SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rae* [2008] QCA 385
PARTIES:	**R** **v** **RAE, Alan Thomas** (appellant)
FILE NO/S:	CA No 58 of 2008 DC No 646 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Hervey Bay
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2008
JUDGES:	Muir JA, Mackenzie AJA and Daubney J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where appellant convicted of four counts of indecently dealing with a child and one count of exposing a child to an indecent picture – where, at trial, evidence adduced in respect of ten incidents not the subject of charges – where, in summing up, the trial judge referred to these incidents as 'uncharged acts' – where the summing up did not include an express direction that the standard of proof in respect of each of the incidents was 'beyond reasonable doubt' – whether the directions given by the trial judge were appropriate CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where appellant contended that it was open for the jury to find that, even if the contact alleged in the indecent dealing counts occurred, it was not unequivocally a sexual touching – where the appellant's case at trial was that the touching had not occurred – whether the trial judge should have directed the jury that the acts had to be accompanied by an intention to gain sexual gratification

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where, at trial, the defence counsel did not ask the judge to direct the jury in respect of a defence of accident – whether the trial judge should nonetheless have given such a direction

APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – OTHER IRREGULARITIES – where appellant contends that the jury were not given sufficient particulars of three of the indecent dealing counts – where prosecutor's opening gave details of these counts – whether counts of indecent dealing sufficiently particularised

Criminal Code Act 1899 (Qld), s 210(1)(a), s 210(1)(e)

HML v The Queen (2008) 82 ALJR 723; [2008] HCA 16, considered
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
R v BAS [2005] QCA 97, considered
Harkin v R (1989) 38 A Crim R 296, applied
R v R [1998] QCA 83, applied

COUNSEL: P E Smith for the appellant
T A Fuller for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Daubney J and with the order he proposes.

[2] **MACKENZIE AJA:** I have had the benefit of reading Daubney J's analysis of the learned trial judge's summing up and of issues raised by *HML v The Queen* in relation to the approach that should be followed when summing up in cases where evidence formerly described as "uncharged acts" is involved. I accept what he has written as accurate for the purposes of this case.

[3] I am satisfied, for the reasons he gives, and independently, that the terms of the summing up were sufficient, and that no miscarriage of justice could have resulted from its terms. I agree with the orders proposed.

[4] **DAUBNEY J:** On 8 February 2008 the appellant was convicted, after trial by jury, of four counts of unlawfully and indecently dealing with a child under 16 years at a time when she was under 12 years of age (Counts 1, 2, 3 and 5) and one count of

exposing a child under the age of 12 to an indecent picture (Count 4). The conduct was alleged to have occurred on dates unknown between 1 March 2005 and 30 June 2005. The appellant was sentenced to 15 months' imprisonment on each offence, to be served concurrently.

[5] The appellant has appealed against his convictions. An application for leave to appeal against sentence was also filed, but was abandoned at the hearing. That application was dismissed.

[6] The circumstances in 2005 under which the appellant, then aged 34, came into contact with the complainant, a girl aged eight at the time, may be summarised as follows. The appellant was in a relationship with D, a female friend of the complainant's mother, for a time in 2005. At that time, the complainant and her family spent their weekends on a farm outside Maryborough. The appellant visited the farm regularly, and would stay there on weekends, even after his relationship with D had concluded. The appellant spent much time with the complainant, including allowing her to drive vehicles which he had brought to the farm. Some of the conduct which formed the basis of the counts occurred during these driving episodes. The other conduct occurred when the appellant took the complainant to his father's house, where he exposed her to indecent material on a computer and kissed her.

[7] In mid-2005, the complainant told D that the appellant had touched her inappropriately. D told the complainant's mother and another male about those disclosures. The matter was referred to the police, who interviewed the complainant on 13 June and again on 16 June 2005.

[8] The appellant was originally charged with:

- five counts of indecent dealing with a child;
- two counts of exposing a child to an indecent object; and
- one count of exposing a child to an indecent act.

[9] These charges proceeded to trial in the District Court in February 2007. The appellant was found not guilty of one of the charges of exposing the child to an indecent object, one of the charges of indecent dealing, and the charge of exposing the child to an indecent act. The jury was unable to reach a verdict on the other charges.

[10] Those other charges were the subject of the trial which led to the convictions now challenged.

[11] The evidence led at trial by the prosecution was from the following witnesses:

- the complainant, in the form of the interviews in 2005 and also by pre-recorded evidence;

- the complainant's younger brother, in the form of a police interview on 13 June 2005 and pre-recorded evidence for the trial;

- the complainant's mother;

- the mother's friend, D;

- the mother's male friend whose family owned the farm;

- an employee of the appellant;

- an investigating police officer, through whom the record of a police interview with the appellant on 14 June 2005 and some of the physical evidence was tendered.

[12] As further details of the matters which emerged in evidence as founding the case against the appellant will be recounted below, it is unnecessary to set those out in detail at this point, save to observe that the only witness whose evidence went directly to the conduct underlying the charges was the child complainant. The records of interview and her pre-recorded evidence contain evidence of varying degrees of physical and emotional contact between her and the appellant, ranging from the appropriate to the physically intimate.

[13] When arguing the appeal against conviction, counsel for the appellant advanced four contentions from which he asserted the Court ought conclude that the verdicts were unsafe or unsatisfactory:

(a) That the jury had been exposed to evidence relating to the charges in respect of which the appellant had previously been acquitted;

(b) That at no stage were sufficient particulars given as to the occasion on which Counts 1, 2 and 3 occurred so as to distinguish those from the other counts;

(c) That the learned trial judge's directions to the jury were insufficient, particularly with respect to the matters on which the jury needed to be satisfied when considering the indecent dealing charges;

(d) That the learned trial judge's directions in respect of 'uncharged acts' referred to in the evidence were inadequate or defective.

Evidence in relation to the charges previously acquitted

[14] It was initially argued that evidence had been put before the jury in relation to the matters underlying the charges on which the appellant had previously been acquitted. This submission was founded in the fact that the appeal record contained complete and unedited transcripts of the statements which had been given by the complainant, her brother, and the appellant. In the course of argument, however, a review of the transcript of discussion between the learned trial judge and the

prosecution and defence counsel made it clear that the recordings which had been played to the jury in this trial had, in fact, been edited to exclude references to the previously acquitted counts. Counsel for the prosecution and defence who appeared on the appeal, neither of whom had appeared at the trial, were then given the opportunity to review the evidence which was actually placed before the jury for the purposes of clarifying whether the appellant could, or desired to, persist with this argument.

[15] Counsel for the appellant and the respondent subsequently informed the Court that both parties agreed that evidence of the acquitted counts was not placed before the jury at the subject trial, and in those circumstances the appellant abandoned his arguments concerning that matter.

[16] It is therefore unnecessary to consider this matter further.

Particulars of the charges

[17] The appellant's complaint before this Court (on the basis, at least, of the portion of the trial transcript reproduced in the appeal record) was that there were no sufficient particulars given by the prosecution as to the particular occasions upon which it was contended that Counts 1, 2 and 3 occurred so as to distinguish those counts from the other counts.

