's buttocks.
>
> Count 2: indecent treatment of a child under 16, under care.
>
> That between 31 December 2011, and 6 October 2012, on WSR, the accused touched the complainant on her breast".[4]

[6] The complainant made her first complaint to her mother and mother's partner[5] in October 2012.[6] At trial, the Crown tendered, pursuant to s 93A of the *Evidence Act* 1977 (Qld), a recording of a police interview conducted with the complaint on 8 January 2014.[7] The recording was played to the jury.

[7] In the interview, the complainant, who was then 15 years of age, told the police officer she was there to tell her "what [the appellant] did to [her]".[8] She then went on to detail that the appellant "started with little things like leaning over on to my saddle and that and putting his hand on the front of my saddle…or putting his hand on my leg".[9] The complainant said it then "moved on" to "rubbing"[10] her "private part on the outside of [her] jeans and stuff like that",[11] "brushing his hands up past [her] breasts", and "putting his hands down [her] shirt…and under [her] bra".[12] As to the act or acts involving the complainant's genitals, she said that the appellant would "stand behind me and rub like my private area and again I'd just walk away,

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2 Amended Notice of Appeal filed on 1 December 2016.
3 AB227.
4 AB210.
5 The partner, who is the complainant's step-father, is the appellant's son.
6 AB225.
7 Exhibit 1; Transcript (MFI "A") at AB215-244.
8 AB218.
9 Ibid.
10 AB224.
11 AB219.
12 AB224, 229.

move away, do something else".[13] As to the touching of the breast or breasts, the complainant said that the appellant would put his hand under her shirt and bra "through the collar" and "[h]e'd just leave it there and I'd…but I…I wouldn't let him do anything else because I'd walk away, try and get away".[14]

[8] The complainant said that the act of putting his hands down her shirt was a "re-occurring thing',[15] and spoke generally that "pretty much mainly every campdraft …or every ride I went on with him on a horse, something happened whether it was discreet or not",[16] and "pretty much every campdraft he did something".[17] She also said that the acts would occur either while they were riding or standing together,[18] and always when they were alone.[19]

[9] The complainant gave pre-recorded evidence on 18 February 2016.[20] The s 93A interview was tendered. The complainant confirmed the accuracy of what she told the police.[21] In examination-in-chief, the Crown prosecutor sought clarification of one matter in the interview. It related to her description of how "it all started" and concerned the nature of the appellant's alleged conduct in leaning over and putting his hand on her saddle. In response, the complainant spoke of the appellant putting his hand on the top of the saddle, but not of any sexualised touching of her in doing that.[22]

[10] In his outline of submissions, counsel for the appellant, who was defence counsel at trial, identified the following aspects of the complainant's evidence given in cross-examination:[23]

(a) she rode with the appellant on the road "a lot more" than six times, and "20 times across the few years";[24]

(b) it is "probably" correct that she attended six camp drafts with the appellant at which she did not stay overnight;[25]

(c) there were "more than" nine occasions in which they stayed overnight;[26]

(d) there were "quite a few occasions" of touching as she exercised horses;[27] and

(e) there were "so many" incidents of touching at camp drafts that she could not put a time or date to them.[28]

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13 MFI "A"; AB230.
14 Ibid.
15 MFI "A"; AB228.
16 MFI "A"; AB237.
17 MFI "A"; AB242.
18 MFI "A"; AB228.
19 MFI "A"; AB236.
20 AB21-61. The recording is Exhibit 2; transcript is MFI "C".
21 AB25 Tr1-5 ll12-14.
22 Ibid ll27-38.
23 Appellant's Outline of Submissions, paragraph 8.
24 AB31, 37.
25 AB33 Tr1-13 ll24-27.
26 AB38 Tr1-18 ll44-46.
27 AB47 Tr1-27 ll40-41.
28 AB48 Tr1-28 ll11-15.

