SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAR* [2014] QCA 248
PARTIES:	**R** **v** **PAR** (appellant)
FILE NO/S:	CA No 10 of 2014 DC No 119 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	3 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2014
JUDGES:	Fraser JA and Atkinson and Jackson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty after trial of one count of maintaining an unlawful sexual relationship with a child under 16 and three counts of unlawfully and indecently dealing with a child under 16 with circumstances of aggravation – where the appellant was found not guilty on six other counts of sexual offences – where the appellant argued the not guilty verdicts required the jury to reject the credibility of the complainant such that the offences for which guilty verdicts were returned could not be proved beyond reasonable doubt – whether the guilty verdicts are irreconcilably inconsistent with the acquittals, and the guilty verdicts are therefore unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – COMPOSITION OF JURY – where during the trial the jury supplied a note expressing concerns with juror number 4 – where the trial judge, the prosecutor and defence counsel then questioned the speaker and six other jurors individually about juror number 4 – where the trial judge and counsel then

questioned juror number 4, who was then discharged and replaced by one of two reserve jurors – where the appellant argues the judge erred in undertaking that enquiry and that there were no valid grounds to discharge juror number 4 – whether the trial judge erred in undertaking the enquiry which preceded the discharge of juror number 4 – whether, given that enquiry had occurred, it was appropriate to discharge juror number 4

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the trial judge discharged juror number 4 during the trial after a process of enquiry and replaced her with one of two reserve jurors – where both parties' submissions assumed the errors in the process of enquiry of the trial judge resulted in a miscarriage of justice – whether the errors resulted in a miscarriage of justice requiring the convictions to be set aside

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where the trial judge discharged juror number 4 during the trial after a process of enquiry, and replaced her with one of two reserve jurors – where the appellant argued the errors in the process of enquiry were of such a nature to render the proviso inapplicable – whether the errors excluded any application of the proviso – whether, if the errors resulted in a miscarriage of justice, there was no substantial miscarriage of justice and the court should exercise its discretion to dismiss the appeal

Criminal Code 1899 (Qld), s 668E(1A)
Jury Act 1995 (Qld), s 56(1)(a)

James v R [2012] 1 NZLR 353; [2011] NZCA 219, followed
Katsuno v The Queen (1999) 199 CLR 40; [1999] HCA 50, cited
Lee v The Queen (2014) 88 ALJR 656; [2014] HCA 20, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v CX [2006] QCA 409, cited
R v Edwards, Heferen & Georgiou [2002] 1 Qd R 203; [2000] QCA 508, considered
R v N (2005) 21 CRNZ 621, cited
R v Omid [2012] QCA 4, considered
R v Orgles & Orgles [1994] 1 WLR 108, considered
R v Panozzo; R v Iaria (2003) 8 VR 548; [2003] VSCA 184, distinguished
R v Roberts [2005] 1 Qd R 408; [2004] QCA 366, considered
Randall v The Queen [2002] 1 WLR 2237; [2002] UKPC 19, distinguished
Smith v Western Australia (2014) 250 CLR 473; [2014] HCA 3, distinguished

COUNSEL: S M Ryan QC for the appellant
D A Holliday for the respondent

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

[1] **FRASER JA:** The appellant was found guilty by a jury of maintaining an unlawful sexual relationship with a child under 16 years and of three counts of unlawfully and indecently dealing with a child under 16 years with circumstances of aggravation. The jury returned not guilty verdicts upon the remaining six sexual offences charged against the appellant. Counsel for the appellant summarised the charges against the appellant, the particulars of the charges, and the verdicts as follows:

"Count	Offence	Particulars	Verdict
1	Between 31 July 2003 and 16 May 2008 Maintaining an unlawful sexual relationship with a child under 16	Counts 4, 8, 9 & 10 The appellant rubbed his penis against the complainant numerous times.	Guilty
2	Date unknown between 1 January 2002 and 5 November 2005 Without legitimate reason, exposed child under 16 to an indecent film Child his lineal descendant Child under 12	Appellant showed complainant a pornographic movie while her mother was at Dreamworld.	Not guilty
3	Same occasion/date as count 2 Indecently dealt with child under 16 Child his lineal descendant Child under 12	Appellant put his penis on or near the complainant's genital area while her mother was at Dreamworld.	Not guilty
4	Date unknown between 4 November 2005 and 16 May 2008 Indecently dealt with child under 16 Child his lineal descendant	The appellant put his penis on or near the complainant's genital area in the complainant's purple room.	Guilty
5	(Dates amended at trial) Date unknown between 31 December 2005 and 16 May 2008 Unlawfully procured child under 16 to commit and indecent act Child under 12 Child his lineal descendant	The appellant procured the complainant to send him a photo of her genital area.	Not Guilty

6	Date unknown between 31 December 2007 and 16 May 2008 Without legitimate reason, wilfully exposed child under 16 to indecent picture Child his lineal descendant	The appellant showed the complainant a pornographic website.	Not guilty
7	Date unknown between 30 April 2008 and 16 May 2008 Attempted to unlawfully procure child under 16 to commit an indecent act Child his lineal descendant	The appellant attempted to procure the complainant to let a dog lick her vagina.	Not Guilty
8	Date unknown between 31 May 2007 and 1 September 2007 Indecently dealt with child under 16 Child under 12 Child his lineal descendant	The appellant put his penis on or near the complainant's genital area when [her friend A] slept over.	Guilty
9	Date unknown between 31 December 2005 and 16 May 2008 Indecently dealt with child under 16 years Child his lineal descendant	The appellant put his penis on or near the complainant's genital area and mentioned [a cousin of the complainant].	Guilty
10	Date unknown between 31 August 2007 and 9 September 2007 Indecently dealt with child under 16 years Child under 12 Child his lineal descendant	The appellant put his penis in between the complainant's legs and moved it in and out at the Gold Coast.	Not guilty"

[2] The appellant has appealed against his convictions. The three grounds of his appeal are set out as headings in these reasons.

First ground of appeal: "The verdicts are irreconcilably inconsistent and the guilty verdicts are therefore unreasonable".

[3] The appellant did not contend that the evidence was insufficient to make it reasonably open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted. Rather, the appellant invoked the principle that a verdict of conviction should be set aside if that is necessary to prevent possible injustice where an inconsistency between that verdict and a verdict of acquittal on another count reveals an unacceptable affront to logic and common sense.

[4] The convictions depended upon the evidence of the complainant. The complainant was the appellant's daughter. She was between seven and 12 years of age in the period charged in the maintaining offence (Count 1). She was between nine and 12 years of age during the periods charged in Counts 4 and 9, and she was 11 years old during the period charged in Count 8. In relation to the counts of which the appellant was acquitted, the complainant was aged between five and nine during the periods charged in Counts 2 and 3 and she was of varying ages between nine and 12 during the periods charged in the remaining counts. The complainant's evidence was contained in four recorded police interviews admitted in evidence under s 93A of the *Evidence Act* 1977, and in pre-recorded evidence. The first and second interviews occurred in May and June 2008, when the complainant was 12 years old. The third and fourth interviews occurred in October and December 2009, when the complainant was 13 years old. The complainant gave her pre-recorded evidence in November 2012 when she was 16 years old. It will be necessary to refer to the complainant's evidence in a little detail, but it is sufficient here to note that her evidence, from which the particulars were derived, supported all of the counts in the indictment, with the arguable exception of count 7. (In relation to count 7, the appellant conceded that the jury might have thought that the complainant's evidence was insufficient to establish the alleged attempt.)

