SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ortega-Farfan* [2011] QCA 364
PARTIES:	**R** **v** **ORTEGA-FARFAN, Manuel Jesus** (appellant)
FILE NO/S:	CA No 255 of 2011 DC No 1442 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2011
JUDGES:	Fraser and Chesterman JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The conviction is set aside.** **3. A verdict and judgment of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of one count of indecently dealing with a child under 16 years, with a circumstance of aggravation that the child was under 12 years – where the appellant took part in covertly recorded conversations with the complainant's father – where, during these conversations, the appellant stated that he "can't get involved with children or play with children" and that he was seeking psychological and psychiatric help – where portions of the conversations were omitted from the transcript read to the jury – where the portions excised provided important context to those statements – where the Crown relied on those statements as indicating a consciousness of guilt – where the trial judge directed the jury as to how the statements could be used – whether a miscarriage of justice occurred as a result of the jury receiving an incomplete picture of the conversations CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL

ALLOWED – where there were a number of inconsistencies between the accounts of the conduct given by the complainant at various times – where, during the pre-recording of her evidence, the complainant agreed that her father had reminded her about a number of aspects of her evidence – where, during her police interview, the police officer misstated the complainant's initial complaint back to her – where the complainant's father's evidence of early complaint was of doubtful reliability as a result of contradictions by other evidence, including the complainant's own evidence, and evidence that the appellant continued to have unsupervised contact with the complainant after the alleged complaint – whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty

Criminal Code 1899 (Qld), s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, applied
R v PAH [2008] QCA 265, considered
R v Williams [1987] 2 Qd R 777, considered
SKA v The Queen (2011) 85 ALJR 571; [2011] HCA 13, considered

COUNSEL: K Prskalo for the appellant
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant pleaded not guilty to two counts of indecently dealing with a child under the age of 16 years, with a circumstance of aggravation that the child was under 12 years. The Crown case was that the appellant touched the complainant on her bottom while she was sitting at the computer (count 1) and that on another occasion the appellant pulled down the complainant's pants and kissed her bottom while she was doing an exercise in her bedroom (count 2).

[2] After a trial in the District Court which occupied four days, the jury acquitted the appellant of count 1 and found him guilty of count 2.

[3] The appellant has appealed against his conviction on the following grounds:

> "(1) The trial miscarried because out of court statements made by the appellant were improperly admitted as evidence demonstrating a consciousness of guilt and the jury were wrongly directed that the statements could be used to implicate the appellant in the commission of count 2;
>
> (2) The verdict was unreasonable and can not be supported having regard to the evidence."

[4] I will discuss the grounds of the appeal after I have referred to the evidence adduced in the Crown case at the trial. The appellant did not give or call evidence.

The complainant's interview

[5] The allegations against the appellant were first reported to police in the course of a police interview with the complainant about a different matter on 10 August 2009.[1] The video recording of the interview was adduced in evidence against the appellant under s 93A of the *Evidence Act* 1977 (Qld). The complainant was then seven years old. Towards the start of the interview the complainant told the police officer that she lived with her parents and her younger brother and sister in a house and that she had come to the police station because an adult ("A") who lived downstairs had shown her his "rude part". After the police officer had elicited some details of this occasion, the complainant said that A was "trying to … touch my bottom, like putting his hand in, inside the underwear of mine and then trying to do that." She also said that on the same occasion A exposed himself to the complainant and a friend of hers (apparently another girl of a similar age).

[6] The complainant told the police officer that she disclosed these matters to her parents at a dinner at her house on the following evening. Those present also included A, the complainant's friend, and others. After the complainant had made other disclosures to the police officer about that event, she made the following statement:

> "I was sitting on [A's] lap and he was trying to feel my bottom and putting his hand like into my underwear and I said, put your hand out you, your like my friend from Brisbane, he always wants to do that to me."

[7] The police officer continued to question the complainant about A's conduct. The complainant said, amongst other things, that she had "got all upset and then ran into my room" because when she first told her mother about A's conduct her mother did not really believe her.

[8] Subsequently, the police officer asked the complainant whether anything like this had happened before. She shook her head. The police officer said that he wanted to understand whether "anything else happened at all like that". Again, she shook her head. The police officer then said that "the other thing you mentioned just quickly was you told him … not to touch you on your bottom because you got a friend like that in Brisbane who does that." The police officer asked the complainant who she was talking about and the complainant responded that "he, when he comes over to … my house like last year he kept on doing that and he tried to kiss it all the time." She said that the appellant was "like pulling down his pants, my pants" in her room last year. The following exchange occurred:

> "COMPLAINANT: Um, because he said he'd show us, he'd show me some like um, exercises that you can do. But then after he was playing with me trying to do the one, I was going to do like a handstand.
>
> SCON SHEEHAN: Okay. And what was he doing then?

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[1] At the hearing of the appeal, the Court was provided with a transcript of the interview containing corrections which had been agreed by both parties.

COMPLAINANT: He was trying to pull my pants down and kiss my bum and pull my underwear down.

SCON SHEEHAN: So he pulled your pants down and your underwear--

COMPLAINANT: Mm.

SCON SHEEHAN: And kissed your bum? Yeah. So how many times did he do that?

COMPLAINANT: Um, he's done that quite a few times.

SCON SHEEHAN: Mm."

[9] The complainant then returned to the computer incident:

"COMPLAINANT: But then once when I was in my togs and ah, he was showing me something on the computer he, he slipped his hand through my underwear--

SCON SHEEHAN: Yep.

COMPLAINANT: And my pants and then he, he was touching my bottom and I said, keep your hand out of there, because I don't really like people doing that.

SCON SHEEHAN: Yeah okay. So where were you when that happened?

COMPLAINANT: Um, I was at the table.

SCON SHEEHAN: Mm.

COMPLAINANT: And he was showing me something on the computer.

SCON SHEEHAN: Yep. So where was he sitting?

COMPLAINANT: He was sitting on a chair beside me and I was sitting on the chair.

SCON SHEEHAN: Okay.

COMPLAINANT: And then he w-, he slipped his hand through my underwear and then just put his hand on my bottom.

SCON SHEEHAN: Mm, okay. So what were you wearing that time?

COMPLAINANT: Um, I was wearing my togs that was just a s-, T-shirt and--

SCON SHEEHAN: Mmhmm.

COMPLAINANT: Just these tog underwear.

SCON SHEEHAN: Mmhmm. So wearing tog underwear?

COMPLAINANT: Mmhmm.

SCON SHEEHAN: And a T-shirt?

COMPLAINANT: Mm, like those togs T-shirt, rashy shirts."

[10] The police officer re-introduced the topic of the exercises:

"SCON SHEEHAN: Rashy shirt. Yep. Okay, alright. So the one, the time with the exercises.

COMPLAINANT: Mmhmm.

SCON SHEEHAN: Okay, so were was mum and dad?

COMPLAINANT: Um, they were downstairs.

…

SCON SHEEHAN: Okay. So what did you think when he was pulling your pants down and kissing your bottom?