[11] The Crown also called a friend of the complainant, B. She knew the appellant through attending rodeos at Warwick.[29] B gave a statement to police on 19 October 2014. She gave evidence at trial of a complaint made to her by the complainant that the appellant had "inappropriately touched her around the breasts and the inside of her legs when they were attending campdrafts together or alone together" and of an incident when the appellant entered the shower in the 'gooseneck'[30] while the complainant was using it.[31] She could not remember whether the complainant had told her about any other incidents.[32] In cross-examination, she said that the complaints were made to her on different occasions. She was provided with a copy of the statement she made to police and asked about several other allegations made to her by the complainant referred to in it. She agreed that those allegations had been made with the exception of one, which she said she could not remember.[33]

[12] The complainant's mother testified in the prosecution case. She gave evidence as to the frequency with which the complainant and appellant attended camp drafts together. She was aided by camp draft calendars and a transaction record of cheque payments.[34] Counsel for the appellant summarised the evidence given in the following way:[35]

> "In examination-in-chief [she] indicated that the calendar was 'only a bit of a guide' to the camp drafts the complainant attended.[36] In cross-examination [she] accepted the calendar had camp drafts the complainant 'might have gone to' whereas the transaction record had camp drafts the complainant 'probably went to'.[37]
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> The transaction record revealed [she] had paid nominations for 21 camp drafts between 22 April 2010 and 23 October 2012.[38] Of the 21 camp drafts:
>
> (a) For six of them [she] had also paid a nomination for [her partner], the complainant's step-father. The complainant did not refer to offending occurring at camp drafts she attended with her step-father;
>
> (b) Five were pony club camp drafts. [She] stated ordinarily the appellant would not attend pony club camp drafts as adults do not normally compete;[39]
>
> (c) 12 were local to Warwick. [She] indicated that she would attend the local camp drafts to watch the complainant

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29 AB84 Tr2-8 l39.

30 This is the name given to a trailer attached to a truck used to transport horses to camp drafts. The trailer accommodated the horses and included living quarters which the appellant and the complainant would occupy if they were overnighting. The quarters comprised a shower, a kitchen and a dining area.

31 AB85 Tr2-9 ll5-15.

32 Ibid ll17-18.

33 AB87 Tr2-11 l25 – AB88 Tr2-12 l16.

34 MFI "D" – MFI "K"; AB287-356.

35 Appellant's Outline of Submissions, paragraph 8.

36 AB97 Tr2-21 l7.

37 AB118 Tr2-42 ll15-18.

38 AB106 Tr2-30 l29 – AB111 Tr2-35 l28.

39 AB99 Tr2-23 ll22-24.

compete.[40] [She] further stated if the camp drafts were close to home and for a single day, the appellant and complainant would not stay overnight.[41] The appellant gave evidence that he would not stay the night at local camp drafts;[42] and

(d) Only five in the two and a half year period were without her step-father, non-local and non-pony club."

[13] The evidence to which I have referred was led to support the Crown's case for the maintaining offence.

[14] Count 2 was based on an allegation made by the complainant in the police interview concerning a specific incident. It occurred when she was riding with the appellant along WSR. The allegation was that while her and the appellant's horses were alongside each other, the appellant "put his hand down her shirt in between [her] bra and that" and "squeezed" one breast.[43] The complainant said she then "kicked [the appellant's] horse so it would jump and move away and then move [her] horse away and that and try to keep a bit of distance between the two horses so he couldn't get near [her]".[44]

[15] **Defence case**: The appellant gave evidence at trial. He accepted that he took the complainant to "close to" six local camp drafts and "something like" nine away camp drafts.[45] He denied any interference with the complainant when he would take her to camp drafts. He said the only physical contact between them would occur either when he would put his hand on her back while they were riding together to teach her to keep her back straight,[46] or when there was possible glancing contact while they were both in the gooseneck and one person was at the sink and the other at the table, due to the limited space between them.[47] He gave evidence that when they rode together he would ride on a particular stallion named "Wrangler" which he said could be aggressive if it got close to other horses.[48] He said the closest he could get to another horse would be a metre to a metre and a half.[49]

[16] The appellant was cross-examined with respect to the allegations against him. He accepted that he had entered "Wrangler" in shows and camp drafts. He said that he was never alone in the gooseneck with the complainant; that the door to the gooseneck was always open; and that during the evenings, he would sit separately from the complainant when he had a cup of tea.[50]

