SUPREME COURT OF QUEENSLAND

CITATION:	*R v CAH* [2008] QCA 333
PARTIES:	**R** **v** **CAH** (appellant)
FILE NO/S:	CA No 78 of 2008 CA No 184 of 2008 DC No 83 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	Orders delivered ex tempore on 29 July 2008 Reasons delivered 24 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2008
JUDGES:	McMurdo P, Mackenzie AJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – appellant found guilty after trial of one count of maintaining a sexual relationship with a child, 10 counts of indecent treatment and three assaults – complainant was the appellant's step-daughter – appellant had pleaded guilty to three counts involving sexual misconduct against the complainant in Victoria – complainant gave evidence of those acts and of other sexual conduct between herself and the appellant in Queensland which were not the subject of any charge – trial occurred before the High Court's decision in *HML v The Queen* – whether the judge misdirected the jury on the use of such evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – appellant had pleaded guilty to three counts involving sexual misconduct against the complainant in Victoria – appellant gave evidence that he did

not commit the Victorian offences and pleaded guilty to them only for pragmatic reasons – judge directed jury that if they found that the appellant lied in the witness box, those lies could be used to corroborate the complainant's testimony – whether the judge misdirected the jury on the use of lies as corroboration

CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CORROBORATION – WHAT CONSTITUTES CORROBORATION – alleged offences occurred between 13 and 18 years before trial – judge directed jury of dangers of relying on complainant's evidence where not supported by independent evidence – judge directed that because the complainant and her mother gave the same evidence about uncontroversial matters such as the layout of houses and the years she attended certain schools, the complainant was corroborated by her mother – whether the judge misdirected the jury on corroboration

Criminal Code 1899 (Qld), s 632(3), s 668E(1A)
Evidence Act 1977 (Qld), s 53

HML v The Queen (2008) 82 ALJR 723; [2008] HCA 16, applied
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, applied
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
R v MacKenzie [2002] 1 Qd R 410; [2000] QCA 324, considered
R v UC [2008] QCA 194, followed
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: P J Davis SC, with B Reilly, for the appellant
S G Bain for the respondent

SOLICITORS: Jacobson Mahony for the appellant
Director of Public Prosections (Queensland) for the respondent

[1] **McMURDO P:** The appellant pleaded not guilty on 4 February 2008 to one count of indecent treatment of a child under 12 under his care (count 1), 17 counts of indecent treatment of a child under 16 under his care (counts 2-7, 9, 11, 13, 14, 16-20, 22 and 23), four counts of common assault (counts 8, 10, 15 and 21), one count of assault occasioning bodily harm (count 12), and one count of maintaining a sexual relationship with a child with a circumstance of aggravation (count 24). After an 11 day trial, he was convicted of 10 counts of indecent treatment of a child under 16 under his care (counts 2-5, 9, 13, 16-17, 19 and 23), three counts of common assault (counts 8, 10 and 15), and one count of maintaining an unlawful

relationship of a sexual nature with a child under 16 years (count 24). The jury also gave special verdicts which have no relevance to this appeal. He was found not guilty in respect of the remaining ten counts. (The judge directed not guilty verdicts on two counts of indecent treatment, counts 11 and 18.) The judge ordered a pre-sentence report and on 7 July 2008 sentenced the appellant to nine years imprisonment on the maintaining count and to lesser concurrent terms of imprisonment in respect of the remaining counts. The appellant appeals against his conviction and applies for leave to appeal against his sentence. Ultimately, his appeal against conviction was based on essentially two grounds. He submitted that the complainant's evidence of his sexual conduct towards her in Victoria and the documentary exhibits relating to his plea of guilty to and sentence on those counts (exs 9-11) should not have been admitted. His second contention was that the primary judge's directions to the jury concerning the complainant's evidence about the appellant's sexual conduct towards her in Victoria and Queensland which were not the subject of the present charges were inconsistent, confusing and wrong. He also contends that his sentence was manifestly excessive.

[2] On 29 July 2008, this Court allowed Mr CAH's appeal against conviction, set aside the guilty verdicts, entered verdicts of acquittal on counts 9 and 10 and ordered retrials on the remaining counts on which the guilty verdicts were set aside. The reasons for those orders are as follows.