COMPLAINANT: Um, I thought it was disgusting.

SCON SHEEHAN: Mm. And what did you say? Did you say--

COMPLAINANT: Um--

SCON SHEEHAN: Anything to him?

COMPLAINANT: I said don't do it.

SCON SHEEHAN And what did he do?

COMPLAINANT: He said okay, okay, and then he's pulled my pants back up.

SCON SHEEHAN: Mm.

COMPLAINANT: And then I just done my handstand.

SCON SHEEHAN: Okay. What sort of exercises was he showing you?

COMPLAINANT: He was showing this one where you have to put your hands on your head and then like he, don't use hand for a handstand like this, putting your head ah, he-, your arms on your head and then just doing like this hand stand like that or something.

SCON SHEEHAN: Okay. So was he doing that, was he?

COMPLAINANT: Mmhmm.

SCON SHEEHAN: Oh.

COMPLAINANT: But then I tried it and I could do it.

SCON SHEEHAN: Okay.

COMPLAINANT: And then after I done the one when you just do it on your hands, called a handstand.

SCON SHEEHAN: Yep.

SCON SHEEHAN: And that's when he was, pulled your, your pants down?

COMPLAINANT: No that was when I was doing the exercise that he was showing me."

[11] The police officer returned to the time when the complainant was "sitting at the computer and he was touching your bottom", and the complainant responded: "No that isn't the [appellant] bit, that's the [A] bit." The police officer asked whether the appellant did not do that, and the complainant responded that the appellant and A "done it before."

[12] When the complainant was asked whether this incident concerning the computer was at the same time as "when you were doing the exercise and kissed your bottom", the complainant responded:

> "That was like after the co-, well after we were on the computer and then [the appellant] went upstairs and then he showed me something, I know what he was wearing though."

[13] The complainant subsequently confirmed that "the computer time and going up to your room and doing the exercise" were on the same day. She was not able to be more specific about the time of the alleged offences than that they had occurred the year before (in 2008). She recalled that because she was then in her old house and the family later moved to a new house.

[14] The police officer asked the complainant whether there was anything else she could remember about the appellant. She responded that there was not.

The complainant's interview with an acting Crown prosecutor

[15] The complainant gave pre-recorded evidence about 20 months later, when she was nine years old. Three days before the complainant gave evidence she was interviewed by an acting Crown prosecutor. The acting Crown prosecutor's memorandum of that interview was agreed to be an accurate record. The memorandum recorded that the complainant said:

> "
> - … [The appellant] came into her bedroom. He locked the door and closed the blinds;
> - It was around Midday and her mother, father, brother, sister and [the appellant's] wife … were all downstairs;
> - [The appellant] was showing her how to do stretches and she showed him one of her gymnastics stretches;
> - She lay on her stomach and arched her back upwards so that her head and feet were almost touching;
> - While she was doing this, [the appellant] pulled her pants down to just below the cheeks of her bottom and kissed her three times on the bottom;
> - She did not recall where on the bottom but she felt this and turned her head around and saw what he was doing;
> - She told [the appellant] to '*stop it*' and she was trying to pull her pants back up at the same time;

- She was 6 or 7 at the time and was doing gymnastics at school;
- This was the only time that anyone kissed her on the bottom and it only happened once.
- On another occasion she was in her father's bedroom with [the appellant];
- [The appellant] asked her to take her clothes off and she said no;
- [The appellant] took his clothes off but had '*undergarments*' on underneath;
- She walked out of the room;
- She did not tell anyone about this;
- [The appellant] was staying with them for a few weeks and he was sleeping in her father's bedroom;
- She could not recall when this was;
- She didn't want to go to church after this because she thought that [the appellant] would be there;
- She recalled telling police about someone touching her while showing her something on a computer;
- She said that this was [A];
- [A] used to live downstairs and he had a computer;
- [A] put his hand down her pants while she was looking at the computer
- She could only recalled this happening once."

The memorandum also recorded that the complainant got onto the floor and demonstrated how she was positioned at the time the appellant allegedly kissed her bottom. The Crown made a formal admission that in this demonstration the complainant lay on her stomach and arched her back upwards so that her head and feet were almost touching.

The pre-recorded evidence

[16] A video recording of the complainant's evidence was adduced under s 21AK of the *Evidence Act*. In cross-examination, the complainant referred to the appellant and his wife staying at her house overnight. She said that she was pretty sure that it was a week before she started school. When asked why she was pretty sure about that the complainant referred to the appellant and his wife having stayed for New Year's Eve. Defence counsel elicited from the complainant that she had spoken to her parents about that a couple of days earlier. She subsequently agreed that her parents spoke to her about what she might say and they tried to remind her of those things. The trial judge asked the complainant whether her mother and father also told her to tell the truth, and she agreed that they had.

[17] There was then the following exchange between defence counsel and the complainant:

> "So, your parents were having a chat to you about the types of things that you might be asked and the types of things that you might say in Court?-- Yes.
>
> That's right? And when you were talking to them, or they were talking to you, did they remind you of anything that you had forgotten?-- Yes.

> All right. What were the things that you'd forgotten that they reminded you about?-- Well, when we went in the room he closed the blinds and closed the door and he started doing these stretches and then I started doing these gymnastic stretches. And then - and then I laid on my stomach - and then he said, like, 'I'll show you this trick if you lay on your stomach.' And then he was, like, laying on top of me and pulled my pants down kissed my bottom.
>
> All right. And is that what your mum or your dad reminded you of? Is that right? And you're nodding your head?-- Yes.
>
> All right. Had you forgotten that, had you?-- Yes.
>
> And was it your mum or your dad that reminded you of that?-- My dad.
>
> And so, do you really remember that now or do you just remember your dad telling you that's what happened?-- I really remember it now.
>
> You really remember it now. All right?-- Yeah."

[18] In subsequent evidence the complainant denied that her evidence that the appellant lay on her back and held her down whilst he pulled her pants down was something that her mother or father had reminded her about. She added, however, that "…'cause my dad said that [the appellant's] lawyer tried to trick him with saying that like, it was a gymnastics stretch or something. And then he reminded me that it was a gymnastics stretch but - that I did, but he was doing a stretch, too." The complainant then agreed that her father had reminded her of this.

[19] The complainant gave evidence that she told the appellant to stop it "but he just, like, 'No, two more kisses then stop' because he was kissing me on my bottom."

[20] In subsequent cross-examination the complainant denied that, whilst she was lying on her stomach, she had raised her head up. She denied that, when the appellant lay on her and kissed her, she was doing the gymnastics exercise of lifting her head and feet up at the same time. She volunteered that, in gymnastics, some people lie on their stomach and move their head up and their feet up and touch their feet to their head, but she denied that she was doing that kind of exercise when the appellant kissed her bottom. She denied that she did a handstand after that event.