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40 AB116 Tr2-40 ll31-35.
41 AB119; Tr2-43 ll26-27.
42 AB142 Tr 3-11 l7.
43 MFI "A"; AB234-235.
44 MFI "A"; AB235.
45 AB144 Tr3-13 l43 – AB145 Tr3-14 l7.
46 AB150 Tr3-19 ll31-37.
47 AB151 Tr3-20 ll10-14.
48 A 15 second video recording of Wrangler behaving aggressively towards another horse (Exhibit 6) was tendered.
49 AB148 Tr3-17 ll24-29.
50 AB155 Tr3-24 l34 – AB156 Tr3-25 l23.

[17] Two other witnesses were called who each testified that they had attended camp drafts and had not seen any unusual or concerning contact between the appellant and the complainant at them.

Directions relevant to the appeal

[18] The learned trial judge summed up on the fourth day of the trial. He explained the elements of Count 1 to the jury. As to the "maintaining" element, his Honour gave the following directions:[51]

> "'Maintained' carries its normal meaning, that is, it carried on or kept up or continued. It must be proved there was an ongoing relationship of a sexual nature between [the appellant and the complainant]. So there must be some continuity or habituality of a sexual conduct, not just isolated incidents. Any such acts which you find occurred in New South Wales may be taken into account. All of you must be satisfied beyond a reasonable doubt that the evidence establishes that an unlawful sexual relationship with [the complainant] involving unlawful sexual acts did, in fact, exist. But it is not necessary that all of you be satisfied about the unlawful sexual acts."

[19] The jury retired at 11.23 am. Later, at 2.22 pm, the court received a note from the jury. It read:[52]

> "We would like to see the police interview with [the complainant] and the preliminary cross-examination with [the complainant]. We would like clarification on the wording of count 1 (maintaining). We would like the defence summation – five points of defence."

[20] After discussion with counsel, the following further directions were given in response to the note:[53]

> "…Now, in relation to count 1, the maintaining, which is query number (2), as I said this morning, the prosecution must prove that the [appellant] maintained an unlawful relationship of a sexual nature with a child under the prescribed age… [A]n unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over any period. An unlawful sexual act means an act that constitutes an offence of a sexual nature which is not authorised, justified or excused by law. And in the Crown case in relation to count 1, the conduct forming the foundation of that count is the touching of [the complainant] on or about her genital area on the outside of her jeans, and the touching of her breast or breasts inside her shirt.
>
> The unlawful sexual act must be of a nature that is indecent so as to satisfy the meaning of indecent treatment of a child, as I outlined in relation to count 2. Now, just to refresh your memory on that, the word 'indecent' bears its ordinary everyday meaning, that is, what the community regards as indecent. It is what offends against currently accepted standards of decency, and must always be judged

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[51] AB192 ll1-8.
[52] AB197 ll17-24.
[53] AB201 l9 – AB 202 l23.

in the light of time, place and circumstance. ‘Maintained’ – that is, maintain the unlawful sexual relationship, ‘maintained’ carries its ordinary meaning, that is, it’s carried on, kept up, continued. It must be proved that there was an ongoing relationship of a sexual nature between [the appellant and the complainant], so there must be some continuity or habituality of sexual conduct, not just isolated incidents. And any such acts which occurred in New South Wales may be taken into account.

You must be satisfied beyond a reasonable doubt that the evidence establishes that an unlawful sexual relationship with [the complainant] involving unlawful sexual acts existed, but it’s not necessary for all of you to be satisfied about the same unlawful sexual acts. So that’s maintaining. I’ll now ask the bailiff to put on the section 93, the first recording of the police interview, please, Mr Bailiff.

RECORDING PLAYED

HIS HONOUR: Ladies and gentlemen, I’m again obliged to say to you, in relation to those two tapes that you’ve heard, that you must not draw any adverse inference by virtue of the medium by which you saw them replayed. Their probative value, that is the tendency to prove a fact, is not increased or decreased, that is, it’s not better or worse evidence, and no greater or lesser weight should be attributed to it by virtue of the medium or by virtue of the fact that you’ve now seen it for a second time.

