SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCQ* [2013] QCA 388
PARTIES:	**R** **v** **BCQ** (appellant/applicant)
FILE NO/S:	CA No 213 of 2013 DC No 3 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bowen
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2013
JUDGES:	Holmes JA and McMeekin and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The convictions in respect of Counts 10, 11 and 13 be set aside and verdicts of acquittal entered in respect of each of those counts.** **3. The verdicts of guilty in respect of Counts 1, 8 and 9 be set aside, and a new trial be ordered in respect of each of those counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of one count of maintaining an unlawful sexual relationship with circumstances of aggravation (Count 1), three counts of aggravated indecent assault (Counts 8, 10 and 11), one count of aggravated indecent treatment of a child (Count 9), and one count of rape (Count 13), and acquitted of four counts of aggravated indecent treatment of a child (Counts 2, 3, 5 and 7), one count of aggravated indecent assault (Count 4), and one count of attempted rape (Count 6) – where the appellant contends the verdicts of guilty were unreasonable and inconsistent with the verdicts of acquittal – where the respondent submits there was a logical and reasonable basis as the verdicts of not guilty on Counts 2-7 were in the context

of the complainant's evidence being less specific in respect of the dates of those offences – where the complainant's evidence was no more specific as to the dates of Counts 10, 11 and 13 than Counts 2-7 – where findings of guilt on Counts 8 and 9 were open on the evidence – whether verdict unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – REVIEW OF EVIDENCE – where the complainant relied upon a pretext call which contained the appellant apologising for his conduct when the complainant was a "little girl" – where the appellant contended the apology related to consensual sexual conduct when the complainant was over 18 years of age – where the jury were directed that it was a question for them to determine what the telephone conversation meant and whether it supported the complainant's account – where the appellant contends the trial Judge erred in failing to adequately direct the jury as to the use to be made of alleged admissions during the pretext call – where the appellant also contends the jury ought to have been directed as to the standard of proof when deciding whether the complainant's evidence constituted an admission the appellant had sexually interfered with the complainant when she was a child – whether the jury were adequately directed as to the proper use to be made of the contents of the pretext call

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v BBQ (2009) 196 A Crim R 173; [2009] QCA 166, cited
R v DAL [2005] QCA 281, cited
R v FAD [2013] QCA 334, cited
R v IE [2013] QCA 291, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M J Copley QC for the appellant/applicant
T A Fuller QC for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Boddice J and the orders he proposes.

[2] **McMEEKIN J:** I am indebted to Boddice J for his reasons which I have read in draft. I will not refer to the facts in detail as they are accurately set out by his Honour. I agree with all that his Honour has said about the principles that apply on

the setting aside of a jury verdict and on his Honour's analysis of counts 8 and 9. I restrict my remarks to counts 10 to 13 and to the alleged misdirection.

The Alleged Inconsistency

[3] Because we are setting aside a jury verdict, something that should be done only with considerable reluctance, particularly on the ground of alleged inconsistency which can be potentially explained in so many ways, and ways not always necessarily evident from the written record, I wish to say a few words of my own. In making these remarks I have in mind particularly the third and fourth propositions that appear in the judgment of Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-367.

[4] The question on appeal is whether the quality of the evidence led in relation to counts 10, 11 and 13 is no better than the evidence led in relation to the charges that were said to have taken place earlier in time and which led to an acquittal. If not, then logically those counts should have received the same response.

[5] The period averred in the indictment, when all charges are considered, covered the time from 1 November 1991 to 1 December 1998. The charges were based on complaints brought by a woman 29 years of age at trial about events that she said occurred when she was aged only between eight and 12 years - about 17 to 21 years prior to the trial.

[6] Given that time lapse, that there was imprecision in the complainant's evidence is hardly surprising. Despite that imprecision the jury were satisfied that the complaints of inappropriate sexual conduct by the appellant, her grandfather, were made out. Putting to one side the disputed counts the conviction on count 1 makes so much plain.

[7] However the appellant was acquitted on some of the 12 counts left to the jury. The quality of the complainant's evidence about what occurred on the various occasions, so far as the written record can show, seems to be much the same and with detail that the jury might well have thought compelling. They of course had the considerable advantage of seeing and hearing the complainant and the appellant and judging the impact of the appellant's explanation for his statements in the pre-text phone call, statements that he conceded related to sexual contact between him and the complainant.

[8] Given the state of the evidence the only proper inference that can be drawn from the verdicts given by the jury, some guilty and some not guilty, is that the jury entertained a reasonable doubt about the timing of the events about which complaint was made and so whether the acts complained of took place in the period averred in the indictment.

[9] There was good reason for that doubt in respect of the charges on which the jury returned verdicts of not guilty. The complainant herself conceded the uncertainty. In response to one question in cross-examination, when challenged that her repeated qualification "to the best of my knowledge" reflected the response someone had suggested she should make, the complainant replied:

> "No. That's to the best of my knowledge. It happened 20 years ago. It could have been September school holidays; it could have been the

> Christmas school holidays. I'm doing my best to remember what happened 20 years ago."[1]

[10] Given that the charges brought against the appellant, and in respect of which that answer was given, nominated a time period that did not include the September school holidays it is completely unsurprising that the jury could not be satisfied beyond reasonable doubt that the alleged offences occurred within the time period averred, an essential element of the charges. The complainant herself could not say that and there was no other evidence to show that the dates alleged were accurate.