[3] The 24 offences were charged as occurring between September 1990 and August 1995 at various places in north Queensland and south-east Queensland when the complainant was between 11 and 16 years old. The appellant was married to the complainant's mother from when the complainant was about three years old until she was 16 years old. The family lived at different addresses in Melbourne during the 1980s. The complainant's mother and the appellant had a son together in about 1985. The family moved from Melbourne to northern New South Wales for six weeks then to Darwin for about a year, next to central Queensland for two months, and then to various addresses in north Queensland for some years and later to south-east Queensland.

The evidence of sexual activity between the complainant and the appellant in Victoria

[4] In 2005, the complainant told police that between 1984 and 1987 when she was between five and eight years old and living in Melbourne, the appellant committed sexual offences against her. She also complained that between 1990 and 1995 the appellant maintained an unlawful sexual relationship with her in Queensland. The latter complaint led to the charges the subject of this appeal. As to the former complaint, the appellant pleaded guilty in the County Court of Victoria in December 2005 to counts of gross indecency and indecent assault of a person under the age of 16. Three counts involved the complainant; the remaining Victorian offences were committed against a female cousin of the complainant, H.

[5] The prosecutor in the present trial tendered "A Return of Prisoners Convicted at the Sittings of the County Court held at Melbourne and sentenced on the 15th day of December 2005" (ex 9). This recorded that the appellant was sentenced to an effective term of one years imprisonment for counts of indecent assault and gross indecency with a person under 16 years; that he was ordered to provide saliva for DNA analysis; that he was a registrable offender under the *Sexual Offenders*

Registration Act 2004 (Vic) for life and he was ordered by consent under s 85B of the *Sentencing Act* 1991 (Vic) to pay compensation to the complainant in the sum of $20,000.

[6] A document headed "Background and charges relating to [the complainant]" was also tendered (ex 10). It set out the circumstances surrounding the Victorian offences. The first occurred in this way. The appellant applied cream to the complainant's vaginal area for medicinal purposes on many nights when she was aged between five and six; she had suffered ongoing vaginal infections. One night he asked her if she had ever put her finger into her vagina. She replied that she had not. He put his finger on her vagina and told her that boys would put their penis in there.

[7] The second of these offences occurred in this way. The complainant noticed that she was growing fine pubic hair; she was showing her pubic area to her mother when the appellant walked in. He later took her to the cellar in his mother's home next door. He pulled down her pants, shone a torch on her vagina and rubbed his finger around the vaginal area, feeling for hair. When the complainant began to cry he told her she could not leave until she stopped crying.

[8] The third of these counts encompassed the following conduct. When the complainant was between five and six years old, the appellant on three occasions came into her bedroom whilst she was asleep, removed her doona and masturbated in front of her.

[9] Exhibit 10 also noted that in 1995 when the complainant's cousin, H, confronted the appellant, he admitted touching the complainant on one occasion. When he was interviewed by police in March 2005, he denied all of the offences.

[10] The transcript of the sentencing proceedings in Victoria on 7 December 2005, which included the prosecution and defence submissions, was also tendered (ex 11).

[11] In a pre-trial hearing on 24 January 2008, another judge (not the trial judge) ruled that exhibits 9 to 11 inclusive, as well as evidence from the complainant as to these events, was admissible as relationship evidence and evidence of guilty passion; it could be used "to explain lack of rebuff on behalf of the complainant or lack of complaint for a long period of time". The judge did not consider it was similar fact evidence. The form of exhibits 9 to 11 was agreed between defence counsel and the prosecutor at trial.[1]

[12] Although the pre-trial ruling pre-dated the High Court's decision in *HML v The Queen*[2], *HML* is consistent with the judge's conclusion to admit the complainant's evidence of the sexual activity between the complainant and the appellant in Victoria. Evidence of sexual acts between a complainant and an accused person not the subject of the current charges is admissible to show that the complainant's evidence on the current charges is not inherently improbable because of the nature of the relationship between the complainant and the appellant providing it satisfies the test in *Pfennig v The Queen*.[3] That test is whether there is no reasonable view of that evidence consistent with the accused person's innocence. Such evidence will

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1 Trial transcript, pp 417 – 421.

2 (2008) 82 ALJR 723; [2008] HCA 16.

3 (1995) 182 CLR 461; [1995] HCA 7.

usually satisfy that test because there will rarely be a reasonable view of it other than that it supports an inference that the accused person is guilty of the offence charged.[4]

[13] The complainant's cousin, H, gave evidence at trial that in 1995 she asked the appellant if he had touched the complainant. He said "Only a couple of times. I stopped it. I pulled myself up on it."

[14] The appellant gave evidence at trial denying that he committed the charged offences in Queensland and the sexual activity with the complainant in Victoria. He also denied making any admission to H.