[21] The complainant's evidence was that the appellant showed her some stretches, the complainant then did a gymnastics stretch where she lifted her legs over her head and touched the ground whilst she was lying on her back, and the appellant then told her to lie on her stomach whilst he did a stretch with her arms. She said that whilst she was lying on her stomach the appellant lay on her, holding her down, pulled her pants down, and kissed her on her bottom. The complainant said that she told the appellant to stop it and he responded, "No, two more kisses then stop". After he had kissed her three times he let her get up. She saw what he was doing because she turned her head, looking over her shoulder.

[22] The complainant said that she did not tell anyone about the appellant's conduct "until a couple of months". She gave evidence that this was because she was afraid and she was little. She said that she "didn't want to" tell her mum and dad because "my dad's got this tape of - 'cause they stayed on the Saturday and on - and on that

Sunday morning - my dad's got this tape of when in the morning I was getting ready for church and then, like, I wasn't - didn't want to go to church or anything or go near [the appellant]." She said that her dad had the tape. Defence counsel asked the complainant whether her dad had told her that the day after the events she did not want to go to church. The complainant agreed and she said it was "because I couldn't remember that." She agreed that that was something her dad had told her had happened and that she did not really remember it. She added that she did not know that her dad was filming her on that day.

[23] The complainant gave evidence of another occasion when the appellant told her to take her clothes off, he said he would do it first, and he took his clothes off leaving only his "garments" on. She said that that occurred in the morning in her parents' room because he was then sleeping in her parents' room. (Her father's evidence was to the effect that there was no occasion when the complainant was in the house that the appellant was sleeping in that room, although the appellant and his wife did stay at their house on one occasion when the complainant's father and mother were away on holidays.)

[24] The complainant referred to an occasion when A slid his hand down her pants whilst she was on the computer. She initially agreed that it was A who did that and not the appellant, but then she added that the appellant "had done that before". She said that she was sure about that, and that the appellant did it when he was staying at her house in 2008. The following exchange then occurred:

> "You remember that happening. And whereabouts were you when it happened; which room?-- It was at [the appellant's] house.
>
> At [the appellant's] house?-- Yeah, I think it was at [the appellant's] house. I'm pretty sure it was at [the appellant's] house in Brisbane.
>
> And who else was at [the appellant's] house?-- Like who lived there or was there?
>
> Well, who - do you know if anyone was home at the time that you were there with [the appellant]?-- I think it was at my house or [the appellant's] house, but I can't remember, but he done it.
>
> And were you on the computer?-- Yes, I was sitting on his lap.
>
> Right. And that's the same thing that [A] did, isn't it?-- Yeah.
>
> You were sitting on [A's] lap and he touched your bum?-- Yeah, 'cause he slid his hands down my pants.
>
> And you say [the appellant] did the same thing?-- Yeah.
>
> Right. And if I said to you, nothing like that ever happened, what would you say about that?-- It did happen.
>
> Right. If I said that nothing like that ever happened at [the appellant's] house, what would you say about that?-- Well, I think it was at my house or at his house, but I can't remember what it was - it was at somewhere there.
>
> Something like that?-- Yeah, it was at - at - it was at my house or [the appellant's] house, but I can't remember."

[25] The complainant did not agree that there was ever any time when she was about six or seven years old when the appellant was at her house and pretended to eat her

stomach, making a growling noise and upsetting her. She did not agree that there was a time when the appellant apologised to her for making her upset or asked her to forgive him for that. The complainant agreed that after the time when she did not want to go to church she saw the appellant lots of times. She also agreed that the appellant continued to play with her after that occasion. She said that she did not tell her parents about the appellant putting his hand down her pants when she was at the computer.

[26] In re-examination the complainant gave evidence that the incident in her bedroom when she was doing exercises happened before the incident when she was at the computer, and in the house the family had previously lived in at Maroochydore. She said that the two incidents occurred on different days. She said that when the appellant touched her bottom whilst at the computer she was wearing tracksuit pants that were the same size as jeans, and which were gray with two white stripes.

The complainant's mother's evidence

[27] The complainant's mother gave evidence that the first time she heard about an allegation against the appellant was after the police interview on 10 August 2009. In cross-examination she was asked whether the complainant spoke to her about anything to do with the appellant before the police interview, and she answered that "I can't remember her speaking to me directly." She did not give evidence of any indirect disclosure. She agreed that when the police officer told her after the interview in August 2009 that the appellant might have done something to her daughter she was in shock. She agreed that before the police interview, the complainant had told her about A exposing himself to her, and that she had initially told the complainant not to make up things that she was not sure of. Defence counsel elicited from the complainant's mother that there had been other times when the complainant had told her a story which she had found out was not correct. The example she gave concerned an insignificant event at school.

[28] The complainant's mother agreed that she had regular contact with the appellant and his wife and that in the June/July school holidays of 2009 (which was after the time of the alleged offences) she and her three children stayed with the appellant and his wife. She also agreed that there had been occasions when the appellant was alone with the complainant.

The complainant's father's evidence

[29] The complainant's father gave evidence of an occasion when the appellant and his wife stayed with the complainant's family for one or two nights on New Year's Eve 2008/2009. He gave the following evidence:

> "Did [the complainant] tell you anything about anything that happened with [the appellant]?-- Yes, she did.
>
> Can you tell us the conversation?-- After they left, [the complainant] came to me and told me that [the appellant] had pulled down her pants and kissed her on the bottom.
>
> Are those the words you remember her using?-- Yes.
>
> Did she say - sorry. Did she say where that was?-- She said that she was in her bedroom; yeah.
>
> What did you say to her?-- I sort of - I just said that I - that possibly it wasn't what she thought it was and I said 'Maybe he's playing

> a game with you and you ran across the room and he grabbed hold of your - your pants and - and your pants came down and maybe it was just a game, sweetie' and she said, 'No, Daddy, it wasn't a game'.
>
> Did she say anything else?-- She did. I asked her to describe to me what happened and - and she did so.
>
> Sorry, that was in this conversation?-- Yes.
>
> Well, what did she say when she-----?-- She - well, she - she said that she - she was doing a stretch on the floor and he - he said 'If you do this stretch it's – it's good for your back' and she put her legs back over her head and said 'When I put my legs back over my head, he pulled down my pants and kissed me on the bottom'.
>
> And - so that was all the conversation that you had with-----?-- That's-----
>
> -----[the complainant] at this time?-- That's correct; yeah.
>
> What did you observe of her interaction with [the appellant] during the time of this visit or stay at New Year's Eve?-- Yeah, I thought it was strange, the - the - the next-----
>
> Perhaps not what you thought, what-----?-- Sorry.
>
> -----you observed?-- She was withdrawn. The following day she didn't want to say goodbye to him and then - nothing else really was noticeable on that visit, on that particular visit, but I do recall the next time they came to visit she said 'I don't want to see [the appellant]'."

[30] The complainant's father agreed that he took the complainant to the police station for her police interview in August 2009 and that he spoke to police then and subsequently on 1 September 2009 when he made a telephone call which was recorded by police. He had subsequent conversations with police officers on occasions when there were further covert recordings of his conversations with the appellant.