[11] While there are some different features to the evidence relating to the charges later in time, where verdicts of guilty were returned, which, in my view, could justifiably impact on the impression that the jury formed as to the reliability of the complainant's recollection of the accuracy of the dates alleged in those respective counts, there remains significant doubt, on the complainant's own evidence, of that accuracy. I cannot resolve that doubt in my own mind as being explained by any advantage the jury may have had. I note that the learned trial judge's directions to the jury on the matter similarly did not draw any distinction between the time periods and the quality of the evidence on the charges here under discussion, he, of course, having seen and heard the witnesses.

[12] To put the evidence into context the complainant turned 12 years old in August 1995 and counts 10 to 13 allegedly related to events in the pre Christmas Day holiday period of November - December 1995.

[13] There are three passages in cross-examination that are relevant.

[14] After the response that I have already referred to concerning the September holiday period in relation to the counts on the indictment earlier in time the complainant was asked why she made "a concession" that it could have been a different school holiday period and she replied: "I was a eight, 10, 11, 12-year-old child. I didn't take down times, dates. I'm trying to remember what happened exactly, on the exact time, exact day, 20 years ago. I'm doing my best. I remember the trauma I went through but to remember the exact days, it's – I don't want to commit to one day and then find out that it wasn't the exact day. So, to my best knowledge, that's the time I remember."[2]

[15] The relevant point is that the complainant did not herself draw any distinction between one age and another. On its own that may be explicable but other answers compound the problem.

[16] Earlier in her cross examination the complainant gave the following evidence:

> "Now, the fifth incident that you referred to, and that's when you said that it was the monopoly gang [*sic* – presumably "game"], you said "I think I was about 12 years old". Are you able to specify if it was summer or winter when that occurred? --- No"[3]

[17] In case there was any doubt about what was meant by the reference to the "fifth incident" the specification of the monopoly game and the complainant's age

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1 AB 51/40.
2 AB 52/45.
3 AB 41/25.

sufficiently identified the occasion under examination as being that to which counts 10 to 13 related. The evidence in chief was to the effect that while the type of offending involving the playing of the Monopoly game occurred on many occasions[4] the particular counts alleged occurred within a few days of each other[5] and involved the one and only count of rape. An inability to say whether "the fifth incident" occurred in summer or winter throws into considerable doubt the other evidence led that the offending conduct occurred in the period nominated in the indictment – well known to every Australian child as summer.

[18] Finally that other evidence was not, at its highest, that the complainant could assert with certainty that she had the right holiday period. When questioned directly about the events relevant to counts 10, 11 and 13 the following exchange took place:

> "I'll move on to the final incident, the one that you say occurred when you were about 12 years old? --- To the best of my knowledge.
>
> The summer of 1995. Would that be correct? --- To the best of my knowledge, yes
>
> …
>
> Now was at the school holiday period? --- Correct
>
> Was it a Christmas school holiday period? --- To the best of my knowledge, they were there for Christmas, but they were there for Christmas school holidays.
>
> I see. So it occurred in that six week Christmas holiday break, but not – you're saying your grandfather wasn't there for Christmas day? --- No
>
> --- is that correct? --- Yes"[6]

[19] Here the complainant repeats on three occasions her earlier answer of "to the best of my knowledge" both in relation to her age and the holiday period. She had explained the qualification that she put on that answer. Hence the temporal attribution remains quite imprecise.

[20] In my view the uncertainties in the evidence which evidently led to the jury having and expressing a reasonable doubt about the earlier incidents of offending conduct are just as cogent in relation to these later incidents. I agree that the convictions must be set aside and verdicts of acquittal must be entered on counts 10, 11 and 13.

The Claimed Misdirection

[21] No re-direction was sought at trial, nor was complaint made initially in the grounds of appeal, but leave was sought and given to raise this point on the appeal.

[22] There are effectively two complaints. The first is that the learned trial judge did not explain to the jury that the "admission" involved in the appellant's statements in the

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4 AB 34/39.
5 AB 35/9.
6 AB 55/43 – 56/16.

pre text call were not to any specific conduct. The second is that the learned trial judge did not instruct the jury that they had to be satisfied beyond reasonable doubt that the call constituted an admission the appellant had sexually interfered with the complainant when she was a child.

[23] The concern, I gather, in relation to the first point is that the use of the word "admission" by the learned trial judge in his summing up carries the risk that the jury might misconstrue the intent of his remarks and assume they were being directed that the contents of the telephone call carried greater and more direct evidential value than appropriate. In the context of the limited debate in this case I do not share that concern.

[24] Effectively, the argument is that the learned trial judge did not explain what the admission was that was made in the course of the call. Neither counsel thought that needed any elucidation from the trial judge. I am not surprised.

[25] The appellant conceded in his evidence that his statements in the course of the call were in relation to his sexual conduct towards the complainant but not when the complainant was a child, as she alleged, but rather when she was an adult. He expressly admitted to conduct involving touching of the breast and groin areas but denied penetration, but all with the complainant when she was a consenting adult.