[18] I should observe that the transcript contained in the appeal record did not (as is frequently the case) set out a transcript of the prosecutor's opening. In the course of argument, however, attention was drawn to the following observation by the learned trial judge, recorded as having been made immediately after the prosecutor concluded opening the Crown's case:

> '... counts 1 and 2 are bracketed together because they both involve driving lessons. And for count 1 I've put "touching of the breast", and in count 2, "touching of the private parts". Count 3, I've put "driving lesson and a kiss for every lap". Count 4, I've ringed the word "[BA]" so, you can see that counts 4 and 5 are at the accused's residence rather than at the property, which are counts 1, 2 and 3. Count 4 is showing a sexual image from the computer. Count 5 is – I've summarised as "two kisses".'

[19] These observations by her Honour clearly raised a question as to the content of the prosecutor's opening, and whether, in fact, the prosecutor had given particulars of the individual charges in the course of his opening.

[20] It was agreed in the course of argument by counsel for the appellant and the respondent that it was appropriate and necessary for the Court to be provided with a copy of a transcript of the prosecutor's opening address for the purposes of this Court being satisfied as to what was actually said by way of particularising the charges against the appellant.

[21] After the hearing of argument on this appeal, a transcript of the prosecutor's opening was provided to the Court.

[22] Having reviewed that transcript, it is clear to me that the prosecutor did, in fact, sufficiently particularise the events said to underpin each of the charges in the course of his opening. It is sufficient to quote the following part of the prosecutor's opening:

> 'Now, as for what she says: well, you'll hear about it in her police interviews, primarily. You'll also hear about it in the evidence. The first thing you'll hear is a police interview. Now, she doesn't quite go through it in order as they appear in the chronological order or the order they appear. So I'll go through it in the order that she talks about it.
>
> She talks about counts 1 and 2 first. Now, both of those occurred in the course of the accused giving her driving lessons. You'll hear about those from – or in the evidence of the child, but also other witnesses. And he gave her those lessons in a van where she had to sit on his lap. That was at the property at [BR], and in the – she'll tell that in the first – well, one of those lessons – the first – but he touched her on the top of her shirt in the chest or breast region. So, that's the first incident: that's count 1 which you'll hear about.
>
> A little later in one of the interviews she says that at that time he also said he wanted to kiss her breasts. So, that's count 1: happens in the course of a driving lesson.
>
> Count 2 is that – well, it's – also happens in the course of a driving lesson. But on that occasion you'll hear that she – well, she says he touched her on her private parts. She actually uses those terms. And so they're counts 1 and 2. Count 1 touching on the breasts in a driving lesson; count 2 touching on the private part.
>
> The next count you hear about is actually count 4. And it occurred when she was at his residence at or near [BA]. And it consisted – well, you'll hear her give evidence that he showed her sexual images on his computer depicting persons engaged in sexual activity. And he also has spoken to her about what those sexual – I mean, given labels to those sexual activities. But the count itself consists of showing her these sexual images on the computer when she was at his residence.
>
> The next count she talks about is count 3, again occurred in the course of a driving lesson, again at the farm at [BR]. She was again driving and he – you'll hear evidence that he required a kiss from her each time they did a particular distance or lap. So, he wanted a kiss for each lap. So he wanted a kiss for each lap and that's what happened.

> And finally count 5, again happens at the residence of the accused at [BA]. She was there with him and he was shaving and he kissed her both before and after he shaved.'

[23] As Dowsett J observed in *R v R* [1998] QCA 83, the general rule, as a minimum requirement, is that it is necessary 'that there be sufficient particularity in the allegations to demonstrate one identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence'. This is, to adopt the words of Fitzgerald P in the same case, to allow the accused, who was presumed to be innocent, to identify the occasion to which a count relates.

[24] It seems to me that this passage in the prosecutor's opening did give sufficient particulars of each of the counts. It would certainly appear from the learned trial judge's observations immediately after the prosecutor's opening, and indeed from her Honour's summing up, that the prosecutor had adequately identified the occasions which were the subject of each of the counts. It is also notable that the appellant's trial counsel neither requested particulars at any stage nor raised any complaint of being under any misapprehension as to what occasions were being alleged to comprise each of the counts on the indictment.

[25] Having had the benefit of reviewing the transcript of the prosecutor's opening (which was not available at the time of the hearing of this appeal), I am satisfied that the charges against the appellant were sufficiently particularised.

The summing up on the indecency charges

[26] The appellant submitted that, when summing up, the learned trial judge did not properly put the defence case to the jury. There were several aspects to this argument:

(a) that the jury should have been, but were not, directed that if each act alleged in Counts 1, 2, 3 and 5 occurred, the prosecution still had to prove beyond reasonable doubt that the act was accompanied by an intention to gain sexual gratification;

(b) that, notwithstanding that the defence of accident was not contended for by defence counsel at trial, the trial judge should, on the appellant's version, have directed the jury with respect to accident. Further, in respect of Count 4, it was submitted that, on the appellant's version that he did not wilfully expose the complainant to indecent material, the trial judge should have, but did not, explain to the jury that if this was a reasonable possibility or it could not be excluded beyond reasonable doubt, then the appellant was entitled to be found not guilty.

[27] The offences with which the appellant was charged fall under subsections 210(1)(a) (in respect of Counts 1, 2, 3 and 5) and 210(1)(e) of the *Criminal Code*:

> 'Any person who –

(a) unlawfully and indecently deals with a child under the age of 16 years; or

...

(e) without legitimate reason, wilfully exposes a child under the age of 16 years to ... any indecent film, video tape, audio tape, picture, photograph or printed or written matter;

...

is guilty of an indictable offence.'

[28] In the course of her summing up, the trial judge said to the jury:

'If I could explain to you the offence, which is unlawful and indecent dealing, deals with – has a definition. It includes touching and it is not an issue in this trial, but if the accused did the things which are included in the five counts, then they would be indecent dealing. Count 1, of course, is the touching of the breast; count 2 is the touching of the private parts; count 3 is the kiss during the driving lesson; count 4 is the exposure to the image on the computer; count 5 are the two kisses at his residence. All of those, if they occurred, and he has put the Crown to proof as to whether they in fact occurred, and he has denied that they occurred in his record of interview; if you are satisfied beyond a reasonable doubt that they occurred, in the way that she alleges, then I would think you would not have any difficulty in arriving at the conclusion that there had been a dealing.

The next element of the offence is that the dealing must be indecent. The word indecent bears its ordinary, every day meaning; that is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances. Now, it is a matter for you, as to whether there was, first of all a dealing, and secondly, whether it was indecent. You might need to reflect on that more carefully when it comes, for example, to the driving lessons. You might need to look carefully at the evidence and make a finding of fact as to what it is that the accused did and whether what he did was indecent. That is a matter for you. The dealing must be unlawful, that is, not justified, authorised or excused by law. That is not an issue in this trial.'