In relation to the third query of yours, the following are the agreed matters between the parties as to the defence case, that is, that [the appellant] attended six, or perhaps one or two more, local drafts with [the complainant]. Next, the kitchen area of the gooseneck would not be used at local drafts, [campdrafting] events. There was something like nine [campdrafts] away, as opposed to local. Other people attended some of those away [campdrafts]. There was a lack of privacy when camping at the [campdraft]. About six occasions [the appellant] acknowledges that he and [the complainant] exercised horses alone.

Wrangler was a quiet horse, but once he had a couple of mares, he became very aggressive, that is, after he was joined a couple of times, he became very aggressive. When riding with [the complainant], [the appellant’s] case is that he would keep a metre to a metre and a-half away from her. Next, he did not touch [the complainant] on the chest or in the area of the vagina. And finally, there was limited physical contact with [the complainant]. The only physical contact in the gooseneck may have been walking past each other when the other was at the sink because of the limited space between the kitchen sink and the table. So they are 10 points in all made by the defence, [the appellant].”

[21] The jury retired at 4.28 pm. They were recalled at 4.32 pm at which point his Honour gave the following clarification which had been prompted by defence counsel:[54]

> "…When I was speaking to you again in relation to maintaining, count 1, and the unlawful sexual acts, which I spoke of and identified which the Crown were relying upon, I omitted to mention, as I did in my first run through of this, that anything which happened in New South Wales are not acts which are to be considered…"

[22] Having dealt with that matter, his Honour then asked the jury this question:

> "Now in relation to the points I've just made in relation to the defence case, does that answer your number (3) question? The alternative is for me to again go through the end of my summing up when I went through and summarised the respective addresses. It's a question of whether you would like that, or whether the query you've raised is satisfied by these defence points which I've just read out to you".[55]

The speaker answered, saying twice that the directions given were sufficient.[56]

[23] The jury retired at 4.34 pm. They returned with guilty verdicts on each count at 5.29 pm.[57]

Grounds of appeal

[24] The appellant relies on the following grounds of appeal: [58]

> "1.(a) The learned trial Judge erred in twice not concluding the Appellant had no case to answer in relation to count 1, the charge of Maintaining a Sexual Relationship with a Child.
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> (b) If ground 1a is successful the finding of guilt on count 2, the charge of Indecent Treatment of a Child, should be set aside as the evidence led to support count 1 was inadmissible on count 2.
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> 2. That finding of guilt on both charges was unreasonable and cannot be supported having regard to the evidence.
>
> In the alternative to ground 2
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> 3.(a) The finding of guilt on count 1, the charge of Maintaining a Sexual Relationship with a Child, was unreasonable and cannot be supported having regard to the evidence.
>
> (b) If ground 3a is successful the finding of guilt on count 2, the charge of Indecent Treatment of a Child, should be set aside as the evidence led to support count 1 was inadmissible on count 2.
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> 4. The directions of the learned trial Judge were deficient in that His Honour failed to assist the jury in applying the law to the facts of the case.

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54 AB204 ll42-46.
55 AB205 ll4-8.
56 Ibid ll10 -14.
57 AB205 – AB207.
58 Amended Notice of Appeal filed on 1 December 2016.

5. The learned trial Judge erred in not warning the jury about issues impacting on the reliability of the Complainant's evidence in accordance with *Robinson v The Queen* (1999) 197 CLR 162.

6. The learned trial Judge erred in not fully addressing the request of the jury 'We would like the defence summation – five points of defence'."

[25] The appellant's submissions, both written and oral, did not deal with these grounds discretely. At the commencement of oral submissions, counsel for the appellant began with what he called his primary argument. It has particular relevance to Grounds 1 and 4.

[26] This argument centred upon an issue of statutory construction. Upon the footing that the construction urged by the appellant is correct, it would follow, the appellant argued, that the directions given to the jury were deficient and that there was an insufficiency of evidence upon which the jury could have convicted on Count 1. It is convenient to deal with the primary argument first.