[5] The complainant's younger sister ("S") gave evidence that on a number of occasions she had seen the appellant naked and crouching over the complainant, on some occasions on the complainant's bed and on other occasions in her parents' bed. In a recorded police interview, S (who was then eight years old) gave evidence that she used to wake up and see the appellant naked and on top of the complainant whispering to the complainant. S said that she was about six or seven the first time she saw the appellant do this. She subsequently said that she saw it happen "probably last year that was when I was seven turning eight" (which was a reference to 2007). On that occasion S saw the appellant engaged in that conduct in her parents' bedroom. S thought that the complainant had pyjamas on but her father was naked. Her mother was away at the time. When S was asked how many times she thought that she saw her father going to the complainant's room, she answered that it happened four or five times. S couldn't remember how many times it happened in her parents' bedroom. S gave her pre-recorded evidence in November 2012 when she was 12 years old. In cross-examination she maintained that she saw her naked father crouching on top of her sister. She saw it a few times in her sister's room. She also saw it happen in her parents' bedroom. When she saw this happen she could only see her father but the complainant was lying on the bed.

[6] The other evidence in the Crown case may be summarised in very brief terms. A cousin of the complainant ("B") gave evidence that the complainant sent a picture of the complainant's vagina to the appellant (Count 5). A friend of the complainant ("A") gave evidence that on an occasion when she stayed at the complainant's house the complainant left their room and went into the appellant's room. When the complainant returned she told A that the naked appellant had got onto the complainant's back and started moving up and down (Count 8). A also said that the naked appellant came into the complainant's room and slept in A's bed.

[7] The complainant's mother gave evidence of preliminary complaints by the complainant in mid-May 2008. The complainant told her mother that the appellant played with her breasts and her vagina and tried to stick his penis in but it didn't fit. The complainant's mother took the complainant to "D", a friend of the complainant's

mother. D gave evidence that the complainant's mother brought the complainant to D's house in mid-May 2008. The complainant told D that the appellant got into bed with her naked, played with her breasts and vagina, and sometimes tried to "stick it in". The complainant's mother gave evidence that when she confronted the appellant with the complainant's allegations the appellant admitted that he had got into bed naked with the complainant.

[8] The complainant's mother also gave evidence that she had earlier spoken to the complainant about photographs the complainant had sent to the appellant. Someone from the school had rung the complainant's mother and told her that another child's mother had said that the complainant had sent nude photos of herself to her father. The complainant told her mother that the appellant had asked her to send the photos. The complainant denied that the appellant had ever touched her and said that everything was okay. The complainant's mother asked the appellant about this. He said that he had asked the complainant and B to send him photos but he was referring just to silly photos, not nude ones, and there was nothing he could do about it when the girls started sending nude photographs to him.

[9] The appellant gave evidence. He denied each of the alleged offences. He denied having engaged in any sexual or inappropriate conduct with the complainant. He denied making the admissions alleged by the complainant's mother. He denied having been sexually attracted to the complainant. He maintained his denials in cross-examination.

[10] The appellant argued that the not guilty verdicts indicated that the jury had concerns about the credibility or reliability of the complainant. If the jury had due regard to those concerns, they would not have been able to return any of the guilty verdicts. Notwithstanding the complainant's ability to give details about the alleged events, which ordinarily would be considered a hallmark of reliability, the jury must have had a doubt about the complainant's evidence in respect of the counts (except perhaps count 7) upon which the appellant was acquitted. The trial judge's finding for the purpose of sentence that the maintaining count (count 1) was established only in relation to the period of two or three months between the middle of 2007 and September 2007 (rather than the whole of the charged period between 2003 and 2008) itself demonstrated that the jury should have had a doubt upon the counts upon which the appellant was found guilty.

[11] In order to explain why I do not accept those arguments it is necessary to compare the quality of the evidence in the Crown case upon the counts charging specific offences upon which the jury returned guilty verdicts with the quality of the evidence upon the counts of which the appellant was acquitted. I will refer first to the counts charging specific offences of which the appellant was found guilty.