The judge's directions to the jury

[15] The following judicial directions to the jury were contentious in this appeal.

[16] The judge summarised the evidence of the appellant's sexual conduct towards the complainant in Victoria and Queensland not the subject of the present charges and gave the following relevant directions:

> "Now, if you accept the complainant's evidence about these acts going back to Victoria early days and an early age you maybe satisfied that they indicate past sexual impropriety initiated by him against her and that can be used to show their true relationship, a relationship he encouraged, he developed, he caused, he brought about; also guilty passion on his part, grooming by him of her, conditioning her.
>
> It can also be relevant as to why the complainant may not have rebuked him on occasions and as to why she may have not have complained to others including her mother about that. I'll mention briefly her evidence about why she didn't complain and she was threatened with abandonment if she did, she was threatened with rejection according to her.
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> Now, in considering whether the evidence can be used in this way, this is the uncharged acts, you should have regard to the time gap between Victoria and Queensland, the last known offence in Victoria, the first one in Queensland but also have regard there to the fact that there was [northern New South Wales], there was Darwin, [central Queensland] in between. But have regard to that time gap and to the complainant's evidence of what happened or didn't happen between the last time in Victoria and the first time in Queensland.
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> Now, the evidence can also be used to explain the escalation of the seriousness of the offending from count 1 onwards in Queensland. I mean, it starts with him grabbing her breasts and it escalates, you might think, thereafter. The evidence of the Victorian acts, may also offer an explanation for or a background to the subsequent offending in Queensland. I mean, it wasn't as if it just happened out of the blue in Queensland; there was some history to it which may explain why

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[4] *HML* at 751 [107] (Hayne J), 739 [41] (Gummow J), 740 [46], 744 [59] (Kirby J), 780 -781 [287]-[289] (Heydon J), 823 [506] (Kiefel J).

it started again in Queensland. It may indicate that count 1 and the following counts just didn't happen out of the blue.

The evidence may also be evidence of an unnatural or abnormal or guilty passion by the [appellant] for the complainant at the time of the sexual offences charged in the indictment. It's evidence of a guilty passion, a guilty desire for a young child in Victoria and a continuation of that passion or desire for that same child when that child was older in Queensland and perhaps more developed, and a continuity in the relationship.

Now, admonitions by the [appellant] to the complainant at a very young age to stop crying, 'don't show you've been crying, act normally, look normally, don't tell your mother', is evidence which may explain why the complainant to an extent allowed the [appellant] to continue to do this to her and why she didn't complain until she was no longer part of his life as it were, until she was out of the way.

And even when they moved to [W] there was still an ongoing presence. It wasn't as if he had disappeared forever. He was coming and going. They may not have - he and her mother may not have been living, in all respects, as man and wife but he'd turn up and he was still to that extent, a presence in the complainant's life.

The uncharged acts in Queensland, if you accept the complainant's evidence, also show the true and complete nature of the relationship between the [appellant] and the complainant thus placing the events charged in their proper context. Also taken as a whole, the evidence could demonstrate a pattern of grooming or conditioning as I said and accustoming the complainant to sexual contact and the evidence in the context of resuming a course of conduct might explain the complainant's failure to react with surprise to particular charged acts and also his confidence that the complainant would submit to them and submit to, effectively without public complaint to what he was doing.

A failure by the complainant to complain about individual acts until she did, might well be explicable if the charged offences are seen as part of a pattern that continued for some time.

Now, the [appellant] is charged with only the offences set out in the indictment and as I said, you must consider each of those charges separately. If you have a reasonable doubt about an essential element of a particular charge, you must find the [appellant] not guilty.

Now, you should have regard to the evidence on the uncharged acts only if you find that evidence to be reliable and only if you accept the complainant there but you must - if you do accept it and you are satisfied that those incidents happened, you must not use the evidence to conclude that the [appellant] is someone who has a

tendency to commit that type of offence which he is so charged or a propensity.

It would be quite wrong for you to reason that you were satisfied he did those acts on the other occasions and therefore he is likely to have committed the charged acts. You have to consider the evidence about the charged acts separately but supported by the uncharged acts if you find them to have occurred.

Further, you should not reason that he had done the uncharged acts on the other occasions and therefore should be convicted of the offences charged without considering the evidence relating specifically to the offences charged. So the evidence of those uncharged acts comes before you for just the limited purposes that I have mentioned to place everything in context and to explain behaviour and before you can find the [appellant] guilty of any charge, you must be satisfied beyond reasonable doubt that that charge has been proved by evidence relating to it.