[26] The issue then was rather starkly exposed for the jury. Did the repeated apologies made in the course of the call relate to an admission that there was sexual conduct towards the complainant when she was a child or when she was an adult? There was no other argument.

[27] There was, in fact, no statement in the pre text call about any specific conduct. That is, the complainant throughout the course of the call did not allege that any particular conduct took place. The appellant did not at any time admit that any particular type of conduct took place. There was not, at any stage, even an explicit reference to sexual contact taking place. What the appellant did say related to repeated apologies for his conduct.

[28] In that context I cannot accept that it is incumbent on the trial judge to tell the jury that the call did not contain an admission of any particular conduct and that when the complainant was a child.

[29] The cases where concern has been expressed of a misunderstanding about a claimed admission made in a pre text phone call or otherwise have been in circumstances where there was scope for some misunderstanding and misuse of the evidence.

[30] For example in *R v BBQ*[7] the defendant had given an account suggestive of a claimed accidental touching of the buttocks of the complainant. The account was given in response to a claim that he had tickled the complainant's vagina, which claim he denied. He faced four counts of indecent conduct separated in time, none of which related to the touching of the complainant's buttocks. The trial judge spoke of the account amounting to an admission and repeatedly referred to a touching of the buttocks as included in the charged acts, which it was not. In that context where there was a statement of a particular act and a misstatement of the significance of that act the prospect of the jury misusing the evidence was apparent.

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7 [2009] QCA 166.

As well the admitted conduct related to conduct at only one point in time, a time associated with only one charged act, and a time remote from the other charged acts. In that context the failure of the trial judge to identify clearly to the jury that the admission, if it could be an admission of any relevance at all, could only be to an admission of having given effect to an unnatural sexual attraction to the complainant, his daughter, was of real significance and concern.

[31] Those problems simply do not arise here.

[32] While *R v IE*[8] is closer to the facts here, again there was plain scope for misunderstanding of the effect of the evidence. There the appellant made quite cryptic comments in a pretext phone call with the complainant. The appellant claimed that his comments had nothing to do with any prior sexual conduct towards the complainant. Rather he claimed the comments were to do with his assumption that the call was about getting together to discuss a rift in the family that had developed after the complainant had made allegations of sexual misconduct against him years before. A bland reference to the statements amounting to an admission, without any explanation of an admission as to what, had the real danger of leaving the jury with the impression that the comments had much greater evidential value than they in fact had. Again the common ground present here, of the appellant having given effect to an unnatural sexual attraction to the complainant, his grand daughter, was not present there. The need in *IE* to explain what legitimately could be the extent of any admission construed from the remarks simply does not arise here.

[33] Here the point was both simple and clear. Each side denied that any sexual conduct had occurred at the time nominated by the other. On the one side the appellant said that he was apologising for inappropriate sexual conduct when his grand daughter was an adult and on the other it was contended that he was apologising for inappropriate sexual conduct when she was a non consenting child. That the apology was for having given effect to an unnatural sexual attraction to the complainant, unnatural because the object of his attentions was his grand daughter, albeit a step relationship, was not in issue. It was common ground.

[34] The suggested factual redirection required the judge to point out the patently obvious. I cannot see that there was any real scope for the jury to misconstrue the evidence or misunderstand its significance. Either the repeated apologies related to unspecified sexual conduct towards the complainant at a time when the complainant was an adult or it related to a time when she was a child. If the latter then the evidence plainly provided corroboration of the complainant's evidence.

[35] I see no need for any explanation from the trial judge.

Standard of Proof

[36] I turn then to the remaining question – was it necessary to direct that the jury be satisfied beyond reasonable doubt that the conversation related to the time when the complainant was a child and not an adult? The appellant contends that it is the decision of the majority in *HML v The Queen*[9] that requires the giving of a direction here as to the standard of proof that had to be applied. I have, with some hesitation,

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8 [2013] QCA 291.

9 (2008) 235 CLR 334.

come to the view that the complaint is right. It is certainly consistent with two decisions of this Court applying *HML - R v BBQ*[10] and more particularly *R v IE*[11]. What I think needs to be highlighted is that this decision extends the scope of the effect of the principle for which *HML* stands.

[37] *HML* was concerned with propensity evidence and specifically with proof of "uncharged acts" – that is the admission into evidence of acts not the subject of the charge before the court but showing discreditable conduct of the accused – and, for present purposes, the direction that ought to be given as to the standard of proof that needed to be satisfied in determining whether such acts had occurred before they could be acted upon.

[38] The telephone conversation in issue here did not contain any proof of any uncharged act. It contained no express reference to any sexual conduct at all. The principle then, by this decision, extends not only to those cases where the proof proffered is of express acts establishing a sexual interest in the complainant but of conversations containing admissions of a sexual interest in the complainant.