[31] In cross-examination the complainant's father gave evidence that after the police interview with the complainant, he told a police officer who the appellant was and that the complainant had previously told him that "something else had happened." He said that he told police that he responded to the complainant that she might have misunderstood something and the appellant might have been playing a game, which the complainant denied. (The police officer gave evidence that the complainant's parents appeared upset when they were told the information about the appellant, and that they did not disclose that the complainant had earlier said anything about the appellant.)

[32] The complainant's father agreed that in his statement to police in January 2010 he said that on Friday 2 January 2009 the complainant disclosed to him that the appellant was in her room, pulled her pants down and kissed her on the bottom. He agreed that he had told police that he had told his wife about the complainant's statements about the "bottom kissing". He agreed that he did not confront the appellant at that time. The complainant's father agreed that he gave evidence in

September of 2010 (at the committal hearing) that the complainant had told him that the appellant had removed her pants and kissed her on the bottom whilst she was doing a stretch on the floor in which she put her legs over the back of her head. In further cross-examination he said that, when the complainant told him about the appellant, she demonstrated the exercise the appellant had asked her to do. In that demonstration the complainant lay on her back and lifted her legs up and over her head. She did not lie on her stomach.

[33] The complainant's father agreed that after January 2009 he observed contact between the complainant and the appellant, including an occasion when the complainant was sitting on the appellant's lap using a computer at the appellant's house. He said that he was concerned about that. He did not suggest that he intervened.

[34] The complainant's father agreed that at the committal hearing on 30 September 2010 he gave evidence that the complainant spoke to his wife first and his wife told him about what the complainant said, but he said that he was sure it was the other way around.

[35] In further cross-examination, the complainant's father denied that he had told the complainant that the appellant's lawyer had tried to trick him. He agreed that he told the complainant that the appellant's lawyer might try to trick her. He denied that he reminded the complainant about a gymnastics stretch. He denied that he had discussions with the complainant immediately prior to her giving evidence in which he reminded her of various things which he thought were relevant.

The covertly recorded conversations

[36] The complainant's father cooperated with the police in the covert recording of conversations with the appellant in September 2009. The conversations were in Spanish, which was the first language of the appellant, and in which the complainant's father was fluent. By agreement at the trial, evidence of the conversations was given by the reading of transcripts of agreed translations of the conversations. Some passages were excised from the transcript which was read to the jury. It was common ground in this appeal that the excised passages were properly withheld from the jury.

[37] Various passages in the recorded conversations suggest that the complainant's mother had earlier told the appellant's wife that the appellant had indecently dealt with the complainant in the way alleged in count 2. The first recording was of a 17 minute telephone conversation on 1 September 2009. The complainant's father referred to a message from the appellant in which the appellant was said to have sought forgiveness for what he did. The appellant responded that what he wanted to ask forgiveness for was "for what I did, not for what I didn't do". The appellant described an occasion on which the complainant was upset, the appellant went upstairs to the room with the complainant's father and said "forgive me" to the complainant, and the complainant's father told the complainant that the appellant "didn't mean to hurt you". The appellant went on to say that "we weren't alone, we weren't alone at any moment, and that was all". The complainant's father suggested to the appellant that it was not a game, that the appellant had asked the complainant to do an exercise on the floor extending her legs behind her head, and the appellant had pulled down her trousers and kissed her bum. The transcript records that the

appellant laughed, repeatedly denied the allegation, and said that nothing like that had ever happened.

[38] The next passage of the conversation was excised from the transcript. In the excised passage, the complainant's father expressed concern that "something like this happened to you before with a member of your family." The appellant responded that it was totally different and "it was with my daughter, nothing to do with anyone else". The complainant's father asked whether that case involved a little girl as well, and the appellant responded, "no, not at all…eh… what happened with my daughter was something completely different … for two years I couldn't talk to her". The complainant's father asked whether the appellant did something to the complainant. The appellant denied that he had. He also referred to having been to the doctor and having had four days off because his wife was ill and depressed.

[39] In a subsequent passage, which was read to the jury, the appellant asked whether the complainant's father was taping the conversation. The complainant's father gave an unresponsive answer.

[40] The second recording was of a six minute telephone conversation on 2 September 2009. The appellant said that he was worried about whether their previous conversation was recorded. The complainant's father indicated that it was not. In response to the appellant's enquiry whether the police were involved, the complainant's father said that they had gone to the police, who knew what had happened, but that before pressing charges they wanted to find out what happened and what the appellant wanted to do. They arranged to meet.

[41] The third recording was of a face-to-face conversation between the complainant's father and the appellant on 4 September 2009. The time of this conversation is not stated but it occupies five and a half pages of transcript. There is a reference to inaudible conversation at the beginning, of which there was no evidence. The evidence upon which the Crown relied as revealing a consciousness of guilt is contained in this transcript. I will set out the significant passages, emphasising the text which was excised from the transcript read to the jury:

> "[APPELLANT]: I don't want to go through this any more...that's why I've reached an agreement with [the appellant's wife]... she will look after me, I also came to an agreement… that I will never again get involved with anyone... I'll never do anything like that… or do anything… or get myself involved in this type of situations, they are horrible... I'm in total agreement that I can't get involved with children or play with children, I can't... I can't continue, I agree with that, we've reached an agreement, **[the appellant's wife] will look after me, and if… anything that she… that happens in future… she can even call you and tell you and you can put me in jail…but I want to… no more…and I've made a tremendous effort with all this, not to get into any trouble… since... since I was there with this situation.**

I'm not lying to you… I'm… really… I want… want only to come out of all this… least of all to make my wife to have to go through this…

[FATHER]: (inaudible)...and what...are you going to do about...

[APPELLANT]: … I did… I did…(OTHER VOICES ARE HEARD, INAUDIBLE) I've done so much in these years... it's been more than ten years… twelve years, that I've been well, I didn't have any reason to get into anything… I've been rehabilitating myself from everything for twelve years from everything, and I was for ten years rehabilitating myself from my divorce and from what happened to me and now I don't want to destroy everything, I don't want my family to be destroyed.

[FATHER]: Sure, but you have to reform yourself first.

[APPELLANT]: But... I'm seeing a psychiatrist, a psychologist, I'm seeing them...

[FATHER]: Yes, but… part of the process of change is also to go to the President or the authorities of the church and confess what has happened and seek help. Expiation can heal any person. There are two sins that expiation cannot heal: sins against the Holy Spirit and killing someone, taking an innocent's life. There are only two sins that can't be healed, but all the other sins can be healed, all of them.

[APPELLANT]: That's why I wanted to talk to the President of the Estaca (Stake?), I wanted to say it before them.

[FATHER]: Yes, but you're not really confessing, you're not telling me... if I were the President of the Estaca... you're not telling me the truth...so...

[APPELLANT]: Why didn't we all go to him, let's all go to him.

[FATHER]: Because I'm afraid you will tell the same story that you are telling now… that's not the truth.