The statutory construction issue

[27] Counsel for the appellant referred to the wording of the substantive offence in s 229B(1) that the adult maintain an unlawful sexual relationship with a child under the age of 16 years and to the provision in s 229B(2) that an unlawful sexual relationship is a relationship that involves more than one sexual act over any period. He noted the definition of the expression "unlawful sexual act" in s 229B(10) as an act that constitutes or could constitute an offence of a sexual nature, as there defined.

[28] Emphasis was placed on the aspect of s 229B(2) that posits that there be a **relationship** of a sexual nature that involves more than one sexual act. In the absence of a relevant statutory definition of the word, counsel referred to the *Macquarie Dictionary* definition of "relationship" as "1. Connection, particular connection. 2. Connection by blood or marriage. 3. An emotional connection between people sometimes involving sexual relations."

[29] Drawing on that definition, counsel submitted that for a relationship to exist for the purposes of s 229B(2), the adult and the child must be connected, that is to say, they must be in a state of being connected.[59] He then made what he termed his "ultimate submission". It was "that not all offences of a sexual nature committed with continuity or habituality amount to a relationship".[60] In particular, it was put that "fleeting low level contact" of a sexual nature could not constitute a sexual relationship because "it does not amount to a connection between the two people."[61]

[30] In the course of argument, counsel clarified that he did not mean that for a relationship there need be a reciprocity between the parties to it.[62] However, as he put it, there does need to be "at least physical contact of some level of intimacy or

59 Appeal Transcript 1-4 ll3-10.
60 Appeal Transcript 1-3 ll8-9.
61 Ibid ll11-13.
62 Appeal Transcript 1-4 ll12-16.

duration”.[63] When asked what he meant by physical contact of that kind, he replied that, “it’s all but impossible to articulate a test.”[64]

[31] Persisting with the submission, counsel submitted that “fleeting contacts”, as might have resulted when the complainant took steps to move her horse away from the appellant’s horse or to move away from him in the gooseneck, would be insufficient to constitute a relevant relationship. “Something more intimate, something more prolonged, something more invasive” than that was needed.[65]

[32] I am unable to accept the appellant’s submission. Integral to it is a proposition that “low level” physical contact of a sexual nature is, as a matter of law, incapable, either by itself or in combination with other physical contact, of evidencing a sexual relationship for the purposes of s 229B(2). Such a proposition cannot be sustained. The submission also implies that, in order for there to be a requisite relationship, there needs to be a minimum frequency with which the physical contact occurs. That, too, cannot be sustained. It is the continuity or habituality of sexual contact that may give rise to a relationship. It is unnecessary that the contact have some minimum, yet unspecified, degree of invasiveness or frequency in order to give rise to it. The appellant’s construction seeks to place an unwarranted gloss upon the statutory provisions.

[33] It may be accepted that physical contact need not have a sexual nature. However, it is for the jury to decide whether the instances of physical contact of which evidence is given before them, have such a nature, and, if they do so find, whether those instances have a sufficient continuity or habituality to establish a maintaining charge.

[34] It is appropriate to note at this point that the directions given by his Honour as to the “maintaining” element of the offence, which accorded with those in the Benchbook, were correct; and they were adequate. They accurately informed the jury of what they needed to be satisfied beyond reasonable doubt in order to find that element proved. The appellant’s case, confirmed in his own testimony, was that no indecent touching occurred at all. It would have been inappropriate for his Honour to have directed the jury that if they rejected that account and accepted the complainant’s version of events, the conduct revealed in that version was “at the lowest level” and, on that account, was insufficient proof of a relationship. Unsurprisingly, a direction in such terms was not sought at trial.

[35] For these reasons, I would reject Grounds 1 and 4. I now turn to consider the complaint that is common to Grounds 2 and 3, namely, that the guilty verdicts were unreasonable and could not be supported by the evidence.