[39] To make the point more explicable it is necessary to refer in a little more detail to the evidence. After stating that the purpose of the call was "to sort out our issue we talked about a couple of months ago" the complainant made no express reference to any conduct at all. Nor did the appellant. The subject of the call was assumed on both sides to be understood. The probative value of the evidence was in the express mention by the appellant of the complainant being "a little girl" and in the inferences reasonably open from the appellant's failure to reject, qualify or comment on the complainant's repeated references to either her childhood or to children, hers and others. The principal examples of such statements and the appellant's responses, taken from various parts of the conversation, are:

> "It's something I can never get back in my childhood - - - I know that, I know that"
>
> "I'm not the only child that its happened to obviously, there's lots of children out there unfortunately it happens to - -- Yeah"
>
> "Yes, Yeah. It's hard --- Oh don't cry lovey….I'm an adult and I should never have done this to you. You're a little girl, a little girl. I know how it ruins lives…"
>
> "I find it so hard to let my girls go anywhere or so in case anything happens to them -- -Yes, yes. I see what you mean too.
>
> …
>
> Because I have fears from what happened to me -- Yes. That's right
>
> But that's just how it is and I can't explain it to them at their ages. They don't understand what it means or anything - - Yes. Yeah. I know."

[40] The appellant characterises the evidence here as falling within the statement of principle explained by Hayne J in *HML*: "It is important to recognise, however, that

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10 [2009] QCA 166.

11 [2013] QCA 291 – decided after the trial in this matter.

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'".[12]

[41] It is true that the admission contended for here, on the prosecution case, was to the appellant having a sexual interest in the complainant and having acted on that interest. And it might be said that the subject of the call being not expressly identified it had the potential to refer to uncharged, given that they were unidentified, acts of sexual misconduct. These aspects of the evidence thus, potentially at least, attract the application of the principle expressed in *HML*. But the distinction I draw is that in this case proof of the appellant's sexual interest is not to be inferred from evidence of conduct involving the complainant falling under the general rubric of "uncharged acts" but rather from admissions. The point that has concerned me is whether this distinction should result in any different treatment.

[42] The quote by Hayne J that I have referred to is from the judgment of Kiefel J in *HML*. I concentrate on the judgment of Kiefel J as it is in her reasoning, in the passage quoted below, that Hayne J considered that the majority, a narrow 4-3 majority, joined. That her Honour was speaking in the context of the facts there before the court which relevantly concerned acts of a sexual nature involving the complainants on occasions other than the subject of the charges is evident. The full passage reads:

> "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**. **Where the accused has already offended that propensity or tendency may be taken as showing a preparedness on the part of the accused to act upon it and to continue to act upon it. It is to be recalled that in cases such as this there is usually no independent evidence to prove the acts relied upon as relationship evidence.** It is for the jury to determine whether all, or some, of the evidence is acceptable for the purpose suggested by the prosecution, assuming for present purposes that they do not accept the direct evidence of the offences given by the complainant as itself sufficient. **A finding of propensity on circumstantial evidence is one as to an intermediate fact.** 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. From that point they may consider that it is more probable that the accused committed the offences."[13]

[43] That reasoning has no application here. The process of reasoning here is not that the appellant had acted in a certain way at some time prior to the relevant events and that he therefore had a propensity to so act and so the jury should therefore assume that he acted in the way alleged at the material time. The reasoning here is that the appellant admitted to acts which, on his own statements made during the call, he plainly considered to be shameful and which acts, on the prosecution case, occurred when the complainant was a young girl. That then provided the corroboration of the complainant's evidence.

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12 (2008) 235 CLR 334 at [247].

13 (2008) 235 CLR 334 at [506] with my emphasis and omission of citations.

[44] Nor is there an absence of independent evidence here. It is not the word of the complaint that the admissions were made. The jury heard them on the recording. The meaning to be attributed depended to an extent on the context provided by the complainant's evidence. But that involves very different considerations to the matters that troubled the High Court in *HML*.

[45] Those considerations included the unfairness to an accused of having to deal with uncharged and sometimes often poorly particularised acts and the prejudice that can result from the leading of evidence of uncharged acts due to the jury giving inordinate weight to the evidence. Such considerations led the majority in *HML* to require the adoption of the *Pfennig* test of admissibility and hence the express direction as to the standard of proof.

[46] Hayne J explained the rationale of the rule in *Pfennig* in these terms

> "The rule takes as its premise that evidence of other discreditable acts of the accused is ordinarily inadmissible. The foundation for the rule excluding evidence of other discreditable acts of an accused is that, despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in ways that give undue weight to the other acts that are proved. That is why the exception to that general rule of exclusion is drawn as narrowly as it is by *Pfennig*. It is why *Pfennig* requires that evidence of other acts may be admitted only if it supports the inference that the accused is guilty of the offence charged, and the evidence of those other acts is open to no other, innocent, explanation."[14]

[47] Hayne J also explained the uses to which such evidence could be put, adding that the list was not necessarily exhaustive and that there might be little profit in labelling evidence:

> "The kinds of use to which it is possible to put evidence of offences or other discreditable acts other than those being tried are indicated in r 404(b) of the United States Federal Rules of Evidence with its reference to 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident'."[15]

[48] My concern, and consequent hesitation in accepting the applicability of the principle, is that the unfairness and prejudice that were of concern in *HML* are unlikely to arise here where the evidence led is of an admission of a sexual interest, not a course of conduct involving explicit acts. As Kiefel J had earlier observed in *HML*: "A risk of prejudice is most likely to arise, in cases of this kind, where specific, detailed incidents of other sexual misconduct are recounted by the complainant".[16]

[49] It is not irrelevant to note that the evidence proffered here could not be used, and so potentially misused, in the ways identified by Hayne J.