[APPELLANT]: So...are you saying I should go before the Presidency and...

[FATHER]: I'm not telling you to do anything, I'm not giving you advice to do this or that… but I'm saying that the process of contrition, of being

healed of such a serious sin is to go to the church authorities, say what's happened and then seek help from other external sources, psychological...

[APPELLANT]: But I am getting help...I'm seeing a Psychologist and a Psychiatrist…

[FATHER]: Yes, good… but you're still not admitting to what's happened.

[APPELLANT]: But I have admitted it...

[FATHER]: No, you haven't admitted it...

[APPELLANT]: I have admitted it...that's why I was saying that...

[FATHER]: No, no... sorry, but I have to go...

[APPELLANT]: But this is important… it's my life...it's [the appellant's wife's] life and your daughter's life...

[FATHER]: I know...

[APPELLANT]: Your daughter's life… above all...

[FATHER]: Of course it's super important for my daughter, so that she's not in contact..."

[42] In subsequent conversation the complainant's father repeatedly asked the appellant to tell the truth. The appellant continued to maintain that he had told the truth. He said that he had hurt the complainant while playing, "but not with a bad intention". The following exchange then occurred:

"[FATHER]: No, you did more than that... XXX (female name) has told me about more things...

[APPELLANT]: What else can it be, maybe there was something that made her feel bad... I did that, I took her and pretended I was 'eating' her and that and she didn't like it...she didn't like it... and she told me immediately and she said 'stop' and I stopped and nothing happened.

[FATHER]: Yes, that's what she told me, that she had said 'stop', that you stopped, but that you pulled down her pants and kissed her bum. But I'm not going to tell you about the other things...

[APPELLANT]: No, no, no... don't tell me any more...no other things, what you are saying is enough for me...I, not her, I've never in my life pulled down her pants...never. I, I mean…"

[43] After some more exchanges to the same effect the conversation concluded.

Ground 1: The trial miscarried because out of court statements made by the appellant were improperly admitted as evidence demonstrating a consciousness of guilt and the jury were wrongly directed that the statements could be used to implicate the appellant in the commission of count 2

[44] Although there was some reference to implied admissions in the course of debate between the prosecutor and defence counsel, the Crown case, as it was put to the jury by the trial judge, was not that any statement in the transcript amounted to an admission by the appellant. Rather, the trial judge described the Crown case as being that the appellant's statements revealed a consciousness that he was guilty of count 2 despite his expressed denials.

[45] The trial judge referred to the prosecutor's arguments that the appellant's consciousness of guilt in connection with count 2 was revealed by the passages in which the appellant expressed his "total agreement that I can't get involved with children or play with children" and the he was "seeing a psychiatrist. His Honour referred to the prosecutor's submission that "it's so extraordinary that this man, if all he's done is annoy the child by pretending to bite at her and so on, he's apologising and saying he's going to go to a psychiatrist". In relation to the defence contention that the appellant accepted absolutely nothing, the trial judge told the jury that the prosecution case was "that the appellant accepted nothing "because he's playing a double sort of game. He's trying to stop the father from going to the police or taking the matter further by making some sort of clayton's admission but when he's pushed into being required to state what he actually did, he refuses to do so and says, 'I didn't do that'."

[46] In subsequent directions, the trial judge referred to the prosecution case in the following terms:

> "You recall also a point during the conversation where the defendant asked, 'Are you taping this?' Now, that's a matter that you can take into account as well. Does it show that he was being wary? Does it show that he was trying, as the prosecution stated, to do two things, to placate the father, stop things going further but on the other hand, not go so far as to make admissions but saying things like, 'I'm going to a psychiatrist. I'm going to the psychologist'? Was that meant to stop the process but wary enough not to make any admissions; that's the point of what the prosecution says. That shows this consciousness that he had committed the offences."

[47] After referring to the passage in which the appellant referred to not getting involved with children and seeing a psychiatrist or a psychologist, the trial judge observed that the prosecution said that, reading all of the conversations together, "it shows that he's dipping his foot in the water of making admissions but won't go so far as to be specific and when pushed, absolutely denies things but the tone of his behaviour suggests that he can't do other than because he's guilty speak in this way."

[48] The trial judge went on to give directions to the jury concerning the use to be made of this evidence. Amongst other matters, the trial judge directed the jury that they must be satisfied beyond reasonable doubt that the statements were made from a knowledge that the appellant was guilty of the offences charged and for no other

reason. His Honour directed the jury that they must be satisfied that the statements were concerned with some circumstance or event connected with the second count on the indictment and that they could only use the statements against the appellant if they found them to be statements suggestive of the appellant being conscious that he had committed that offence. The trial judge also directed the jury that, if the statements were capable of two interpretations, then the jury must act on the interpretation which was most favourable to the appellant.

[49] The appellant submitted that the jury could not properly perform the task described by the trial judge in those directions because the passages which had been excised from the transcripts influenced the meaning of the appellant's statements upon which the prosecutor relied. The appellant submitted that, when the transcripts were read as a whole, the statements upon which the prosecutor relied did not evidence any consciousness of guilt, or they were at least ambiguous. The respondent submitted that the admission of the evidence in the edited transcript was appropriate because the excised passages did not materially influence the meaning of the statements upon which the prosecutor relied. The respondent also submitted that no miscarriage of justice resulted from the use of this evidence because defence counsel did not object to it at the trial but relied upon the transcripts for the appellant's denials and his alternative explanation for the complainant's complaint.

[50] In *R v Williams*,[2] a decision of the Court of Criminal Appeal, Andrews CJ discussed *Woon v The Queen*[3] and *R v Grills*[4] and said:

> "The type of evidence under consideration must prove a fact relevant to guilt, namely, in this case, a guilty conscience, and that it centres upon the offence charged. If either inherently or in relation to other relevant facts proven, answers given, or in proper circumstances questions to which answers are withheld, may reasonably be relied upon to establish such a fact in support of a verdict of guilt beyond reasonable doubt, they may be left to the jury as evidence.
>
> Where however, nothing in the surrounding circumstances is shown which could reasonably be thought to compel a denial by a person interrogated or where he gives an answer which is ambiguous, neutral, equivocal, or otherwise not plainly inconsistent with a consciousness of innocence it ought not to be left to the jury with a direction to the effect that it is left to them as a fact for their consideration and thus that they might regard it as probative and press it into service of the Crown."

[51] In the same case, Thomas J said:[5]

> "There is nothing special about the principle recognised in *Woon v The Queen*. Both it and the now well-established principles concerning the use of false statements on the part of an accused person are merely examples of admission by conduct (cf. *R. v. Tripodi*). The circumstance in *Woon's case* were particularly strong. The series of contradictions, equivocations and

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2 [1987] 2 Qd R 777 at 780.
3 (1964) 109 CLR 529.
4 (1910) 11 CLR 400.
5 [1987] 2 Qd R 777 at 786 - 787.

suspicious circumstances in the case against *Woon* leads to the overpowering inference that *Woon* was a party to the crime, and it would be virtually impossible to interpret his responses otherwise. Kitto J. agreed with the trial judge's direction that:

> 'Such answers as the applicant chose to give might be considered by the jury, though not amounting to admissions of any of the facts suggested by the police, for the purpose of seeing whether they revealed a consciousness on the part of the applicant that he was guilty of the crime about which he was being questioned'.