And as I said, if you don't accept the complainant's evidence relating to the incidents not the subject of charges, you can take that into account in considering her evidence relating to the alleged events the subject of the charges.

[17] The judge then directed the jury as to the evidence capable of corroborating the complainant's evidence:

Now, ladies and gentlemen, in a case of this nature where sexual misconduct is alleged by the complainant, you must approach her evidence with great care and with caution. You should scrutinise her evidence carefully and you need to be satisfied of its accuracy and reliability beyond reasonable doubt before you can convict.

Human experience in the Courts is that complainants in such matters for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate and very difficult to refute. Now, I'm not suggesting for one moment that the complainant told a false story but I'm telling you that this is a matter that you must consider in your evaluation of her evidence.

So in such cases, it is important to consider whether the evidence - whether there is evidence corroborating the evidence of the complainant, that is, evidence which confirms or supports or strengthens her evidence in that it renders it more probable. It is evidence which confirms in some material particular that the offences took place and the [appellant] was the man who committed them. It's evidence which strengthens the evidence of the complainant by confirming or tending to confirm the [appellant's] involvement in the events as related by the complainant.

Now, here there is evidence which is capable of corroborating the complaint. Whether it does so or not, is a matter for you because it is

a question of fact whether the evidence is capable of corroborating her, that is supporting her evidence. Now, you are unlikely to get corroborating evidence supporting the precise offences in cases like this unless there is an eyewitness and offences like this do not normally happen in the presence of eyewitnesses.

So, you look for other areas where the complainant's evidence may be supported and Exhibits 2, 4, 5, 6 and 7 provide some support. Exhibit 4 to the end of 'only of the school year', some parts provide support for some of the dates she mentions. Five, six and seven are the diagrams - the sketches drawn of the houses by her mother and they are capable of supporting her evidence and the descriptions she gave of the houses at different stages when she lived there.

The documents relating to the Victorian offences, Exhibits 9, 10 and 11 and the plea of guilty to those offences by the [appellant], if you accept that he did plead guilty and he's lying about the circumstances there, that corroborates her evidence in relation to those offences and it is capable of corroborating her evidence generally.

The complainant's mother gave evidence which is capable of corroborating the complainant, there was a cellar in the [C] house. That is also apparent from Exhibit – the Court documents in Victoria. She said there was a pool shed, or a garden shed at the pool. She said the [appellant] applied cream to the complainant's vagina. She said there were parties at the [C] house where there was drinking. She said there was a complaint by the complainant that the [appellant] kicked her. She says there were swimming pools at the houses in Darwin. She said that they did go to [northern NSW], then Darwin, then [central Queensland], then [T B] as the complainant said they did. She confirmed the complainant's schooling at [T B]. She gave evidence of the state of the [T B] and the view from that house. She confirmed they had horses there and the move to [M M] for the ascension and she also confirmed back problems on the part of the [appellant], the move to live at the [N] clinic, the move to [T] before [B], [C] and the move to [W] with the children. She confirmed at the [T B] that - a meditation room, she supported the complainant you might think as to the location of other features in that house including the bathroom, birdcage, the rock wall at the back, sliding doors to the veranda, over to the complainant's room from the veranda and there were chooks there. She also referred to horse feed bins in [T]. She said I think she had to bend over to reach in herself. She referred to a creek at the [C] house. She described the [T] house and the [C] house. She also gave details of the Gemini motor vehicle. She also referred to wrestling in - the [appellant] wrestling in the Queensland houses with [the complainant]. She referred to the [appellant] taking his clothes off at [C] and she referred to the [appellant] assaulting the complainant on occasions.

In fact, she said -

> 'Did you ever see the [appellant] discipline [the complainant]? Yes.
> How? Well, he used to lash out all the time. What do you mean? Like, I saw him hit her across the face with a broom in the horse truck. And clinic saved-----? No, that was on the [G C], we were quarantined before we could break the - I've seen her slap him, I've seen him pull her hair, I've seen him do all sorts of things, like, violent things but not sexual things. Did he ever hit her with consecutive blows? Oh, he used to hit her, yeah. Did he ever refer to that with any particular term, did he have a term for it? Well, he was explosive and he would just go whack and start - he was scary.
> What about using his feet? Yeah, it was like sort of, went off like - he sort of went off like a rocket, he was big and he was a bully. Did he ever kick this girl I've seen him kick her, I've seen him hit her, I've seen him pull her hair, I've seen him----- Did you ever see him kick her, do you recall a specific time that he kicked her? I didn't see him kick her when her arm was broken, I've seen him pull her hair in [C], I've seen him slap her across the face in [T B].'