[50] Given these circumstances I remain unpersuaded that the *ratio* of *HML* commands the giving of the direction contended for here. In context I read Kiefel J's remarks as meaning "[i]n the ordinary course a jury would be instructed by the trial judge

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14 (2008) 235 CLR 334 at [113].
15 (2008) 235 CLR 334 at [124].
16 (2008) 235 CLR 334 at [504].

that they must only find that the accused has a sexual interest in the complainant [where proof of that interest is to be inferred from conduct involving the complainant on occasions other than the subject of the charges] if it is proved beyond reasonable doubt." It is only by analogy that the principle can be found to extend to the facts involved in this case and I entertain considerable doubts about the need to do so.

[51] One reason not to do so is that the direction runs counter to the general principle and itself invites error. Gleeson CJ explained the general principle in *HML*. While the Chief Justice was in the minority there his exposition on this point is, I perceive, unremarkable and was not disputed by those judges in the majority:

> "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."[17]

[52] So in the usual course no such direction as contended for was required. Whether it is required depends upon the character and effect of the evidence in issue. As I have endeavoured to show the character and effect of the evidence in issue here, while in a very general sense similar, is of a different quality to that in *HML*.

[53] The difficulty that I perceive in giving effect to my own view is that this Court has already determined the matter. The proof advanced in *R v BBQ* did involve a discrete act allegedly of a sexual and not accidental nature and so was closer to the factual circumstances considered in *HML*. But I think it inescapable that the decision in *R v IE* involves acceptance that the principle extends so far as the appellant contends and I feel constrained to decide this case consistently with the decision there.

[54] I therefore agree with the orders proposed by Boddice J.

[55] I would wish to add that it follows that it is now incumbent on counsel to draw to the attention of trial judges the need to include an express direction on the relevant standard of proof where the prosecution advance evidence, apart from the charged acts, allegedly showing that the accused has a sexual interest in the complainant, even where the prosecution evidence is of a general kind and does not include discrete uncharged acts. While I make no criticism of trial counsel, particularly given that *R v IE* was decided after the trial was concluded, I note that was not done here.

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17 (2008) 235 CLR 334 at [29].

[56] **BODDICE J:** On 23 August 2013, a jury found the appellant guilty of one count of maintaining an unlawful sexual relationship with circumstances of aggravation, three counts of aggravated indecent assault, one count of aggravated indecent treatment of a child, and one count of rape. The jury found the appellant not guilty of four counts of aggravated indecent treatment of a child, one count of aggravated indecent assault and one count of attempted rape. During the trial, the jury had also been directed to acquit the appellant of one count of indecent treatment.

[57] The appellant was sentenced to eight years imprisonment in respect of the count of maintaining an unlawful sexual relationship with circumstances of aggravation. The appellant was sentenced to concurrent lesser periods of imprisonment in respect of the remaining offences.

[58] The appellant appeals his convictions on the grounds the verdicts of guilty were unreasonable, and inconsistent with the verdicts of acquittal, and the trial judge erred in failing to adequately instruct the jury about the use to be made of alleged admissions during a pretext telephone call. The appellant also seeks leave to appeal the sentences on the ground the sentences imposed were manifestly excessive in all the circumstances.

Background

[59] The appellant was born on 6 June 1928. He was 85 years of age at the time of sentence. He was aged between 63 and 70 at the time of the offences. The complainant was the appellant's step-granddaughter. She was born on 25 August 1983. The complainant was aged between eight and 15 at the time of the offences.

[60] Throughout the period of the offending, the complainant resided with her parents and brother at Bowen in northern Queensland whilst the appellant and his wife lived in southern Queensland. All but two of the offences were committed when the appellant and his wife, the complainant's grandmother, visited the complainant's family at Bowen during school holidays. The remaining two counts were alleged to have been committed at either Tin Can Bay or Coolum when the complainant and other relatives were holidaying with the appellant and his wife.

The offences

[61] Count 1 alleged that between 1 November 1991 and 31 December 1998 the appellant maintained an unlawful sexual relationship with a child with circumstances of aggravation. The jury found the appellant guilty of this offence.

[62] Count 2 alleged that between 1 November 1991 and 31 January 1992 the appellant indecently treated the complainant, a child under the age of 16 under his care. The jury found the appellant not guilty of this count.

[63] Count 3 alleged that between 1 February 1992 and 25 August 1992 the appellant indecently treated the complainant, a child under 16 under his care. The jury found the appellant not guilty of this count.

[64] Counts 4, 5, 6 and 7 were all alleged to have occurred between 1 November 1993 and 31 January 1994. Count 4 alleged the appellant indecently assaulted the complainant, with a circumstance of aggravation. Count 5 alleged the appellant indecently treated the complainant, a child under 16 under his care. Count 6 alleged the appellant attempted to rape the complainant. Count 7 alleged the appellant indecently treated the complainant, a child under 16 under his care. The jury found the appellant not guilty of counts 4, 5, 6 and 7.

[65] Counts 8 and 9 were alleged to have been committed between 1 November 1994 and 31 January 1995 at Tin Can Bay or Coolum. Count 8 alleged the appellant indecently assaulted the complainant, with a circumstance of aggravation. Count 9 alleged the appellant indecently treated the complainant, a child under 16 in his care. The jury found the appellant guilty of counts 8 and 9.