Unreasonableness of verdict - Count 1

[36] **Appellant’s submissions**: The basis for challenging the jury verdict on Count 1 is alleged deficiencies and inconsistencies in the complainant’s evidence. Counsel for the appellant summited that her evidence had “limited probative force” and the

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63 Ibid ll35-36.
64 Ibid l40.
65 Appeal Transcript 1-5 ll1-3.

cumulative effect of the following matters "render the complaint's evidence so unreliable that there is a significant possibility [that] an innocent man has been convicted":[66]

"a. The allegations were not supported by independent evidence. In particular there was no evidence of the complainant expressing any reluctance to spend time with the appellant or being unsettled after spending time with him.

b. The last camp draft where sexual touching was said to have occurred was in Y. That was in March 2012. The first complaint was to the complainant's mother and step-father on 23 October 2012. That matter was not reported to the police until 8 January 2014.

c. Sometime after the complainant told her mother and step-father but before the report to police the complainant told her friend, [B]. [B] gave evidence that the complainant told her the appellant:

   i. 'made sexual comments to her when they were in the gooseneck',

   ii. at a camp drafts said words to the effect of 'If you do this, then you can ride my horse',

   iii. 'when she was in the gooseneck shower, that he came in and she screamed at him to get out' and

   iv. "[the appellant] had touched [the complainant] inside her leg when she was wearing shorts'.

   The complainant did not give evidence of any of those occurrences.

d. The complaint to the complainant's mother and step-father occurred in the course of a 'fight' with her step-father when she said 'I'd rather go and live with [the appellant] and get touched by him than live here.' In cross-examination as to whether at that stage she did not want to live with her mother and step-father the complainant replied 'It was just a fight. It was a heat of the moment fight.'

e. The appellant never threatened the complainant or forced her to go away with him on the camp drafts.

f. The "touching" that is alleged when exercising horses occurred when the complainant had control of the direction and speed of the horse she was riding.

g. When discussing the two particularised acts … the complainant's evidence was vague. When relating the event at Y the complainant stated 'I don't really remember much' and she was not sure what she was doing before the event. …

h. [The complaint's mother] gave evidence that a friend of the complainant's, [M], went 'on a few drafts' with the complainant and appellant. Whilst the complainant nominated

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66 Appellant's Outline of Submissions, paragraph 10.2.

[M] as a close friend, she did not reveal [M] had accompanied her and the appellant to camp drafts."

[37] **Respondent's submissions**: The respondent made the following written submission in response to those matters:[67]

"18. First, the appellant alleges the complainant's evidence was undermined by the absence of directly supportive evidence and an absence of conduct on her part suggesting she wished to avoid contact with the appellant. As to the former such is not necessary and is not unusual in cases of sexual molestation which one might expect commonly occur in private. The latter erroneously assumes that there is a 'proper' way to react for a victim of sexual offences at the hands of a relative and that this complainant's reaction was inconsistent with how one should react.

19. Secondly, the appellant suggests that the short delay before a complaint was made to the complainant's mother undermines her credibility. The delay was only a matter of months and it would be wrong to assume that in the context of alleged interference by a family member such a delay indicates a lack of credibility. That the matter was not raised with the police until 2014 is explicable on a number of bases, not least of which is the natural reluctance to raise serious allegations against a family member.

20. Thirdly, the appellant points to inconsistences between the complainant's evidence and the account of preliminary complaint by [B]. Such inconsistency is not surprising given the ages of the complainant and witness and are not so material as to be productive of reasonable doubt. As the trial judge directed the jury:

'…the mere existence of inconsistencies does not mean that of necessity you must reject [the complainant's] evidence, because some inconsistency is to be expected. Because it is natural enough for people who are asked to, on a number of different occasions, to recount a particular event and to repeat what happened at an earlier time, it's not unusual for them to tell a different version each time.'

21. Fourthly, the appellant raises the circumstances on which the complainant first told her mother something had occurred. The passage referred to by the appellant is set out below:

'And you said – this is what you told the police: 'I'd rather go and live with [the appellant] and get touched by him than live here'? – Yeah.

So did you not want to live with your Mum and [her partner] at that point when you said that? – It was just a fight. It was a heat of the moment fight.

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67 Respondent's Outline of Submissions, paragraphs 18-26.

Okay? – And I guess the whole situation with [the appellant] had built up and then I just exploded.'