And this is her, continuing in cross-examination:

> 'Did [the complainant] sometimes tell you that the [appellant] pulled her hair and that he would punish her by smacking her? I've seen him pull her hair and I've seen him hit her, I've seen it.'

She said:

> ' 'He hit me again', I've heard her say things like that, we were scared of him, he was a bully. He used to throw things and furniture and all sorts of things. We tried to stay away from him as much as possible. He exploded frequently.'

And in his evidence, the [appellant] said:

> 'When you were living with [the complainant and her mother and brother], were there times when you needed to discipline the children? Yeah, for sure, yeah, both of them, used to give them a bit of a whack on the bum, just a whack on the bum, things like that.'

The complainant's mother also gave evidence of occasions when the [appellant] may have been at home by himself with the complainant at [various places in Queensland].

[The mother] is also capable of corroborating the complainant to the extent that she said - she referred to [the complainant's] ongoing vaginal infections as a child and the [appellant] himself also referred to the vaginal infections.

Now, the [appellant] in his own evidence is capable of corroborating the complaint. He referred to the complainant's vaginal infections and applying cream to the vaginal area. He said that the complaint suffered vaginal infections from an early age and at [C] he probably told her not to sleep with underwear to air her vagina. He admitted showering with her, once or twice, at [C]. He said that he last showered with her at [C] when she was little, never in Queensland. He admitted kicking her in [C] and injuring her wrist. He admitted that he made up a story for the doctor the next day. He admitted there was a cellar at his mother's house. He denied that the offence though happened. He also gave evidence of the fact that there was a cutting at the back, not a rock wall he said, but a cutting with rocks in it, at the back of the [T B] [h]ouse.

He said he may have told [the complainant] to close the chook shed door at [T B] - may have happened. Count 8 is an offence involving the opening and closing of the chook shed door. There was molasses for horse feed at [T B] and [K B]. There was an electric fence at [T], which [the complainant] turned off and on, on occasions. Count 17 involves the electric fence.

He said that [the complainant] took the master bedroom, with ensuite, at [C] shortly after they moved in. He admitted taking the complainant to the wine cellar at his mother's house on more than one occasion - was denying that he did anything to her there. He admitted taking there on more than one occasion. He admitted giving her cuts, or striking her, could've been on the head or the shoulder, outside the fish and chip shop. At [C], he said he sometimes dried himself naked in front of a heater. He would walk naked from the bathroom to the heater.

In Queensland, on occasions, he said he might have walked naked from the swimming pool to the house after dropping his togs on the ground before going inside. At [C], he said sometimes he and his wife allowed [the complainant] to have an alcoholic drink, or drinks. And there is, as I said, Exhibits 9, 10 and 11, the Victorian documents, which, if you accept them, and you reject the [appellant's] account of how he came to plead guilty in Victoria, clearly are capable of corroborating the evidence of the complainant because they amount to admissions by him that what she says happened did, in fact, happen.

There is the admission to [the complainant's cousin, H] and that admission is referred to in Exhibit 10, Ladies and Gentlemen, in the agreed statement of facts, in the second last paragraph, where it says,

> 'In 1995 [H] confronted the [appellant] at a farm address near [M]. The [appellant] admitted to touching [the complainant] on one occasion.'
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> Now [H] said this, Ladies and Gentlemen, that she was living at her father's property at [M] in 1995.
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> Now the [appellant] came to visit her father. She spoke to him and she said, 'I asked him if he'd ever touched [the complainant] and he said to me 'Only a couple of times. I stopped it. I pulled myself up on it.'
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> In his address to you [defence counsel] said, of [H's] evidence, 'That evidence is a lie. She is lying.' Well it was never put to her that she was telling lies in cross-examination. It was never suggested by the defence, to [H], that she was lying when she said that. Now if you accept her evidence there, that's an admission by the [appellant] as to touching [the complainant]. It's a matter for you whether you infer from that it's really - it is inappropriate touching.
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> Now - so if it was an admission, you find, to inappropriate touching, that would support the complainant's evidence in a non-specific sense, but as I said, it is consistent with the agreed statement of facts.
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> That is the evidence which is capable of corroborating the evidence of the complainant. It's a matter for you whether you think it does. The [appellant's] lies about Victoria, if you find them to be lies, are also capable of corroborating the complainant and I'll tell you how in just a moment."