[66] Count 10 alleged the appellant indecently assaulted the complainant, with a circumstance of aggravation, on a date unknown between 1 November 1995 and 25 December 1995. The jury found the appellant guilty of this count.

[67] Count 11 alleged the appellant indecently assaulted the complainant with a circumstance of aggravation. Count 13 alleged the appellant raped the complainant. Both were said to have occurred during one incident at Bowen, on dates unknown between 1 November 1995 and 25 December 1995. The jury found the appellant guilty of counts 11 and 13.

[68] Count 12 also alleged indecent treatment of the complainant, a child under 16 in his care, on a date unknown between 1 November 1995 and 25 December 1995. At trial, the complainant gave no evidence of this offence. The jury were directed to find the appellant not guilty of count 12 at the close of the Crown case.

Evidence

[69] The complainant gave evidence the appellant and her grandmother would visit them during the school holidays. The first occasion when there was inappropriate contact between the appellant and herself was when she was about eight years of age. It happened in a cubby house under the house. The appellant touched her on the vagina by placing his hand inside her underpants (Count 2).

[70] The complainant said a similar thing happened a couple of months later when she was playing under the front verandah of her house. The appellant did the same thing, touching her vagina by placing his hand inside her underwear (Count 3). On this occasion the appellant said she wasn't to tell anyone because she would not see her grandmother again.

[71] The next occasion the complainant recalling something happening was when she was about 10 years of age. Her parents were working, and her grandmother had gone down to the shops. The appellant called her out of her bedroom into the lounge area. He was sitting on the couch with nothing on bar a t-shirt. She could see his penis. It was erect. The appellant told her to take her clothes off. He then made her sit on his lap. The appellant touched her on her chest and in her vagina area with his fingers and his mouth. The appellant put his fingers "just inside" but didn't penetrate her vagina (Count 4).[18] The appellant then made her play with his penis (Count 5). The appellant lay on top of her. The complainant could feel his penis on her vagina but he was unable to insert his penis into it (Count 6). The appellant then made the complainant play with his penis until he ejaculated (Count 7). The appellant told her it was their secret and she wasn't to tell anybody.

[72] The complainant said when she was about 11 years of age she visited the appellant and her grandmother in another town near a beach. It was Christmas time. The complainant said as she left the toilet the appellant grabbed hold of her and started touching her. The appellant made her lie down and he played with her vagina with

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18 AB32/5.

his hands and his mouth (Count 8). She played with his penis until he ejaculated into a hanky (Count 9).

[73] The complainant said there were other occasions in Bowen when the appellant did something to her; "It used to happen a lot".[19] They often played monopoly and when they did the appellant would play with her vagina with his fingers and mouth. On one occasion, when she was about 12 years of age, the appellant inserted his fingers just a little bit into her vagina (Count 10). The complainant said her mother or grandmother walked into the room but was not able to see what was happening.

[74] The complainant said a couple of days later she was home playing a video game when the appellant came over to her. He had a condom. He started touching the complainant on her chest area and on her vagina (Count 11). He showed her how to put a condom on and placed himself on top of her. His penis went into her vagina, not very far, but enough to make him ejaculate (Count 13). The appellant said it was their secret.

[75] The complainant said the last occasion the appellant touched her inappropriately was when she was about 12 years of age. The complainant said after leaving home, at about 14 and a half years of age, she had little contact with the appellant, only seeing him around her birthday or Christmas. She spoke to her grandmother on the telephone. The appellant and her grandmother also attended her wedding in 2008.

[76] The complainant said in late 2006 or early 2007 she told her now husband she had been molested by the appellant as a child. In about 2011, she told her mother. She also made a complaint to police. The police organised for the complainant to telephone the appellant. In that conversation, which was recorded by police, the appellant apologised to the complainant. He also said, in response to an allegation that he had touched her inappropriately whilst she was a child, that he was the adult and he should never have done this to the complainant as she was a "little girl".

[77] In cross-examination, it was put to the complainant that none of the incidents had occurred, and the appellant had not visited Bowen at the times alleged by her. It was also put to the complainant there had been occasions of consensual sexual activity with the appellant when she was about 19 or 20. It was alleged she had rubbed herself against the appellant, and allowed him to touch her breast and to insert his fingers into her vagina. The complainant denied any such sexual contact.

[78] The complainant's husband gave evidence that prior to their marriage in 2008, the complainant told him, in or around 2006, she had been molested by the appellant. The complainant did not give, and he did not ask for, any further details. The complainant's mother also gave evidence that in or about September 2011, the complainant told her the appellant had done inappropriate things to her when she was a child. The appellant had had sex with her on two occasions. He had also touched her, and made her touch him, in inappropriate places, and "do things".[20]

[79] The complainant's mother said the appellant and her mother visited them in Bowen between 1991 and 1995. She estimated they had visited anywhere from once a year to maybe a couple of times a year in those years. In cross-examination, she agreed the telephone call from the complainant was the first time she had ever heard anything about the allegations. She also agreed she had not noticed anything untoward when her daughter was growing up.

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19 AB34/40.