[29] The contention that there should have been directions that the acts had to be accompanied by an intention to gain sexual gratification was said to be derived from *R v BAS* [2005] QCA 97. That case was quite different from the present. Fryberg J, with whom Davies and McPherson JJA agreed, said at [12] that the circumstances of that case 'were, to say the least, unusual', and continued:

'The conduct in question took place between September 2001 and March 2002. It consisted of acts of touching of breasts by hand and

> by machines, blowing air on to a breast, touching an area between the anus and the vagina with a machine and digital penetration of vaginas. The acts were performed on seven young women: two from one family, four from another and one who was a close friend of one of those four. One from each family was under 16 years of age. All consented to the acts in question. The Crown alleged that their consent (and that of their mothers) was obtained by fraud or, in the case of the two aged under 16, that consent was irrelevant. The Crown case was that the appellant dishonestly represented that his conduct was for the purpose of "alternative therapy" when in fact his purpose was prurient. That purpose made it indecent and the dishonest misrepresentations meant that the women's consent was obtained by fraud. In the main the appellant admitted the relevant conduct. He had not attempted to conceal it (in the case of one girl, most of the conduct took place in the presence of her mother, who sometimes participated in the procedures). The defence case was that the purpose of the treatment was therapeutic, that was its nature, and if it was not, the defendant at least believed it was therapeutic. Consequently there was no fraud or indecency.'

[30] At [15] – [18], Fryberg J considered a direction given by the trial judge in that case going to whether, in order to convict, the jury had to be satisfied beyond reasonable doubt that the appellant's purpose in doing the relevant acts was not therapeutic, and in that context quoted an extract (appropriately abridged for the purposes of the case his Honour was there considering) from the judgment of Lee CJ at CL, with whom Wood and Matthews JJ agreed, in the New South Wales Court of Criminal Appeal in *Harkin v R*[1]. It is instructive for present purposes to have regard to that case, in which the appellant was convicted of indecent assault on two girls aged 11. The girls were staying at the appellant's house during school holidays. One evening the appellant took the girls in his car to a nearby bush track, where each girl had a turn driving the car while sitting on the appellant's lap. He put his arm around each girl when on his lap, saying he was her 'seatbelt'. When one of the girls was sitting on his lap, he put his hand under her shirt and played with her breast. When the other girl, Elizabeth, sat on his lap to steer, he put his hand on her breast outside her clothes. She said that the hand was there for a couple of seconds before she nudged it away with her elbow and removed it.

[31] Lee CJ noted, at 301, that it had been 'strongly urged upon the court that [in relation to the charge concerning Elizabeth] the learned trial judge fell into error in not directing the jury that before they could come to a conclusion that the appellant was guilty, they had to be satisfied beyond reasonable doubt that the acts of the accused were intended by him for his sexual gratification'. His Honour considered there was no reason in that case for the trial judge to give such a direction, stating:

> 'It is in my view clear that if there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual

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1 (1989) 38 A Crim R 296.

> connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas. Thus, if the appellant intentionally touched the breast of the girl Elizabeth, it is my view that if there is nothing more, and there is not, that in itself is sufficient to give to the assault the necessary sexual connotation and to render it capable of being held to be indecent, and it is then for the jury to determine whether in the case of a mature man of 38 and a girl of 11 years and nine months that should or should not be regarded as conduct offending against the standards of decency in our community. The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification.'

[32] The argument advanced for the present appellant in this Court was to the effect that, in respect of Counts 1, 2, 3 and 5, the extra direction was necessary because it was open on the evidence for the jury to find that, if the contact alleged in each of those counts had occurred, it was not unequivocally a sexual touching. Additionally in relation to Counts 1 and 2, it was submitted that the defence of accident should have been put to the jury because 'it could well have been the position that a jury could find that these acts occurred but because it was in the context of being moved from a lap or changing positions during the driving lessons.'

[33] Neither of those contentions is, in my view, tenable. On the complainant's versions of each of the acts underlying these counts, the appellant's conduct was deliberate:
- in respect of Count 1, the complainant's evidence on 13 June 2005 was:

> 'Okay, all right. So, this time that you said that he touched you on your breast, that's while you were learning to drive? --Yeah.
>
> How did he ------? -- And he said, that he was going to try and like test me, but he wasn't.
>
> And what else did he say? -- He said that – he said he wants to kiss me and stuff.
>
> So the time that he's touched you on the breast, how did that happen? -- Um, what do you mean?
>
> Like how were you guys sitting, how did he do it? -- I was sitting on the one lap, and he just – I was sitting with one leg like, and I was sitting with my leg between there, and his leg there, and then his other leg there, so he could put the clutch down.
>
> Mmm-hmm? -- And then he just put his hands under there, like that. Under my arms, when I was steering.

Mmm-hmm? -- And then touched there.

Okay, so he did it with both his hands, did he? -- Yeah. And sometimes he goes up my shirt.

Okay. Do you remember the first time it was that he touched you there? -- First time he gave me driving lessons.

And that time – the first time he gave you driving lessons, what type of touch was it? -- Just like a pinch, sort of. Just a long one, just grabbed them. And like – and just like rubbed them.

Well, what did you say? -- Don't. It didn't work, he didn't stop. And I said, stop (indistinct) (indistinct). Wouldn't stop.

So, that was the time that you were in the car? -- Yeah.'

- in respect of count 2, the complainant's evidence on 13 June 2005 was:

'Mmm – hmm? -- And (indistinct) and he said, and he agreed with most of it, and then he goes, and he touched me down there, when he said that he was just moving my leg, but if he was moving my leg, he would grab there, and move. But he went up here and moved it.

So, was this – where was this, that that happened? -- When we (indistinct) go lesson.

Another driving lesson, was it? -- Yeah.

So what do you call that place that he touched? -- I call it my private part.

And he said he was moving your leg, did he? -- Yeah, but he actually was – it's what he just (indistinct) so he didn't get in trouble.

Okay. So, can you tell me what you use that private part for? -- Pardon?

What do you use that private part for, that you were taking about? -- Um to pee.

Okay, yep. So, how did he touch you there? -- He – when we were outside he just went like that. He just rubbed it.

With both of his hands? -- Yeah.

Okay, and this was inside the car? -- Yeah.'

- in respect of Count 3, the complainant's evidence on 13 June 2005 was:

'And you mentioned a time when he tried to kiss you, or he did kiss you? -- Did.

He did kiss you? -- Yeah.

Okay, what happened there? -- He said, (indistinct) for a kiss.

He said what? -- A lap for a kiss.

What does that mean, a lap for a kiss? -- Um, like do you want a lap of driving – pay me back with a kiss, and I said no, but he forced me to kiss him.

How did he force you? -- He grabbed me there, and he kissed me like that. Held me.

Okay, so where was he sitting when this happened? -- In the – where I was sitting, because I actually was sitting on his lap. But he's – down the block there's (indistinct) and there's a tree that you have to go round. And (indistinct) [A's] like a (indistinct) tomboy – she's a girl.

Yeah? -- And she acts like a tomboy and she (indistinct) and stuff.

Yeah? -- She's (indistinct). And they do burnouts around the tree. And then when he -----

That means the tape is about to stop? -- He um pulled me at the bottom of that.

Okay? -- That's where he always kisses me, at the bottom of that.'