[18] The judge next directed the jury to take particular care in assessing the complainant's evidence because of delay:

> "Now there are added reasons here, also, Ladies and Gentlemen, for caution and care in this case and they are, firstly, the age of the complainant at the time of the alleged offences and her age now. She is 28 now and she was aged between 11 and 15 or 16 at the time of the Queensland offences but the Victorian offences go back to when she was aged 5 or 6. So you have to bear in mind that she is giving evidence, as an adult, of what happened to her as a child. And so you have to consider that and take account of that because children, it may come as no surprise to all of you, have fertile, and sometimes fanciful imaginations, and they've been known to invent accounts which bear no relationship to truth, particularly where sexual matters are concerned. A young child may have difficulty in fully understanding or in remembering and describing events that happened some time past and many of these events happened quite a way in the past.
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> And the other reason for caution here is the delay between when the offences are alleged to have occurred and now. The last offence is alleged to have occurred in Queensland no later than the 28th of

August, 1995, and it's now February 2008. Delays like that can lead to mistakes or inaccuracies in the complainant's evidence which could be due to the lapse of time since the events occurred, or it could be due to the fact the events described did not occur.

An accused is placed in a difficult position in a case such as this because the complainant gives evidence of what happened, and in doing so goes into details. That's so whether it's accurate or not, and the accused, in such a situation, is often left with no option other than to simply deny these allegations. If a complaint be made early, he may have been able to say, for example, 'Well look, I've got evidence that I was elsewhere. I wasn't there at the time' but if a complaint is made 10 years later, for example, it's difficult for an accused person to deal with that.

By the same token, you have to bear in mind the evidence here about why the complainant said she did not complain, if you accept her. Another important aspect of delay is the possibility of error or error in the complainant's recollection, having regard to her youth at the time of the alleged offences. Notwithstanding that the complainant may be a truthful witness, in the sense that she believes what she said, her evidence might, nevertheless, provide an inadequate foundation for a finding of guilty, beyond reasonable doubt.

As I said, delay may reduce the opportunity to test her evidence and might provide an inadequate foundation for a finding of guilt beyond reasonable doubt.

As I said, delay may reduce the opportunity to test or adequately test the complainant's evidence and that's a reason for scrutinising her evidence with great care in determining whether you are satisfied about its truth and accuracy.

In any case, where the prosecution depends, as it does, basically here, solely upon the evidence of the complainant, you should carefully scrutinise her evidence before acting on it. With delay, as I said, comes the potential for error in the evidence of the complainant.

Experience has shown that human recollection, particularly in the recollection of events occurring in childhood, is frequently erroneous and liable to distortion by reason of various factors and the likelihood of error increases with delay; the longer the delay, the greater the chance of error.

So, you must bear those matters in mind when you are considering the evidence of the complainant and the position which the [appellant] was placed in."

[19] His Honour then returned to the question of lies, which the judge had earlier told the jury were capable of corroborating the complainant:

> Now, I want to deal now with the issue of lies. The prosecution says that there are four lies of relevance here. These are lies by the [appellant]. One, 'I did not commit the offence' in the first charge in Exhibit 10, the first Victorian charge.
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> The second lie, 'I did not commit the offence in the second charge', referred to in Exhibit 10.
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> Third lie, 'I did not commit the third offence charged' in Exhibit 10, or, 'I did not admit to [H], to touching [the complainant] on one occasion'.
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> Now, the prosecution says that those are lies told by the [appellant] and they show that he is guilty of the offences charged or at least has certainly admitted to the three uncharged offences.
>
> Ordinarily the telling of a lie will merely affect the credit of a witness or the person who tells it. A lie told by an accused may go further and in limited circumstances amount to conduct which is inconsistent with innocence and amount therefore to an implied admission of guilt. In this way, the telling of the lie may constitute evidence and when it does so, it may amount to corroboration.
>
> If you disbelieve him about the circumstances under which he pleaded guilty in Victoria, well, that is the Victorian evidence amounts to admissions of past offending and can be used in the way I've told you. It would also amount to corroboration.
>
> Also, if you find that he told lies about those matters, the four lies I've mentioned here, then the fact of those lies can also be used by you.
>
> But before you can use such evidence against the [appellant] you must be satisfied of a number of matters. And unless you are satisfied of all of these matters, then you can't use the evidence against him, otherwise than as relevant to his credit.
>
> First you must be satisfied that he has told a deliberate untruth. Firstly you must be satisfied that he deliberately told lies in the witness-box when he said he did not commit these three offences in Victoria and he did not say that to [H].
>
> There's a difference between the mere rejection of a person's account of events and the finding that a person has lied. In may cases where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The [appellant] may have been confused or there maybe other reasons which would prevent you from finding that he's deliberately told an untruth. To conclude that a statement is a lie is to conclude that the truth is elsewhere.