His Honour thought in that case that there was:

> 'ample room for the jury to find in some of the answers the applicant gave, considered in the light of the facts he admitted as to the telegrams, sufficiently convincing indications of a guilty conscience to satisfy them beyond reasonable doubt that he was in fact guilty'.

Thus, in an appropriate case a person's responses may afford "unintended proof … that the accused person was afflicted with a consciousness of guilt of the crime alleged against him" (at 535).

But such directions ought not to be given unless the evidence in question fairly justifies such a far-reaching inference. It may be noted that in *R. v. Starr* [1969] Q.W.N. 23, W.B. Campbell J. (as he then was) was pressed with *Woon's case* as justification for presenting evidence of an accused's reactions when accused by the police of a complaint made by his daughter. He put his hands to his head, looked white and said "I have nothing to say." Towards the end of the interview he again put his head in his hands on a table and failed to reply when asked if he was prepared to confront his daughter and hear what she had to say. The prosecutor submitted that such evidence could properly be used as unintended proof showing consciousness of guilt in accordance with *Woon's case*. His Honour thought it would be dangerous to have such evidence so placed before the jury. His Honour went further and directed that such evidence not be admitted, although it was strictly admissible, on the ground that it would be safer to exclude it. No doubt the danger that his Honour had in mind was the possibility of incriminatory speculation on the part of the jury. Again, in *R. v. Doolan* [1962] Qd.R. 449, the appellant had been provided by the police with a statement from a co-offender. He read the statement and remarked that he thought that the other man had more sense than to give the police a statement, and added 'He has dubbed us all in.' This Court held that although the statements were strictly admissible it would be dangerous to permit such comments to be interpreted as evidence against the appellant. The danger obviously stemmed from the essentially equivocal nature of the statement. No one could safely say whether it was an admission of involvement or not.

…

> It is impossible to lay down principles which will always determine when the *Woon* direction is justifiable and when it is not. It may be observed that it is a direction that should be given sparingly in as much as it is appropriate only in cases where the Crown case may fairly be advanced by such evidence and where an incriminatory interpretation may safely be inferred from it. Not every unusual human response or departure from run-of-the-mill reactions during a police interview satisfies these requirements."

[52] Andrews CJ's observation that a statement said to reveal a consciousness of guilt should be excluded where it was ambiguous or "not plainly inconsistent with a consciousness of innocence" goes further than Thomas J's observation that a *Woon* direction should be given sparingly and only where an incriminatory interpretation "may safely be inferred". The third member of the Court, de Jersey J (as the Chief Justice then was), held that the evidence was inadmissible but did not make any general statement about the circumstances in which such evidence should be admitted.

[53] In *R v Ciantar*,[6] a five member Victorian Court of Appeal extensively reviewed the authorities. I would adopt their Honours' following conclusions:

> "Consequently, as the Court of Criminal Appeal said in *R v Perera*, and reiterated in *Woolley*, it is folly, if not impossible, to attempt to formulate general propositions or rules which will govern the occasions on which lies or conduct give rise to an inference that the accused thereby displayed a consciousness of guilt. Everything depends on the circumstances of the particular case. … As Major J commented in *White*:
>
> > [The question as to the use that the jury can make of evidence of lies or flight] is not a formula. The result will always turn on the nature of the evidence in question and its relevance to the real issues in dispute.
>
> Plainly, however, it is necessary to keep in mind the controls which customarily apply to the use of evidence of consciousness of guilt as prescribed in *Edwards*. Post-offence conduct is not to be left to a jury as evidence of consciousness of guilt unless it has first been precisely identified together with the circumstances and events that are said to indicate that by engaging in the conduct the accused demonstrated a consciousness of having committed the offence which is charged.
>
> The judge must also be satisfied that the post-offence conduct when taken in conjunction with the circumstances and events so identified is capable of demonstrating such a consciousness of guilt.
>
> So, if an innocent explanation of post-offence conduct is so inherently likely that a jury could not properly regard the conduct as evidence of guilt, or if the post-offence conduct is intractably neutral,

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6 (2006) 16 VR 26 at 48 [69] – [72] per Warren CJ, Chernov, Nettle, Neave and Redlich JJA. This decision was referred to with approval, in a somewhat different context, by Keane JA in *R v Mitchell* [2007] QCA 267 at [50] - [51].

> the judge should refuse to leave the conduct to the jury as evidence capable of demonstrating consciousness of guilt. But where the judge is satisfied that the post-offence conduct, when taken in conjunction with the circumstances and events so identified, is capable of demonstrating such a consciousness of guilt, the post-offence conduct should be left to the jury to determine whether it has that effect. …" (footnotes and citations omitted)

[54] In this case, the appellant's question whether the complainant's father was taping the conversations was not of itself capable of constituting evidence of guilt. As the appellant submitted, that question was intractably neutral on the issue whether the appellant was guilty or innocent. Evidence of that question was nevertheless admissible, since it supplied relevant context in which both any potentially incriminatory statements and the appellant's denials of guilt fell to be assessed. In my respectful opinion, that is how the jury is likely to have understood the trial judge's direction quoted in [46] of these reasons.

[55] The more substantial issue is whether the evidence of the appellant's statements that he could not get involved with children or play with children and that he was seeing a psychiatrist and a psychologist should have been before the jury. If the question were whether these statements, considered in isolation from their context, were capable of conveying a consciousness of guilt, there could only be one answer. Putting the excised passages to one side, there was real strength in the prosecutor's argument that, despite the appellant's repeated denials, those statements revealed a consciousness of guilt which implicated him in count 2. Applying the decision in *R v Ciantar*, the statements would be admissible. Unless they were excluded in the exercise of the trial judge's general discretion at common law or under s 130 of the *Evidence Act*, the jury would have the task of assessing the evidence in conformity with the trial judge's directions. In performing that task, it would be unsurprising if the jury placed weight on the statements as evidence that the appellant was guilty of count 2.

[56] However, the question in this appeal is a different one. It is whether the passages withheld from the jury were capable of being regarded as being inconsistent with or materially weakening the inference of guilt which the Crown contended arose from the appellant's statements. If so, the jury could not comply in any meaningful way with the trial judge's directions quoted in [48] of these reasons.