When cross-examined in her pre-recorded evidence at trial, the complainant gave the following evidence:

'So, this happened more than once did it, that he wanted to kiss for a lap? You're shaking your head yes? -- Yes.

How many times did it happen? -- Um, every time we went for a lap in the car.

Every time you went for a driving lesson? -- No. Not -----

So, not – not the first one? -- No. A couple – like, after he started, he – he said it – like he's taken me for driving lessons the first time..

Yes? -- And, um, I can remember like that was fun, and then we did it, um, like we went for another driving lesson, and a couple of days like later, he wanted to kiss me every time we went driving.

Yes. And did he kiss you? -- Yes.

> Whereabouts? -- Sometimes he was always kissing me on the face, like on the lips and stuff.
>
> And who would be where? Would you be on his lap, or would you be in the driver's seat; you'd be in the passenger seat? -- Sometimes I'd be in the passenger seat.
>
> Sometimes you'd be in the passenger seat? -- Yeah.
>
> So, he'd be driving, or he'd be in the driver's seat. Yes? -- Yes.'

- in respect of Count 5, the complainant in her interview on 13 June 2005, described an incident at the appellant's house when he kissed her both before and after he had a shave.

[34] When cross-examined, the complainant was challenged in respect of the acts underlying Counts 1, 2 and 3:

> 'I want to put to you that he never said anything like he was tempted to touch you or you had nice eyes? He never said anything like that during the driving lessons? -- He did.
>
> And I want to put to you that the only time he might have touched you in the area of the chest or the area of the backside was in that process of moving you from one part of his lap to the other; what do you say? -- Well, he touched me other times as well, not just moving me.
>
> Okay. And if he did kiss you, it was only on the cheek? -- Sometimes it would be on the lips and sometimes it would be on the cheek it was on.
>
> And I put to you, he never said anything like, "A kiss for a lap"? -- He did.'

[35] A little later in the cross-examination she gave the following evidence:

> 'Okay. Do you remember telling the police that Alan also tried to kiss you or did kiss you after he'd shaved? -- He did.
>
> Okay. So, you remember telling the police that? -- I can't remember if I told the police, like -----
>
> But you do remember it happening? Well, what do you remember about that? -- After he shaved, then he, like, kissed me and stuff.
>
> Whereabouts did he kiss you? -- On the lips.
>
> And did he say anything before or after he kissed you? -- No.

> You're shaking your head, "No". Whereabouts was he – Alan – when he kissed you? -- In his room.
>
> And whereabouts were you? -- I was -----
>
> In his room, too? -- Yeah.
>
> What part of his room were you? On the bed or standing up or sitting down? -- I was, like, where the bit of the bed sticks up, like, the end. I was just leaning on that -----
>
> Okay? -- ----- kind of thing.
>
> And was it a quick kiss? -- Yeah.
>
> He just gave you a quick kiss on the lips, you say? -- Yeah.
>
> And then moved on. Didn't say anything before that? -- No.'

[36] Unlike the situation in *R v BAS*, where the accused had admitted the touching but sought to characterize it as 'therapeutic' and therefore not leading to sexual gratification, the appellant's case was that the kissing and touching had not occurred. In his record of interview with police he denied outright that either the 'kiss for a lap' or the 'kissing when shaving' had occurred, and in relation to touching responded as follows:

> 'Yeah, I can imagine. She's only tiny, isn't she? -- Yeah. And – so, I had my hand on the door handle and the other hand on the handbrake -----
>
> Yeah? -- ----- ready to come up. And – yeah. So, when I moved her my hand went pretty close. And the only time I can explain there being any touching near the breast is when we were tickling and – well, doing a tickle it – I got up that way and I just stopped again.
>
> What, in the car? -- No, no, no, not in the car.
>
> Well, where was the tickling? -- At one stage the – the boys – a whole bunch of kids at [P]'s and we were wrestling there; this was weeks ago.'

Later in the interview the following passage was recorded:

> 'You've seen [indistinct] her shoulders still? Okay. So, what about the times that – that we been told that you have asked for a kiss for a training – for a driving lesson? -- No. The only time at the – I gave her anything that might have been construed as more than a friendly hug, when she first started driving the green car, she nearly hit a fence post.
>
> Mmm? -- We got out the car and she couldn't breathe and she panicked, so I just gave her a – a warm hug.

> Mmm? -- And that's all it was, was a hug.
>
> Mmm? -- Just to try and settle her down a bit. Then we drove back up the hill and she told her mum about almost crashing and -----
>
> Okay. So, did you talk about all that for a kiss? -- No.
>
> Never? -- No.'

[37] It was not suggested that the trial judge did not appropriately direct the jury about the degree of satisfaction needed in accepting the complainant's versions of each event. The summing up contained several cautions by the trial judge to the effect that the jury could only convict on a particular count if satisfied that they accepted the account of the complainant beyond reasonable doubt. No direction such as that now contended for was sought by the appellant's trial counsel. That is understandable in the light of her Honour's summing up. Indeed, such a direction may well have acted to the appellant's detriment in the context of a summing up which called for the jury to acquit if not satisfied of the complainant's version beyond reasonable doubt. And, to adopt the words of Lee CJ in *Harkin*, to the extent the jury considered the touching in this case was intentional, such touching was, in the circumstances, sufficient to give it the necessary sexual connotation and render it open to the jury to find it to have been indecent. On the complainant's evidence, the touching and kissing acts were not ones which objectively did not unequivocally offer a sexual connotation.

[38] The appellant's complaint in respect of Count 4 is, in my view, similarly unsustainable, but can be dealt with more succinctly. The trial judge summed up by reminding the jury of the complainant's evidence of the appellant showing her pornographic pictures on his computer, including the following passage from her cross-examination:

> 'I want to put it to you that Alan didn't show you any pictures on his computer; what do you say? -- Yeah, he did.
>
> But, if you saw pictures on Alan's computer – either it was part of the screensaver or maybe you went to Alan's computer when he wasn't there? -- No, he was there and he had – like, he had to put the things like – for the next one to come up. He put – and the next one would come up, but then he went back to the Start and like, that was all naked people and stuff.'

[39] Her Honour then immediately reminded the jury of the statements made by the appellant to the police:

> 'And what did you do? – Usually I'm just picking up my phone chargers or something – which is what – this was, this time. I plugged mine in and the computer was on and I went to the toilet, I think. When I came back the screensaver was on and it was – and it – there was pictures a child shouldn't see, naked women et cetera. There's naked women and some comics. There's a Bart and Lisa

> having sex [indistinct] and just things like that. But, I was trying to flick it to turn it off and go through so I could shut it all off. And then I went and had a shave and she came out and she watched me shave and we talked.
>
> And at page 27, the police officer put to him:
>
> So, you're saying, if she's viewed them - this is the images, the video stuff on the computer – it's because she'd done it herself? -- Yes.
>
> Is that what you're saying? -- Yes. It just takes two clicks to click on Windows Media Player and if you click on Play and the Play lists plays.
>
> How long does it play for? -- The movies range anywhere from 10 seconds to one. I think it is about four minutes long.'