> Now, secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offences charged, that is, it relates to a material issue. I mean, these lies were you to find them lies, would clearly relate to circumstance or events connected with the charges here. You can only use a lie against the [appellant] if you are satisfied having regard to those circumstances and events that it reveals a knowledge of the offence or some aspect of it.
>
> And thirdly you must be satisfied that the lie was told because the [appellant] knew that the truth of the matter would implicate him in the commission of the offences charged.
>
> In other words if he got in the witness-box here and said, 'Yes, I did do that in Victoria', well, he would know that that would implicate him in the offences charged here in the sense that he would've admitted three uncharged acts which you could use in considering whether he committed the offences charged in the way I've previously mentioned to you.
>
> The [appellant] must be lying because he is conscious that the truth would convict him. There maybe reasons for the lie apart from the realisation of guilt. People sometimes have an innocent explanation for lying. For example, to bolster up a just cause, out of shame, out of a wish to conceal embarrassing or disgraceful behaviour. A lie maybe told out of panic or confusion or to escape an unjust accusation or to protect some other person or avoid a consequence extraneous to the offences charged.
>
> The statement, each of those four statements, each of those four alleged lies must be shown to be lies by evidence other than the complainant.
>
> Now, if you accept - if you reject the [appellant's] evidence and accept the evidence from the Victorian documents, then they are capable of proving the lies."[5]

Discussion and conclusion

[20] The appellant contends that the judge's directions to the jury on the use to be made of the evidence of the sexual activity in Victoria and Queensland which were not the subject of the present charges, on corroboration of the complainant's evidence in general and especially on lies as corroboration, were confusing and wrong.

[21] The trial judge's directions as to the way the jury should deal with the evidence of the appellant's sexual conduct towards the complainant in Victoria and Queensland which were not the subject of the present charges[6] were given before the High Court decision in *HML*. That explains why the judge erred in not directing the jury in the

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5 Errors as in the original transcripts.

6 Set out in [16] of these reasons.

terms set out by Hayne J in *HML*,[7] namely that, before acting on it, they must be satisfied beyond reasonable doubt that the alleged sexual conduct between the appellant and the complainant in Victoria and Queensland which were not the subject of the present charges occurred.

[22] The judge also erred in directing the jury that the evidence of a complainant in a sexual matter should be approached with caution.[8] This direction contravened s 632(3) *Criminal Code* 1899 (Qld). It was, however, an error which favoured the appellant.

[23] In any case, it was necessary to inform the jury of the need for caution before acting on the complainant's evidence because of the significant delay between when the charged offences were alleged to have occurred and her complaint to police in 2005: *Longman v The Queen.*[9] Later in his summing-up, the judge gave an appropriate direction in the terms required by *Longman*.[10] Whether the complainant's evidence was supported by other independent evidence was therefore an important consideration for the jury in determining whether the prosecution had established the appellant's guilt beyond reasonable doubt. The judge's directions on corroboration[11] invited the jury to consider that any evidence on any point, even on peripheral and uncontentious aspects of the evidence, was capable of corroborating the complainant. The essential issue at trial was whether the complainant's evidence that the appellant committed each charge could be accepted beyond reasonable doubt. There was a direct conflict between the evidence of the complainant and that of the appellant on this issue on each charge. In determining whether, despite that conflict, the jury were satisfied beyond reasonable doubt that the complainant's evidence as to the commission of any count was reliable, it was necessary for the jury to clearly understand what was and was not capable of supporting the complainant's evidence as to the commission of an offence or offences. The judge's directions that the complainant's evidence was corroborated on uncontentious peripheral issues such as the layout of houses, the dates when she had attended various schools, and that she had suffered vaginal infections, actively misled the jury on these crucial matters.

[24] Those errors were further compounded by the judge's directions as to how lies could be used as corroboration. The appellant gave evidence that he was not guilty of the Victorian offences but had pleaded guilty to them because he understood that if he did so he would not be imprisoned; because of the high cost of going to trial; and because he understood that, if he pleaded guilty, the Queensland charges would be dropped.