20 AB63/25.

[80] The appellant gave evidence in his defence. He denied any inappropriate touching of the complainant when she was a child. He also denied being in Bowen at the times alleged in the offences. He accepted the complainant and her family had stayed with them at Coolum at Christmas time in 1994. There were about 16 or 18 people staying in the house at the time. The appellant denied there was any inappropriate touching of the complainant during that visit. The appellant gave evidence that as a result of an operation he had in 1991 he was unable to obtain an erection. He also had never used a condom in his whole life.

[81] The appellant said the apology he made in the pretext call related to some consensual sexual activity between the complainant and himself when the complainant was an adult. This sexual activity occurred at a time after the complainant had given birth to her daughter. On a couple of occasions, the complainant rubbed herself up against him. He had grabbed her breast and put his hand down her pants.

[82] The appellant said he should never have done those things and was sorry for his conduct. His words in the pretext call related to that consensual sexual contact. He referred to the complainant as a "little girl" in that call because she was still a little girl to him, even though she was over 18 years of age. He was a person who still referred to her as little girl when she was 25.[21]

[83] In cross-examination, the appellant agreed he did not have any medical material to support his assertion he had had erection problems since 1991. The appellant said he was too embarrassed to go to the doctor. He had on an occasion obtained Viagra from a doctor but it was ineffective. He denied ever touching the complainant inappropriately whilst she was a child. He denied understanding the complainant was referring to events when she was a child in the pretext call.

[84] The appellant's wife also gave evidence in the appellant's defence. She said they always visited Bowen together. She denied they had visited Bowen on the occasions specified by the complainant. That denial was based on the contents of diaries the appellant's wife said she had kept for many years. Those diaries revealed the appellant had had an operation on 21 August 1991. The appellant's wife said after that operation, the appellant was unable to obtain an erection.

[85] In cross-examination, the appellant's wife accepted they did visit Bowen on occasions. She said it was only once a year. She denied the appellant had ever told her he had abused the complainant when she was a child. The appellant did tell her about sexual things that had happened when the complainant was an adult. The appellant could not explain his behaviour. He was too embarrassed, and knew it would hurt her feelings.

Convictions

Applicable principles

[86] The determination of whether a verdict is "unreasonable" requires the Court to undertake a review of the evidence and to decide whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt the appellant was guilty of the offences.[22] If after reviewing all of the evidence, the Court is left with a reasonable doubt about guilt, a conviction must be set aside as

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21 AB90/4.

22 *SKA v The Queen* (2011) 243 CLR 400 at 408 [21].

unreasonable unless that doubt is capable of being resolved by reference to the jury's advantage in seeing and hearing the evidence.[23]

[87] A manifestation of unreasonableness is inconsistency of verdicts.[24] The test to be applied in relation to inconsistencies in verdicts is whether there is a logical and reasonable basis for the jury having concluded guilt in respect of some offences but not others. If a reasonable jury, applying their mind properly to the evidence, could have arrived at those verdicts, there is no inconsistency.[25]

Are the verdicts of guilty unreasonable?

[88] A jury could only be satisfied beyond reasonable doubt of the appellant's guilt of the offences if they accepted the complainant's evidence as being both reliable and credible. Whilst the pretext call provided support for the complainant's version, any admissions therein were only to generalised conduct, not specific offences.

[89] Against that background, the jury's verdicts of guilty in respect of some offences, but not guilty in respect of others, raises the possibility of inconsistency in verdicts. If the jury was left with a reasonable doubt as to the reliability of the complainant's account of inappropriate touching in respect of some of the offences, the jury's conclusion the complainant's evidence was reliable and credible in respect of other offences can only stand if there is a logical and reasonable basis for that conclusion.

[90] The respondent submitted there was a logical and reasonable basis as the complainant's evidence as to the dates of the offences in Bowen was very general. The verdicts of not guilty in Counts 2, 3, 4, 5, 6 and 7 were explicable on the basis the jury was not satisfied the appellant was in Bowen at the time of the alleged offences. In respect of Counts 10, 11 and 13, which were also said to have occurred in Bowen, the jury had no such doubt as the complainant's evidence was more specific in respect of dates, and there was support for the presence of the appellant at the time of those offences.

[91] A careful consideration of the complainant's evidence, however, does not support that submission. Counts 10, 11 and 13, like Counts 2, 3, 4, 5, 6 and 7, were all alleged to have occurred at Bowen during unspecified school holidays only identified by general assertion as to the complainant's approximate age at the time. The complainant was no more specific as to the dates of Counts 10, 11 and 13. Against that background, there is nothing else in the complainant's evidence which could explain why the jury was satisfied beyond reasonable doubt as to her reliability and credibility in respect of Counts 10, 11 and 13, whilst not being satisfied beyond reasonable doubt as to the complainant's reliability and credibility in respect of Counts 2, 3, 4, 5, 6 and 7.

[92] There is no logical or reasonable explanation in the jury having delivered verdicts of guilty in respect of Counts 10, 11 and 13, whilst delivering verdicts of not guilty in respect of Counts 2, 3, 4, 5, 6 and 7. The verdicts in Counts 10, 11 and 13 are inconsistent. This inconsistency supports a finding of unreasonableness in respect of those verdicts. It gives rise to a reasonable doubt as to the appellant's guilt of these offences. Verdicts of acquittal should be entered on Counts 10, 11 and 13.