[57] I am unable to accept the respondent's submission that the editing of the transcript did not materially prejudice the appellant. The appellant's statement that he was seeing a psychiatrist and a psychologist seems to have been given as an example of the appellant's assertion in the passage withheld from the jury that "I've been rehabilitating myself from everything for twelve years". At the very least, that is a reasonable construction. The admission of the evidence that the appellant was seeing a psychiatrist and a psychologist without the context supplied by the excised passage was potentially prejudicial to the appellant. The potential prejudice was of a high order. In the absence of the explanation in the excised passage, the appellant's statement might be thought a very unlikely response by an innocent man to allegations by a child's father that the appellant had sexually abused the child. In this case the excision of relevant context substantially altered the meaning of the statement upon which the prosecutor relied, potentially to the appellant's serious disadvantage.

[58] That part of the transcript was also capable of throwing light upon the effect of the other statements emphasised by the prosecutor that "I will never again get involved with anyone … I'm in total agreement that I can't get involved with children or play with children". Those statements must also be assessed in the context of the excised passage in the first transcript, in which the appellant admitted that a matter concerning his daughter had been dealt with in the courts. The respondent submitted that the earlier passage could not reasonably be regarded as forming the impetus for the appellant's statements about never again getting involved with children or about seeing a psychiatrist and a psychologist, because the appellant had described the incident with his daughter as being "totally different" and "nothing to do with this", and he had denied that the incident with his daughter involved a little girl. However, the conversation had progressed from that point and both before and after the appellant made the statements upon which the prosecutor relied, the appellant repeatedly denied the alleged sexual misconduct whilst at the same time admitting that he had hurt the complainant in the course of play and apologising for that.

[59] In the context of the excised passages and the appellant's denials, the appellant's statements that he could not get involved with children or play with children and that he was seeing a psychiatrist and a psychologist are, at best, equivocal evidence that the appellant was guilty of count 2. The edited transcript presented the jury with an incomplete picture of the conversations. As a result, the jury were in no position to make any meaningful assessment of the significance of the appellant's allegedly incriminatory statements. In these circumstances the edited transcript should not have been before the jury.

[60] The lengthy debate at the trial about the transcripts focussed upon the excision of passages which were irrelevant and potentially prejudicial to the appellant, particularly the passage introduced by the appellant's statement that "something like this happened to you before with a member of your family." After the conclusion of the editing process, there was no review of its effect upon the meaning of the statements relied upon by the prosecutor. It should not be inferred that defence counsel acquiesced in this highly prejudicial evidence going before the jury in order to take advantage of the evidence of the appellant's denials and his alternative explanation of the complaint. I would hold that the admission of this evidence resulted in a miscarriage of justice notwithstanding defence counsel's failure to object to it.

Ground 2: Verdict unreasonable

[61] Ground 2 raises the question whether, in terms of s 668E(1) of the *Criminal Code* 1889 (Qld), the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.

[62] As the respondent submitted, the complainant's evidence, if accepted, was capable of establishing that the appellant was guilty of count 2, but that is not the issue under s 668E(1). The test is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[7] The court must conduct an independent review of the evidence, but it must also bear in mind that the jury had the benefit of seeing and hearing the witnesses give their evidence and it must accord respect to the jury's resolution of the contested factual

[7] *M v The Queen* (1994) 181 CLR 487 at 493 - 495.

questions reflected in the guilty verdict.[8] In this case, I do not regard the jury verdict as significant because I have concluded that the trial miscarried for the reasons articulated in ground 1.

[63] In *R v PAH*[9] Mackenzie AJA synthesised the relevant effect of applicable High Court decisions:

> "The question which the court must ask itself is whether it thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where a jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the appellate court, the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.
>
> If the evidence, on the record itself, contains discrepancies, inadequacies, is tainted, or otherwise lacks probative force in such a way to lead the court to conclude that, even allowing for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence. In doing so, the court is not substituting trial by the Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[64] In support of this ground, the appellant referred to: the inconsistencies in the versions given by the complainant in the police interview, in the interview with the acting Crown prosecutor, and in her pre-recorded evidence; the inaccurate suggestions made to the complainant by the police officer in the course of the police interview; and the complainant's evidence that her father had reminded her of aspects of her evidence.

[65] I will summarise the relevant discrepancies and weaknesses in the evidence:

(a) At the August 2009 police interview, the complainant's first statement concerning the appellant (which related to count 1) was that her friend from Brisbane always "wants" to do that. The police officer misstated that account by suggesting to the complainant that she had mentioned that the appellant "does that".

(b) The complaint stated in relation count 2 that the appellant "tried to kiss it" and "was trying to … kiss my bum". The police officer misstated that account by suggesting to the complainant that the appellant "kissed your bum".

(c) When the police officer returned to the computer incident by saying that the complainant was "sitting at the computer and he was

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8 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 624 [59].

9 [2008] QCA 265 at [29] - [30].

touching your bottom" the complainant responded. "[n]o, that isn't the [appellant] bit, that's the [A] bit." The police officer then suggested a different answer by asking the complainant whether the appellant did not do that, and the complainant responded that the appellant and A had "done it before."

(d) At the police interview the complainant said that both incidents occurred on the same day. In her pre-recorded evidence she said that the computer incident and the exercise incident occurred on different days, and that she could not recall whether or not the computer incident occurred at her house or at the appellant's house in Brisbane.

(e) The complainant told the police officer that "I was doing the exercise that he was showing me." That referred to her description of a handstand where she had her arms on her head. Her statement to that effect was consistent with her initial description that the appellant was trying to pull her pants down and kiss her bottom when she was "going to do" a handstand, and her statement that she did a handstand after the incident. That account was inconsistent with:

(i) The complainant's father's evidence that she had told him that the appellant had kissed her on the bottom after she put her legs over the back of her head.

(ii) The complainant's statement to the acting Crown prosecutor that the appellant pulled her pants down while she was lying on her stomach and arching her back upwards, so that her head and feet were almost touching. (The complainant contradicted that statement three days later, when she gave evidence in which she specifically denied that she had performed that exercise.)

(iii) The complainant's evidence that the appellant pulled her pants down and kissed her on the bottom whilst she was lying on her stomach and not arching her back.

(iv) The complainant's evidence that she did not do a handstand after the incident.

(f) At the interview with the acting Crown prosecutor, the complainant said that the appellant had locked the door and closed the blinds in her bedroom and also referred to an occasion when the appellant was in her father's bedroom with her. The complainant did not mention either of those matters in the police interview 20 months earlier.

(g) The complainant told the acting Crown prosecutor that it was only A who had put his hand down her pants whilst she was at the computer. At the police interview and in evidence the complainant attributed the same conduct to the appellant.

(h) At the police interview the complainant was not able to be more specific about the time of the alleged offences than that they had occurred the year before (in 2008), which she recalled because she was then in her old house and the family later moved to a new house. In evidence the complainant was able to place the date of the alleged

offences with reference to the appellant and his wife having stayed for New Year's Eve.

(i) At the police interview the complainant said that the appellant had kissed her bottom "quite a few times" and he stopped when she said not to do it. She did not refer to any statement made by the appellant about that. The complainant made statements to the acting Crown prosecutor and gave evidence to the effect that she told the appellant to stop kissing her bottom and he said that he would stop after kissing her two more times.