[25] The appellant's convictions on his own plea of guilty to the three Victorian offences were absolute proof of his guilt in the proceedings for those offences, there being no evidence that the convictions were set aside or overturned on appeal. Section 53 of the *Evidence Act* 1977 (Qld) provides the means to prove a conviction and sentence through a certificate from an appropriate court officer. The appellant's convictions on the Victorian offences did not prohibit him from denying his guilt in respect of

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7 *HML* at 766 [196], 739 [41], 744 [61], 823 [506]. See also *R v UC* [2008] QCA 194 at [15], [44], [64].

8 Set out in the italicized portions of [17] of these reasons.

9 (1989) 168 CLR 79; [1989] HCA 60.

10 Set out in [18] of these reasons.

11 Set out in [17] of these reasons.

them in the present trial concerning different offences. In the present trial he was entitled to explain why he pleaded guilty to the Victorian offences even though he now claimed he did not in fact commit them. The persuasiveness of such a contention would, of course, be a matter for the jury. As Brennan, Toohey and McHugh JJ explained in *Meissner v The Queen*:[12]

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."[13]

[26] The appellant's case was that he did not commit any sexual offences involving the complainant, either in Victoria or Queensland, and that he did not make any admission to the complainant's cousin, H. In those circumstances, the judge erred in directing the jury that the appellant's four statements set out in the judge's directions above[14] were capable of being shown to be lies if they accepted the evidence contained in the Victorian documents (exs 9 – 11) and the evidence from H that the appellant admitted to touching the complainant. A significant part of the prosecution case in the present trial was the appellant's sexual conduct with the complainant in Victoria, the support for that aspect of her evidence in the documentary exhibits 9 – 11 and the evidence of the appellant's admission to H.

[27] Ms Bain, for the respondent, in her customary evenhanded way, rightly conceded that the prosecution could not rely on the evidence of the Victorian offences and the appellant's admission to H as capable of corroborating the complainant's evidence as lies showing a consciousness of guilt. That is because the prosecution relied on the proof of the Victorian offences and the admission to H as steps in the proof of the prosecution case against the appellant: *HML*.[15] The appellant's evidence contradicting that evidence was central to his defence on the present charges and could not be treated as lies capable of corroborating the complainant's evidence and proving his guilt on the present charges. This aspect of the judge's directions was also wrong.

[28] Ms Bain fairly and rightly further conceded that the complainant's evidence on counts 9 and 10 was so general and so unspecified that it was insufficient to meet the particulars provided by the prosecution on those counts and that the convictions on counts 9 and 10 should be set aside and verdicts of acquittal entered on those counts.

[29] Despite the manifold and serious errors in the judge's directions to the jury, Ms Bain urged this Court to dismiss the appeal against conviction on the remaining counts

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12 (1995) 184 CLR 132; [1995] HCA 41 at 141.

13 Footnotes omitted. See also *R v MacKenzie* [2002] 1 Qd R 410; [2000] QCA 324 at [6].

14 Set out in [19] of these reasons.

15 *HML* at 766 [196] (Hayne J). See also *R v UC* [2008] QCA 194 at [44].

other than counts 9 and 10 because no substantial miscarriage of justice had occurred in the jury's returning of the guilty verdicts: s 668E(1A) *Criminal Code*. I cannot accept that contention. The primary judge's multiple errors amounted to such a significant denial of procedural fairness that it is impossible to conclude that no substantial miscarriage of justice has actually occurred in this case: *Weiss v The Queen*.[16]

[30] For those reasons, on 29 July 2008, this Court allowed the appeal and set aside the guilty verdicts. The appellant rightly did not contend that the jury verdicts, other than on counts 9 and 10, could not be supported having regard to the evidence. It was necessary to order a new trial on the counts on which the appellant was convicted, other than counts 9 and 10. The orders made on 29 July 2008 are set out in [2] of these reasons. As the appeal against conviction was allowed, it is unnecessary for this court to deal with the application for leave to appeal against sentence. Nor is it necessary to say anything further about the format of exhibits 9 to 11, which was agreed between counsel at trial. The format of any such exhibits at any re-trial will turn on the approach adopted by counsel on what will be a very different trial on far fewer counts.

[31] **MACKENZIE AJA:** I agree with reasons given by McMurdo P for the orders delivered on 29 July 2008.

[32] **DUTNEY J:** I agree.

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16 (2005) 224 CLR 300; [2005] HCA 81 at 316 – 318.