[93] The verdicts of guilty in respect of Counts 8 and 9 are in a different category. They related to an occasion when the complainant was staying with the appellant and his

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23 *R v FAD* [2013] QCA 334 at [2].

24 *R v DAL* [2005] QCA 281 per Keane JA at [22].

25 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

wife at Coolum. That occasion was confirmed by the evidence of the appellant, and his wife. That supporting evidence provides a logical and reasonable basis for the jury's finding of guilt in relation to those counts. Such findings are not inconsistent with findings of not guilty on the remaining counts.

[94] A consideration of the evidence as a whole also supports the conclusion that findings of guilt on Counts 8 and 9 were open on the evidence. If the jury accepted the complainant's evidence beyond reasonable doubt that the appellant had played with her vagina with his hands and mouth, and made her play with his penis until he ejaculated, during a visit to Coolum, that evidence was capable of supporting verdicts of guilty to Counts 8 and 9. There is no basis to conclude the jury's verdicts of guilty of Counts 8 and 9 were unreasonable.

[95] A similar conclusion arises in respect of Count 1. The jury was properly instructed they could rely upon the acts said to constitute the offences in Counts 2 to 13 to found guilty of the count of maintaining a relationship even if they were not satisfied beyond reasonable doubt of the appellant's guilt of the individual counts. There is no basis to conclude the jury's verdict of guilty of Count 1 is unreasonable.

Was the jury misdirected?

[96] The contents of the pretext call were relied upon as evidence supportive of the complainant's account. The jury were directed it was a question for them to determine "what that telephone conversation means and whether it provides support for the complainant's account".[26] Whilst the trial judge later referred to the use to which that evidence could be put when summarising the rival contentions of the Crown and the defence, no elucidation was provided as to the specific issues to be considered by the jury.

[97] Such elucidation was important in the present case, as the appellant had given evidence which, if accepted, provided an explanation for the apology made by him in the pretext call. That explanation provided context for an admission of sexual interaction between the complainant and the appellant which was consistent with the appellant's innocence as the sexual interaction being referred to was at a time when the complainant was an adult, and was consensual.

[98] A specific direction as to the use to be made of any admissions contained in the pretext call was also essential in the particular circumstances as any admission was not to the specific conduct. At best, it constituted an admission of sexual interest in the complainant when she was a child. There was a need for the jury to be specifically directed that that admission was only capable of supporting the complainant's evidence if the jury was satisfied beyond reasonable doubt it constituted an admission the appellant had sexually interfered with the complainant when she was a child.[27]

[99] Whilst the respondent submitted that, in context, the trial judge's reference to the rival contentions limited the use to which that evidence could be put, and highlighted the critical question for the jury, a consideration of the trial judge's later reference to this evidence does not support that contention.

[100] The trial judge said:

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[26] AB157/1.

[27] *R v BBQ* [2009] QCA 166 at [51]-[52]; *R v IE* [2013] QCA 291 at [40]-[42].

> "For the accused it's said that the pretext call is of little weight because it seems that there is mention of five years and that could be a reference to the dishonourable conduct that the accused admits. I'm not sure that he said that to you in his evidence, but it is a matter for you to consider. …
>
> The Crown urges you to accept the complainant. It says that she was credible and convincing in her evidence and made reasonable concessions and the Crown also says that you could not conclude that the telephone conversation represents other than an admission by the accused. The Crown says it's simply ridiculous to suggest that he might have been talking about something that happened when the complainant was an adult.
>
> Well, how will you proceed with this? How you judge the facts is a matter entirely for you, but you might think it useful to ask yourself first whether you accept what the complainant says about what happened in general terms. Does her evidence and the content of the telephone call satisfy you that she is truthful, notwithstanding the accused's denial and the evidence of his wife? …"[28]

[101] Such a summation of the rival contentions failed to direct the jury as to the central issues to be considered when assessing the relevance of any admissions contained in the pretext call. The failure to provide proper direction in respect of this crucial issue left the jury with inadequate direction as to the proper use to be made of the contents of the pretext call, should the jury be satisfied it constituted an admission.

[102] Had proper directions been given in respect of that aspect of the evidence, a jury may well have entertained a reasonable doubt as to the defendant's guilt in respect of Counts 8 and 9. The jury may also have had a reasonable doubt in respect of Count 1, having regard to the Crown's reliance upon the acts in the specific counts as the basis for a finding of maintaining a sexual relationship with the complainant.

[103] The failure to give more comprehensive directions on that matter may have affected the verdicts on Counts 1, 8 and 9.[29] The convictions in respect of Counts 1, 8 and 9 on the indictment must be set aside. As there was evidence, if accepted by the jury, to support verdicts of guilty on these counts, there is no basis to enter verdicts of acquittal in respect of these counts. A new trial should be ordered in respect of those counts.

Orders

[104] I would order:

1. The appeal be allowed.
2. The convictions in respect of Counts 10, 11 and 13 be set aside and verdicts of acquittal entered in respect of each of those counts.
3. The verdicts of guilty in respect of Counts 1, 8 and 9 be set aside, and a new trial be ordered in respect of each of those counts.

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28 AB162/1-20.

29 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], [49], [60].