22. There is nothing in this passage that undermines the credibility of the complainant.

23. Fifthly, the appellant suggests that the fact he did not need to threaten or coerce the complainant to attend camp drafts with him casts doubt on her allegations. As noted above such a submission wrongly assumes that victims of sexual offences will always have the capacity to resist further offending and that a failure to resist or remove himself or herself from the risk of harm is evidence that allegations of sexual offences are untrue.

24. Sixthly, the appellant raises evidence that the sexual touching that occurred while the complainant was riding happened when she had control over the 'direction and speed' of the horse. This appears to be directed to the idea that the complainant could have, and should have, ridden away from the appellant. For reasons already set out this is not a matter that was bound to cause the jury to doubt the evidence of the complainant.

25. Seventhly, the appellant complains that the evidence of the two particularised acts was vague. The evidence set out by the appellant …concerning count two is not vague. The complainant clearly stated, 'I remember him putting his hand down my shirt and that and squeezing my breast.' The evidence relating to the incident at Y …includes the complainant stating:

'…he put his hand down my shirt. Um … he rubbed the front of my jeans … it's hard to explain yeah he put his hand down under my shirt and under my bra and I'd walk away forcefully'.

26. Finally there is a suggestion that an alleged failure by the complainant to identify another young person as present at certain camp drafts undermined her credibility. One problem with this suggestion is that it assumes it was the mother who was right and the complainant wrong about the presence of this person. Even if this is correct it is not a matter of significance."

[38] **Discussion**: In the following two paragraphs, the High Court in *The Queen v Baden-Clay*[68] restated two well established principles:

"[65] … [T]he setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses

68 [2016] HCA 35; (2016) 334 ALR 234 at [65]-[66].

> called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way …
>
> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'." (footnotes omitted)

[39] The complainant's evidence gave a coherent and logical account of sexual touching that occurred when the appellant accompanied her on five camp drafts or when they rode together. In context, the touching to which she testified was indecent touching. It included touching of her breasts outside or inside clothing and touching of her genital area outside clothing. Some 25 instances of indecent touching occurred according to her account. If accepted, the complainant's evidence was sufficient to establish an unlawful sexual relationship. Moreover, it established that the relationship was one which involved more than one unlawful sexual act.

[40] It is true that central allegations in the complainant's evidence were not directly supported. However, her evidence drew support from its consistency with her complaint to her mother and the known dates of the various camp drafts. The appellant has identified matters of imperfection, and arguable conflict, in the evidence in the prosecution case. Those matters are, in type, not uncommon. In most trials some aspects of the evidence are less than wholly satisfactory. In *MFA v The Queen*,[69] McHugh, Gummow and Kirby JJ reminded that experience suggests that juries, properly instructed on the law, are usually well able to evaluate conflicts and imperfections in evidence.

[41] Here, the respondent's submissions, which I have set out, illustrate why it is that the matters to which the appellant has referred would not have caused the jury to fail to have been satisfied as to the veracity and reliability of the complainant's evidence. I consider that it was well open to the jury to have been satisfied beyond reasonable doubt that the appellant was guilty of Count 1. The verdict was not the product of a miscarriage of justice warranting the intervention of this Court.

Unreasonableness of verdict – Count 2

[42] **Appellant's submissions**: The appellant submitted that the complainant's evidence on Count 2 needed to be viewed as a component of evidence which, for the reasons advanced by the appellant in relation to Count 1, was of overall diminished probative value.[70] In addition, it was submitted that the description of the event given by the complainant in her police interview lacked clarity. She was unable to remember how it was that the appellant was able to put his hand down her shirt and under her bra while riding his horse. Moreover, it was questionable why the complainant would have allowed "her horse to come close enough to his horse" for

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69 [2002] HCA 53; (2002) 213 CLR 606 at [96].

70 Appeal Transcript 1-9 ll24-26.

him to reach across to her if she knew of a propensity on his part to touch her indecently.[71]

[43] **Respondent's submissions**: The respondent submitted that, even when taken as a part of the evidence as a whole, the evidence of the Count 2 offending was sufficient for a jury to be satisfied of guilt beyond reasonable doubt. It was not vague. The proposition that, had indecent contact in truth been occurring, the complainant could be expected to have controlled her horse and move it away whenever the appellant's horse approached, would not have appealed to the jury as realistic.