[40] It was submitted for the appellant that 'the jury might have rejected the complainant's account, but then accepted the appellant's but found him guilty on the basis of his account'.

[41] True it is, as the appellant's counsel pointed out, that her Honour did not expressly direct the jury on the concept of 'wilful exposure'. But what she did do was place the complainant's version and the appellant's account in such immediate juxtaposition as to make it clear to a fair minded jury that either they would be satisfied beyond reasonable doubt of the complainant's version, which necessarily satisfied the element of wilful exposure, or they were not persuaded to the requisite standard in respect of that version, in which case they were to acquit. As noted above, the summing up contained several cautions by the trial judge to the effect that the jury could only convict on a particular count if satisfied that they accepted the account of the complainant beyond reasonable doubt.

Evidence of other incidents and uncharged acts

[42] Evidence was adduced at the trial and left to the jury in respect of 10 instances or categories of conduct which were not the subject of charge:

(a) Conversations between the appellant and the complainant in the car about sexual matters, including a discussion of '69ers';

(b) A threat by the appellant to rape the complainant;

(c) Communication of a sexual nature between the appellant and the complainant via a computer messaging service;

(d) The use by the appellant with the complainant of 'code names' for sexual activity;

(e) A note from the appellant to the complainant, only a fragment of which remained, on which the complainant said the appellant had written that

he wanted to have sex with her, but had later torn this portion from the note;

(f) The appellant's spray painting a love message to the complainant on a road;

(g) The appellant writing messages on the complainant's boots;

(h) The complainant seeing, and being shown, other pornographic images on the appellant's computer;

(i) The appellant touching the complainant on the buttocks;

(j) The appellant lying on top of the complainant.

[43] After the prosecutor opened the Crown case, and immediately after the remarks quoted above at [18], the trial judge said this to the jury:

> 'Then I've noted that there's uncharged evidence, and let me just explain to you about that. You've got those particular counts, those five particular counts, but as well, you are going to hear evidence of other alleged incidents in which she says sexual activity involving the defendant occurred. These incidents, these notes on the boots and the cubby house, are not the subject of specific charges before you. But you can use evidence of the, but you must do so only for one purpose and that is this, if you accept that the evidence it shows, the prosecution says, the true nature of the relationship between the defendant and the complainant, thus placing the alleged events, the subject of the five charges, in their proper context. And you will recall Mr Stark using the word "context".

[44] On two occasions in the course of the trial prior to the summing up, and in the absence of the jury, the trial judge and counsel had discussions in relation to the evidence of uncharged acts, with her Honour emphasising the necessity to identify the uncharged acts, and discussing the use to which the evidence was to be put and the directions which were required. It is to be noted that, when discussing the appropriate directions with counsel, her Honour drew appropriate distinction between 'uncharged acts' (in the strict sense of criminal acts not the subject of charges) and evidence of other conduct or contact which was not susceptible to criminal charge, and expressed concern to ensure that the jury was appropriately directed in respect of this evidence.

[45] When summing up to the jury, the trial judge said:

> 'You have heard evidence of other incidents which are not the subject of specific charges. The specific charges are the five matters set out in the indictments. It is in respect of those that you will be required to return verdicts. However, in addition to the evidence concerning each of those five counts, or alleged offences, you have also heard evidence during the course of the trial of other alleged incidents, in which sexual activity involving the defendant and the

accused, is said to have occurred. This is not specific and is in general terms. Those incidents are not the subject of any charges before you and you can use the evidence of them in one way and for one purpose only, and it is this. If you accept the evidence of these, shall I call them other incidents, shows the true nature of the relationship between the defendant and the complainant and thus places the alleged events, the subject of the charges, in their proper context.

So, I will just go through that again slowly. These other incidents or uncharged acts, how can you use them? The law says this. If you accept the evidence, that is, that these things occurred and you still appreciate that the accused has specifically denied that they did occur. It is a matter for you then. Do they show the true nature of the relationship between the defendant and the complainant? And if so, they may place the alleged events, that is the five specific charges in their proper context. And that is why you are hearing it.

Now, I will just go through – I am going to go through the evidence of those, when I come to the evidence. But just to give you the headings of those, this is how I have described them. There is the conversation about sexual matters in the car; that includes 69'ers, and other things. There is the threat about raping; there is the Yahoo messenger; there is the notes involving code names; computer images. The notes about kiss, that is the subject of an exhibit, that particular note. The writing on the shoes; the pink marking on the road; the touching on the backside and the lying on top of her.

Now, that is just my general summary at the moment. I am going to go into the evidence in the summing-up of each of those, and I will summarise for you what the accused said in her record of interview and her police statement, and what the accused says in his record of interview. Those are the other incidents or uncharged acts.

You should have regard to the evidence of these incidents or acts, not the subject of specific charges, only if you find it reliable, so that is the first question for you. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged, so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore it is likely he committed the further five charged offences.

You should also not reason that the defendant had done things equivalent to the offences charged on the other occasions, and on that basis could be convicted of the offences charged; that is the five specific offences. If that involves you neglecting to overlook that you must always look at each of the five charges, and consider separately and carefully whether the proof is there to the requisite standard, namely beyond reasonable doubt.

> Remember that the evidence of incidents not the subject of charges comes before you only for a limited purpose, before you can find the defendant guilty of any of the five charges you must be satisfied beyond reasonable doubt that the charge has been proven, by evidence relating to that charge.
>
> If you do not accept the complainant's evidence, that is [D]'s evidence, relating to incidents not the subject of the charges, take that into account when assessing or considering her evidence relating to the five charges offences.'

[46] Her Honour returned to the evidence on those matters later in her summing up, after having directed the jury about the law and evidence concerning Counts 1 to 5, and introduced her directions by saying:

> 'That's the evidence concerning the five counts. I'll turn now to the uncharged acts or other incidents.'

[47] It should be noted that the evidence on these matters was not objected to, nor was it contended in this Court that it ought not have been admitted. Rather, the appellant's complaints on appeal focused on:

(a) The use by the trial judge of the words 'uncharged acts', and

(b) The lack of a direction by the trial judge that the standard of proof in respect of the uncharged acts was that of 'beyond reasonable doubt'.

[48] As to the first of these, it was submitted that the use of the phrase 'uncharged acts' to the jury was a prejudicial matter in itself because it raised the level of certain of the conduct to that of criminal offences which had not been the subject of charge. Counsel for the appellant sought to found this submission in certain observations made by Hayne J in *HML v The Queen*[2]. What his Honour actually said in that case, in the context of providing some guidance for directions in cases of sexually improper conduct (with an express preface[3] that such directions will vary from case to case and that his Honour was not putting forward a 'model direction') was as follows[4]:

> '**[129]** Fourth, in framing directions to the jury about evidence of events of a sexual kind other than those that are the subject of charge it will seldom, if ever, be helpful to speak of "propensity" or "disposition". "Propensity" and "disposition" are words that jurors are not likely to find helpful. And as pointed out in *Pfennig*, the evidence of other criminal acts or other discreditable conduct *is* propensity evidence. Further, it will usually be better not to describe the evidence of other events of a sexual kind as evidence of "uncharged acts". "Uncharged acts" suggests that what is described could have been the subject of charges. That may not be right. The conduct described may not be criminal; the description of the conduct may not be sufficiently specific to found a charge.