(j) The complainant gave evidence that she had forgotten and her father had reminded her about her account, including that: the appellant closed the blinds and the door; the complainant lay on her stomach; the appellant pulled her pants down and kissed her on the bottom whilst she was in that position.

(k) The complainant's evidence that she was wearing tracksuit pants at the time of the computer incident might have conflicted with her statements at the police interview that she was just wearing togs, but that is not clear.

(l) The complainant's father's evidence that he told a police officer after the August 2009 interview about the complainant's earlier complaint in relation to the appellant's conduct was contradicted by the police officer.

(m) The complainant's father's evidence that shortly after the alleged offence the complainant had complained to her mother, or that she had complained to him and he had told her mother, was contradicted by the complainant and her mother. He also gave evidence that he did not speak to the appellant about the complaint at that time, and the evidence was that both parents acquiesced in the appellant's continuing close contact with the complainant.

[66] The appellant submitted that the evidence that the complainant's father had reminded the complainant of her account about count 2 was of particular significance because the complainant's father's evidence of an early complaint by the complainant was unlikely to be true in light of the matters in (l) and (m). The appellant also relied upon the obvious weaknesses in relation to count 1 and made the point that the jury's doubt in that respect must be taken into account in assessing the reasonableness of the verdict on count 2.

[67] In relation to the last point, there is substance in the respondent's submission that the jury's verdict might be explicable by the complainant's inability to recall in evidence where the incident the subject of count 1 had occurred. The trial judge directed the jury that they had to be satisfied that the incident occurred at the place alleged by the Crown.

[68] In relation to the inconsistencies concerning the exercises performed by the complainant, the respondent submitted that these might have arisen from the complainant's young age and her inability clearly to articulate precisely what she was then doing. She might also have been confused by some of the questioning. In the respondent's submission, it remained open to the jury to be satisfied that the

complainant gave a credible and reliable account of the appellant kissing her on the bottom in her bedroom at a time when she had been doing stretches and exercises. The respondent also submitted that there was no motivation for the complainant to give dishonest evidence. She had expressly rejected the suggestion in cross-examination that the matter which concerned her was the appellant growling at or pretending to eat or bite her stomach. The respondent pointed out also that the complainant was forthright in her evidence that her parents had reminded her of certain details and that she could not remember some details, including the location of count 1. The evidence was inconsistent as to whether the complainant had complained about any incident involving the appellant before the August 2009 police interview, but that inconsistency was before the jury.

[69] The respondent also relied upon a comment made by the trial judge in the absence of the jury that his Honour's impression was that when the complainant spoke to the police officer her evidence was compelling. The respondent submitted that the complainant's evidence could be understood with greater clarity when it was viewed rather than read.

[70] I would not attribute much significance to the variations in the complainant's accounts about the nature of the exercises she performed at the relevant time if they were unrelated to other discrepancies in the evidence. Those inconsistencies, like some of the other inconsistencies upon which the appellant relied, are of themselves of a relatively minor nature. Matters of that kind are to be expected in a young child's account where there are delays between different accounts of an alleged offence of this nature. However those inconsistencies assume more significance in the context of the other matters to which the appellant pointed.

[71] The complainant's father's evidence that the complainant promptly complained about the appellant must be of doubtful reliability in light of the complainant's mother's contradictory evidence, the complainant's parents' conduct in permitting the appellant to continue to have unsupervised contact with the complainant, and the complainant's own evidence. This might well be capable of rational explanation, but on the whole of the evidence it would be unsafe to act on the view that, before the matter was incidentally mentioned in the police interview, the complainant made any complaint to her parents about misconduct as concerning as that which was charged in count 2.

[72] That is relevant in the assessment of the significance of the police officer's repeated misstatements to the complainant of her initial account. Of course the complainant's original statements that the appellant "tried" and "was trying" to kiss her bottom might have been intended to convey that the appellant had in fact done so. That would be an unsurprising use of language by a child, and the complainant might have made that clear without any prompting by the police officer. However, the police officer's suggestions to the complainant that the appellant "kissed your bum" deprived the complainant of the opportunity to give her own unprompted account of what happened. Although it may be suspected that the complainant meant to convey the same thing, it is not possible to be sure what the complainant meant or would have said without the influence of the police officer's inaccurate suggestions.

[73] That concern, together with the doubt about the accuracy of the complainant's father's evidence of early complaint, also bears upon the significance of the complainant's evidence that her father had reminded her of her account. I do not

accept the respondent's argument that the complainant did not identify which elements of her account her father had reminded her about. Her evidence was that her father went much further than merely reminding her to tell the truth. She made it quite clear that she had forgotten, and that her father had reminded her, of the essential elements of her account of count 2. Her subsequent evidence that she remembered the events must necessarily carry less weight in the context of her evidence that she had forgotten those events and her father had reminded her of them. The difference between the complainant's description of the gymnastics stretch in the conversation with the acting Crown prosecutor and her description in evidence only three days later enhances that concern about the reliability of the complainant's evidence on count 2.

[74] It was necessary for the Crown to prove beyond reasonable doubt, not merely that the appellant engaged in indecent dealing but that he was guilty of the particular indecent dealing which the Crown alleged constituted the offence in count 2. A reasonable doubt that the Crown fulfilled that onus arises from the combination of inconsistencies and weaknesses in the evidence which I have summarised.

[75] I am not persuaded that the doubt is one which is capable of resolution by reference to the advantage of the jury in seeing and hearing the complainant and the other witnesses give evidence. The jury must have found that the complainant was a reliable and credible witness. Her demeanour might well have suggested to the jury that she was a truthful witness. But her demeanour could not resolve the doubt about the reliability of her account which arises from the inconsistencies and weaknesses apparent on the face of the record. In any event, the jury's verdict should not be taken into account in this exercise because the jury might have attributed substantial weight to the evidence of the covert conversations which should not have been admitted.

[76] I would decline the respondent's invitation to attempt to resolve the doubt by viewing the video recordings of the police interview and the complainant's evidence. That forms only part of the evidence from which the doubt arises. Furthermore, in *SKA v The Queen*[10] French CJ, Gummow and Kiefel JJ said:

> "The account given and the language used by witnesses, which are available by way of transcript, are usually sufficient for a review of evidence. It is to be expected that if there is something which may affect a court's view of the evidence, which can only be discerned visually or by sound, it can and will be identified. Absent this purpose it is not possible to conclude that a court is obliged to go further and view a recording of evidence. There must be something in the circumstances of the case which necessitates such an approach."

[77] The respondent did not identify any particular feature of the evidence which could only be discerned visually or by sound. It is inappropriate to view the recording for the purpose of attempting to form some general impression about the complainant's demeanour and relying upon that impression to dispel the reasonable doubt which arises upon analysis of the record.

Proposed orders

[78] I would allow the appeal, set aside the conviction, and enter a verdict and judgment of acquittal.

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10 (2011) 85 ALJR 571 at 578 [31].

[79] **CHESTERMAN JA:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[80] **MULLINS J:** I agree with Fraser JA.