[44] **Discussion**: The complainant's evidence-in-chief of the offending contact on WSR was clear in detail. Her account was maintained during cross-examination. Indeed, it was not put to her then that the offending did not occur.[72] It was of little or no consequence that the complainant did not offer an account for how the appellant was able to touch her as she alleged while he was riding his horse.

[45] The jury might well have regarded the appellant's proposition based on the complainant's ability to control her horse as an unrealistic one. It took no account of the speed with which the appellant's horse might close the gap between it and the complainant's horse, nor of the speed with which the complainant would have had to have reacted in order to maintain the gap.

[46] In my view, it was clearly open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt on Count 2.

[47] For these reasons, neither Ground 2 nor Ground 3 can succeed.

Ground 5

[48] **Appellant's submissions**: Counsel for the appellant submitted that, although he did not seek a *Robinson*[73] direction at trial, the absence of one gave rise to the danger of a miscarriage of justice.[74] Because the jury asked for a redirection on the maintaining offence, the learned trial judge ought to have directed on "both the low level of offending and also the frequency".[75] The circumstances warranted such a direction because of the existence of the circumstances which were outlined to support the submissions that the verdicts were unreasonable.

[49] **Respondent's submissions**: The respondent submitted that there were no special features in the present case that warranted the giving of a *Robinson* direction. The jury were fully able to assess the complainant's credit without such a warning because there were no features not already obvious to them.

[50] **Discussion**: To propose that a *Robinson* direction ought to have been given is to invite consideration of the content of such a direction. That exercise necessarily requires consideration of what particular features of the evidence which would not have been obvious to the jury, required direction in order to allay any perceptible risk of a miscarriage of justice.

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[71] Ibid ll30-37.
[72] AB47 l43 – AB49 l46.
[73] See *Robinson v The Queen* [1999] HCA 42; (1999) 197 CLR 162.
[74] Appellant's Outline of Submissions, paragraph 11.1.
[75] Appeal Transcript 1-11 ll16-18.

[51] It was obvious to the jury that the complainant was a child and that her evidence was uncorroborated. In so far as there may have been inconsistencies between accounts given by the complainant to police, on the one hand and to others by way of preliminary complainant, on the other, were specifically and appropriately addressed in the summing up.[76]

[52] Beyond that, there were no particular features that needed to be addressed. There was no exceptional delay. The complainant was not a very young child. There was no evidence that the complainant suffered any illness or disorder relevant to the assessment of her credibility. Furthermore, for the reasons given in relation to the statutory construction issue, reference to "low level offending" and frequency of it, would have risked misdirecting the jury.

[53] In my view, the appellant has failed to establish that the absence of a *Robinson* direction occasioned a miscarriage of justice. This ground of appeal cannot succeed.

Ground 6

[54] **Appellant's submissions**: Counsel for the appellant submitted that, notwithstanding the speaker's affirmative response to the trial judge's question of whether his directions answered the questions posed in the jury note, his Honour ought to have additionally reminded the jury of the competing arguments in the trial. In oral submissions, counsel for the appellant elaborated that in asking for the five main defence points, the jury "was going back to the question of a *Robinson* warning".[77]

[55] **Respondent's submissions**: The respondent submitted that no miscarriage of justice resulted from the way in which the learned trial judge directed the jury in relation to the jury note. His Honour gave directions which were supported by both counsel at trial. Appropriately, he enquired of the jury whether the directions had answered their question. The speaker of the jury responded in the affirmative.

[56] **Discussion**: This ground of appeal is without merit. The jury was satisfied that the direction given, which accorded with discussions with counsel, sufficiently addressed the third point they had raised. Why his Honour needed to have repeated them is unexplained by the appellant in his submissions.

Disposition

[57] Since all grounds of appeal have failed, this appeal must be dismissed.

Order

[58] I would propose the following order:

1. Appeal dismissed.

[59] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

[60] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Gotterson JA.

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76 AB190 ll4-38.

77 Appeal Transcript 1-13 ll38-45.