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2 *HML v The Queen* (2008) 235 CLR 334.

3 at [386].

4 at [389].

> Describing the events as "uncharged acts" may invite speculation about why no charges were laid.'

See also the observations of Gleeson CJ at [349].

[49] Accepting the force of Hayne J's observations, I nevertheless do not consider that the trial judge's several instances of the use of the phrase 'uncharged acts', when seen in their context in the summing up, could reasonably be apprehended to have carried the dire prejudicial effect contended for by the appellant. Indeed, as is apparent from the passages quoted above, her Honour's preferred word in this regard was 'incidents', which to my mind was a completely appropriate neutral term. Even on the several occasions during her summing up when she uttered the phrase 'uncharged acts', it was said in conjunction with the word 'incidents'.

[50] The appellant's second contention was that the jury should have been told by the trial judge that the standard of proof that had to be reached in respect of each of the other incidents or uncharged acts was that of beyond reasonable doubt. Again, the appellant sought to underpin this submission by reference to *HML v The Queen*.

[51] Before turning to consider whether the judgments in *HML v The Queen* support the appellant's contention, it is important to note that:

(a) As is apparent from the terms of the summing up quoted above, the only purpose for which that evidence was put to the jury, as was stated by her Honour on several occasions, was as 'relationship evidence' for the purpose of providing a context for the events which were the subject of Counts 1 to 5;

(b) It is apparent from the lengthy discussion between the trial judge and counsel before the summing up (recorded at pp 136-143 of the transcript) that all parties understood that this was the basis on which the evidence was being put to the jury;

(c) The summing up included a specific warning for the jury not to use this evidence to establish a propensity on the part of the appellant to commit offences of the type charged.

[52] In *HML v The Queen*, three matters were heard together by the High Court – an appeal in each of the matters of *HML v The Queen* and *SB v The Queen* and an application for special leave in the matter of *OAE v The Queen*. Of those matters, the one which bears the most relevant similarity to the present case is *SB v The Queen*. The accused in that case was charged with three counts of indecent assault and two counts of incest. Evidence of a number of matters for which the accused was not charged was led. The trial judge's summing up in that case was summarised by Hayne J at 409-410 [212] – [215]:

> '**[212]** Ultimately, the trial judge directed the jury that the "evidence of other alleged criminal conduct" was "potentially helpful to you in evaluating [the complainant's] evidence". It might "better enable" the jury to assess her evidence. "The whole of the alleged course of

events provides a context in which it is said that the charged acts occurred."

[213] The trial judge told the jury that the prosecution presented the evidence as "explaining the background against which the first offence charged came about" and the other offences which are alleged to have followed where the complainant's evidence "may otherwise appear to be unreal or not fully comprehensible". The trial judge concluded this section of the directions in the following terms:

> Now, those two discrete matters which I have mentioned are the only ways in which you are permitted to use the evidence of the uncharged acts which were stated by [the complainant] in her evidence. Having directed you on the permissible manner in which you may use the evidence, I now turn to direct you on how you cannot use the evidence.
>
> If you find proved that the [appellant] was involved in any of the uncharged acts I have already described, *you must not reason that the [appellant] must have committed any of the sexual acts, the subject of the charges in the Information*. That would be totally wrong. Such reasoning is not permissible.
>
> Furthermore, *it would be wrong to conclude*, if you find proved that the [appellant] engaged in any of the uncharged acts related by [the complainant] in her evidence, *that the [appellant] is the sort of person who would be likely to commit the offences for which he is charged*. Remember, it is the evidence presented in proof of each of the charges, which is the critical evidence in this Trial. The evidence of the uncharged acts has only been presented for the purpose of the permissible uses to which I have referred.
>
> Of course, the first step in the process is to determine whether you are satisfied that any of the uncharged acts have been proved before you can use any of them in the permitted ways I have described. I will, again, refer to this evidence, and what you should do in the course of evaluating it shortly.

(Emphasis added.)

[214] As foreshadowed, the trial judge returned to the subject of "uncharged acts". He warned the jury of the need to scrutinise the complainant's evidence about these events with great care and that "it would be dangerous to act upon her evidence of any of the uncharged acts unless, bearing in mind the warning I have given you, you are satisfied of the truth and accuracy of the evidence". (At an earlier point in the directions, the trial judge had told the jury that when he spoke of the jury being "satisfied of something in respect of the Crown case" he meant "proof or satisfaction beyond reasonable doubt".)

> **[215]** Taken as a whole, the trial judge's directions to the jury confined the jury's consideration of conduct and events other than those charged to using it for "evaluating" the complainant's evidence. The jury were directed that they could not use the evidence of other conduct and events to "reason that the [appellant] *must have committed* any of the sexual acts, the subject of the charges in the Information" or that he was "the sort of person who would be *likely to commit* the offences for which he is charged" (emphasis added).'

[53] There is some significant divergence between the judgments in the High Court in *HML v The Queen*. It is unnecessary for present purposes to undertake a detailed exegesis of the judgments for the purposes of teasing out the differing expositions of the basis on which evidence of 'uncharged acts' in sexual assault cases may be admitted in evidence and put to a jury, and the use which might be made of such evidence, and the directions which a trial judge ought give to a jury relating to such evidence. Hayne J said at 416-417 [247]:

> '**[247]** Although all members of the Court agree that evidence of other sexual conduct that has taken place between an accused and the complainant is relevant, the Court is divided in opinion about further questions that I consider then arise. The reasons of each member of the Court must be read as a whole. It is not appropriate for me to attempt to summarise the effect of the Court's reasons. It is important to recognise, however, that at least a majority of the Court is of the opinion that "[i]n the ordinary course a jury would be instructed by the trial judge that they must only find that the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt".

[54] The proposition last mentioned by Hayne J does not assist the appellant in the present case, because the evidence was not led for the purpose of the jury finding that the appellant had a sexual interest in the complainant, nor was any direction given to the jury in that regard. On the contrary, the direction limited the use of the evidence to placing the evidence in respect of the counts on the indictment 'in their proper context'.

[55] In my view, a review of the judgments in *HML v The Queen* reveals that the appellant's submission on this point is not supported by any of the varying approaches elucidated by the members of the High Court.

[56] Gleeson CJ, at 349 [2], noted that '[i]n cases of alleged child sexual abuse, it is not uncommon for a complainant to assert that the incidents the subject of charges against the accused were part of a pattern of behaviour that extended over a period of time, perhaps many years' and said that '[t]here is nothing new about this kind of evidence, although in recent years the increase in reporting of, and prosecution for, child sexual abuse has drawn wider attention to some of the problems involved.' The Chief Justice then provided an analysis of the various bases on which such evidence could be said to be relevant and admissible. His Honour emphasised the

application of *Pfennig v The Queen*[5] in relation to the probative value and use of such evidence as propensity evidence. In relation to the standard of proof, the Chief Justice said[6]:

> '**[29]** It is the elements of the offence charged that, as a matter of law, must be proved beyond reasonable doubt. (I leave aside presently irrelevant cases where insanity or some other defence is raised.) If evidence of a fact relevant to a fact in issue is the only evidence of the fact in issue, or is an indispensable link in a chain of evidence necessary to prove guilt, then it will be necessary for a trial judge to direct a jury that the prosecution must establish the fact beyond reasonable doubt; generally, however, the law as to standard of proof applies to the elements of the offence, not particular facts. The decisions of this Court concerning corroboration in *Doney v The Queen*, and proof of lies as evidence of consciousness of guilt in *Edwards v The Queen*, illustrate the point. Trial judges commonly, and appropriately, direct juries in terms of their possible satisfaction of particular matters relied upon by the prosecution, without referring to a standard of proof in relation to each such matter. To do otherwise would risk error.
>
> **[30]** Where evidence is adduced for the purpose of explaining a context or similarly assisting the evaluation of the evidence of a witness, no separate question of the standard of proof of such evidence arises. Thus, if a complainant, giving direct evidence of the facts which constitute the elements of the offence charged, says that it was not an isolated incident but part of a wider pattern of behaviour, and does so either generally or with specificity, no separate question of a standard of proof in relation to the latter evidence ordinarily would arise.'

[57] Accordingly, the appellant derives no support for his contention from the judgment of Gleeson CJ.

[58] The judgment of Hayne J, with whom Gummow and Kirby JJ agreed (Kirby J expressly agreeing[7] with Hayne J's reasons and conclusions in the matter of *SB*) proceeded on the thesis summarised by his Honour[8] as follows:

> '**[106]** Admissibility of evidence of other sexual acts directed at the complainant by the accused, which are not acts the subject of charges being tried, is to be determined by applying the test stated in *Pfennig v The Queen*. It is not to be determined by asking whether the evidence in question will put evidence about the charges being tried "in context", or by asking whether it describes or proves the "relationship" between complainant and accused.'

[59] His Honour was critical (for reasons which do not need to be elaborated on for present purposes) of an approach which would see such evidence admitted for the

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5 (1995) 182 CLR 461.
6 at 360 [29] – [30].
7 at 364 [50].
8 at 383 [106].

purpose of providing 'context', 'explanation' or 'intelligibility', and also rejected the admission of such evidence as 'relationship evidence', saying[9] that the purpose or purposes for which such evidence is sought to be adduced will seldom be sufficiently expressed by simply using that or some other shorthand description. His Honour emphasised that it is the identification of each step along the path of reasoning that is necessary and useful.

[60] When dealing with the matter of *SB*, Hayne J, after setting out the summary of the trial judge's directions in the passage I have quoted above, then said:

> '**[216]** By confining the jury's use of the evidence in this way, the trial judge denied the jury's use of it for purposes for which the evidence was both relevant and admissible in support of the prosecution case. In particular, the directions precluded the jury using the evidence of other conduct and events as circumstantial evidence which, if established beyond reasonable doubt, could be used as a step in the proof of commission of the charged acts.
>
> **[217]** It may greatly be doubted that telling the jury that the evidence of other conduct and events might be helpful in "evaluating" the complainant's evidence provided any useful assistance or guidance to the jury. It neither identified any issue in the case nor told the jury what law they needed to know to resolve that issue.
>
> **[218]** It may equally be doubted that telling the jury that the evidence explained the "background against which the first offence charged came about" told the jury anything that was not apparent from the evidence itself. But in assessing whether the directions occasioned any miscarriage of justice, chief weight must be given to the strength of the negative directions given by the trial judge.
>
> **[219]** The directions about how the jury could *not* use the evidence require the conclusion that the uncertainties and ambiguities inherent in the directions about "evaluating" the complainant's evidence and providing "background" to the charged offences occasioned no miscarriage of justice.
>
> **[220]** No ground of appeal being established, no question about the application of the proviso need be considered in this case.
>
> **[221]** The appeal should be dismissed.'

[61] Accordingly, the approach of Hayne J applied to the present case would yield the following conclusions:

(a) That the way in which the trial judge in the present case, by her directions, confined the use to which the jury could put this evidence, meant that the jury was denied use of the evidence 'for purposes for

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9 At 388 [125].

which the evidence was both relevant and admissible in support of the prosecution case';

(b) That it would be doubted that telling the jury, as her Honour did in this case, that the evidence explained the 'context' told the jury anything that was not apparent from the evidence itself;

(c) The directions given by her Honour about how the jury could not use the evidence required a conclusion that the uncertainties and ambiguities inherent in the directions about 'context' occasioned no miscarriage of justice;

(d) The appellant's complaint in the present case could therefore not be made out.

[62] Heydon J, when discussing the arguments advanced in the *HML* case, essayed the various bases on which it was said in that case that the evidence of uncharged acts was admissible against that accused (as providing a 'context' for the charged incidents, as explaining why the accused was confident enough to offend in the manner alleged, to explain why the child acquiesced in the accused's conduct, as capable of demonstrating that the accused had a 'sexual attraction' for the child, as explaining why the child did not make immediate complaint, and as explanation for any inability on the part of the complainant to remember the dates and/or events). Again, it is unnecessary for present purposes to delve further into his Honour's learned exposition on these matters, save to note his Honour's observation[10] that '[f]or a long time, with few exceptions, ... on a charge against an accused of committing a sexual crime against a particular victim, the courts have admitted evidence of uncharged sexual acts by the accused against that victim'. Heydon J did note, however, a tension in previous judgments of the Court, but refrained from expressing a concluded view, saying, at 451 [335] that it was not necessary for the purposes of the case before him to decide whether, even if evidence tendered only to prove background but likely to have a prejudicial effect was admissible, it must first satisfy the test propounded in *Pfennig v The Queen*, because the evidence in the *HML* case was admissible in any event on the basis that it established that the accused had an ongoing sexual attraction to the child. Heydon J expressly stated[11] that it was not necessary to decide the question whether the trial judge had failed to direct the jury that they could not find the uncharged acts proved unless satisfied beyond reasonable doubt because, in Heydon J's view, the summing up, read as a whole, was not open to that criticism. In relation to the appeal in the *SB* matter, his Honour similarly considered it not necessary to make a finding with respect to the necessity for a trial judge to give such a direction, because he considered that the trial judge in that case had, in the context of that trial judge's summing up, given a sufficient direction to the jury. For completeness, I note that Heydon J[12], in the context of the *OAE* matter, similarly stated that it was not necessary to decide the controversy about the standard of proof, i.e. whether a direction about the standard of proof being beyond reasonable doubt need never be given, or need not be given when the evidence is admitted only to give context.

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10 at 422 [271].

11 at 452-453 [339].

12 at 470 [395].

[63] It follows that the contention put forward by the appellant in the present case is not supported by the judgment of Heydon J.

[64] The attitude of Crennan J to the relevance of the evidence of uncharged acts can be seen in the following passages of her Honour's judgment:

> '**[425]** Accordingly, evidence of prior (and subsequent) sexual misconduct between a child and a person accused of sexual crimes against that child may be relevant because such acts explain, or make intelligible, the offences charged by providing a context which shows that they are a part of continuing relations between the parties. Putting the same point in a different way, the uncharged acts are an integral part of the history of the offences charged. As Deane J stated in *B v The Queen*, such evidence may provide:
>
> > the key to an assessment of the relationship between the [accused] and the [complainant] and, as such, constituted part of the essential background against which both the [complainant's] and the [accused's] evidence of the alleged offences necessarily fell to be evaluated.
>
> **[426]** The evidence may also be relevant on other bases. When the existence of a relationship, characterised by "sexual interest" or "sexual attraction" of an adult accused towards a child complainant, points in the direction of the accused's guilt, that evidence makes it more likely that the offence charged was in fact committed. Such evidence may also render other evidence of the complainant more credible or it may be relevant to explain subordinate incidents, such as submission of the young girl to the older man's sexual advances or delay by the young girl in complaining about sexual misconduct towards her.'

[65] Crennan J noted[13] that the context sought to be established by this evidence was that of a 'sexualised family relationship which was directly relevant to the proof of issues in the cases'. Her Honour said:

> 'In each case that evidence explained, and rendered intelligible, the offences charges. To exclude such evidence as irrelevant would occasion unfairness by requiring each complainant to give an incomplete account of her evidence.'

[66] Crennan J considered, however, that a question which had not been decided in previous cases was whether the test of admissibility applied in *Pfennig v The Queen* to circumstantial evidence of propensity led to prove identity also applies to circumstantial evidence of facts or matter tendered to explain or render intelligible the offences as charged, which evidence incidentally reveals propensity.[14] Her Honour then expressed the view that the *Pfennig* test did not apply, or should not be extended to apply, to the evidence of uncharged acts in the matters before the Court,

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13 At 480 [433].

14 485 [454].

because in each case the evidence was led for purposes other than to establish propensity as proving an element of, or fact essential to, the offences charged.[15]

[67] Her Honour further observed at 486-487 [462]:

> '**[462]** Another critical consideration is that these three cases are not entirely circumstantial. Evidence tendered to explain or make intelligible the conduct covered by the charges is not led as sole proof by which elements of, or facts essential to, the offence are to be proved. None of the accused is at risk of being inculpated solely by an inference of guilt based on the evidence of uncharged acts. Each complainant gave direct evidence of the elements of the charges such that a jury could convict each accused without any reference to, or reliance upon the evidence of uncharged acts. A conclusion of guilt was open to a jury in each case, even if the jury rejected the evidence of the uncharged acts, or otherwise set it aside.'

[68] I would note only in passing that these observations would apply to the circumstances of the case presently before this Court.

[69] Directly relevant to the argument with which this Court is presently concerned, however, are the observations of Crennan J[16]:

> '**[477]** It is the elements of a charge which must be proved beyond reasonable doubt. On occasions, a fact which is not one of the ultimate facts which constitute elements of the offence may nevertheless be so indispensable to a finding of guilt that the fact is metaphorically "a link in the chain"; if so it will be necessary for a trial judge to direct a jury that that particular fact must be proved beyond reasonable doubt. However, as Dawson J observed in *Shepherd v The Queen*, such a warning should not be given where it would be unnecessary or confusing to give it or where it is not appropriate to give it because the evidence is not indispensable to a finding of guilt.'

[70] Specifically in relation to the *SB* case, Crennan J said, at [482], that the trial judge had allowed the evidence to go to the jury 'for the limited purpose that the evidence might put the offences in context and thus assist the jurors in understanding the offences charged which might otherwise have seemed difficult to comprehend'. Her Honour noted that the trial judge had directed the jury that it could not substitute that evidence for the evidence of the offences charged, and gave a warning to the jury against propensity. Her Honour held that such directions were adequate, and did not give rise to any miscarriage of justice.

[71] Accordingly, it can be seen that no support for the submission advanced by the appellant in this case can be derived from the judgment of Crennan J.

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15 at 485 [455].

16 At 490 [477].

[72] Kiefel J considered in particular the admissibility of evidence described as 'relationship evidence', saying[17]:

> '**[492]** The term "relationship evidence" refers to all the conduct of a sexual kind that has taken place between the accused and the complainant. It encompasses sexual conduct which is an offence, often referred to as "uncharged acts", and misconduct which may not be an offence. It may not be desirable for a trial judge to describe the acts as "uncharged" to a jury, since it may convey a view, on the part of the judge, that they were proper subjects for charges. The characterisation of the evidence of the other sexual misconduct as "relationship evidence" may also be inapposite to describe the respective positions of the parties and the unilateral actions of the accused. Nevertheless it is a term which has been used for some time to describe the other evidence of sexual misconduct and I will maintain its use in these reasons, for consistency.'

[73] Her Honour noted that relationship evidence was relevant and admissible for showing the sexual interest of an accused in a complainant, but said that more difficulty attended the question as to whether relationship evidence could be used in a more general way to provide a setting or context for the offences charged. Her Honour concluded[18] that relationship evidence is relevant 'but not in a general way and not by way of background or contextual evidence'. Her Honour considered it relevant to answer questions which, in cases of this kind, may fairly be expected to arise in the minds of the jury were they limited to a consideration of evidence of the offences charged. In relation to the standard of proof, her Honour said[19]:

> 'The admission of relationship evidence to show the accused's sexual interest in the complainant clearly involves use of the accused's tendency to engage in acts with the complainant such as those charged. ... In the ordinary course a jury would be instructed by the trial judge that they must only find that the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt.'

[74] In relation to the case of *SB*, however, Kiefel J concluded[20]:

> 'The trial judge explained to the jury that the evidence was relevant only to assist them in understanding how a particular incident came about and gave a strong warning against the use of it as evidence of the accused's propensity. The directions were appropriate and sufficient. This appeal should be dismissed.'

[75] Accordingly, given the directions in this case as to the limited use to which the evidence could be put by the jury and the trial judge's strong warning against the use of it as evidence of the appellant's propensity, it cannot be said that the judgment of Kiefel J supports the argument now sought to be advanced by this appellant.

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17 at 494 [492].
18 at 497 [500].
19 at 500 [506].
20 at 503 [516].

[76] In summary, then:

1. the only point of principle on which there is a majority opinion in *HML*, being that referred to in the judgment of Hayne J[21] (quoted above at [53]), does not support the appellant's contention;
2. otherwise, there is no ratio of a majority in *HML* which prohibits the approach taken by the trial judge in respect of the relationship evidence in this case;
3. when one has regard to the express purpose for which the evidence of the other incidents and uncharged acts was admitted and put to the jury, the directions given by the trial judge as to the limited use to which that evidence could be put by the jury, and her Honour's express warning against using that evidence to establish a propensity on the part of the appellant to commit offences of this nature, I would find that the appellant has not established that the trial judge's summing up was inadequate for failing to include an express direction that the standard of proof in respect of each of the incidents and uncharged acts was beyond reasonable doubt.

Conclusion

[77] The appellant has not otherwise made out any argument to support the contention that the verdicts below were unsafe or unsatisfactory.

[78] Having regard to my conclusions above, I would therefore order that the appeal be dismissed.

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[21] at 416-417 [247].