Verdicts of Guilty of specific offences

Count 4

[12] The complainant made the statements upon which count 4 was based in her first police interview, in May 2008. Towards the beginning of that interview the complainant told the police officer that she had a purple room in the house in which she lived with her sister ("S"), her mother and father, and her grandparents. The first disclosure the complainant made in the interview was that her father "always

used to try and have sex with me and he was asking if I was horny and once he said he would give me money every time I had sex with him." The complainant referred to her father buying her things if she would "do it with him". She referred to the appellant unsuccessfully trying to put his penis inside her, the appellant asking her whether she was "horny", and him saying that he was. The appellant used to come into her purple room in the morning. He would pull her underpants down, get on top of her, and undress her; sometimes she was on her stomach and sometimes she was on her back. She said that this had been happening to her for the last few years, since they had lived in their previous house. The complainant explained that when they first moved to the area they lived in a unit (the "old house") for about a year or two before moving to the current house. The appellant had tried to have sex with her also in the old house. The complainant could not remember the first time or the last time the appellant tried to have sex with her.

[13] When the complainant was asked to remember a particular time when this occurred, she responded that she could not remember exactly when it was. She was awake but still sleepy; she heard the appellant approach. The appellant was naked. He pulled the blankets off, pulled her pants down, and tried to have sex with her. He tried to put his penis in her. He "squirt sperm or something" when he finished. This happened in her purple bedroom in the house she lived in at the time of this interview. It was about 3.00 am or 4.00 am when the appellant got up for work. The complainant said the appellant "moves it up and down, he thinks he puts it inside and then when he was finished, he, I don't know, his sperm didn't go inside me so he wipes it up… and moves my undies back up and moves blanket back up and goes to work." The complainant described the nightie which she thought that she was wearing on this occasion. Towards the end of the interview the police officer elicited some further details of this occasion and similar occasions, including that the complainant said that sometimes the appellant told her that he loved "mating with you because I love you".

[14] In cross-examination during the pre-recorded evidence, the complainant referred to this particular occasion as being one in which the appellant would have been leaving for a day shift at work. Defence counsel challenged the complainant's statement that this was morning when her own evidence was that the sun was not still up, and he challenged the complainant on many other details. The complainant did not make any material concessions.

Count 8

[15] At the end of the first of the complainant's police interviews, the police officer asked the complainant to try to remember specific things that had happened to her. At the beginning of the second interview, which was five or six weeks after the first interview, the complainant said that she had remembered things and written them down in her book. The complainant then read from her notes and made further disclosures. The complainant referred to a night when she slept in a tent outside her friend A's house. The complainant thought that the appellant sent to her or to A a text message in which, so far as the complainant could remember, the appellant said that he would take A to the Gold Coast with them "if she did it with him". (A did not mention such a text message in her police interview. In cross-examination during her pre-recorded evidence A said that she remembered there being a text message sent about Dreamworld on the Gold Coast and she remembered the complainant talking about it and wanting her to go with the complainant, but A did not remember if the appellant asked her to have sex with him.)

[16] The complainant referred to a night when A stayed at the complainant's house. The appellant sent her or A a text message and the complainant went into the appellant's room. The appellant asked the complainant whether A was coming. The complainant said that she wasn't. The appellant was naked. The complainant took off her pants and crawled under the blankets with the appellant. The appellant put his penis between the complainant's legs near her genital area and subsequently ejaculated. The complainant said that she returned to her room and told A what had happened. The complainant gave substantially the same version in her third and fourth police interviews and in cross-examination in her pre-recorded evidence.

[17] A's evidence was generally consistent with the complainant's account. A gave evidence about an occasion when she was sleeping over at the complainant's house: A spoke of the event charged as count 8:

> "… he [the appellant] called me or [the complainant] and I'm like no I'm not going in cause I don't what [sic] so she went in to see what it was and she laid down on her stomach and he got on her… back cause I didn't really want her to go in there… Um she came out I'm like she goes um I like I don't know want about know about really what happened and she told me anyways as a true friend… She told me that what I just said before he did that to her… I said well that's not really nice I'm not going in there cause even though I'm your friend I don't want to go in there cause it's not my house…"

(A also said that the appellant came into the complainant's room and got into bed with A. The appellant was naked. He did not touch A in a way which made her feel uncomfortable.)

[18] A gave substantially the same evidence in cross-examination in her pre-recorded evidence in November 2012, when she was 16 years old.

Count 9

[19] In the complainant's second police interview she referred to an occasion in the appellant's bedroom when the appellant engaged in the same kind of conduct when he said that he had had sex with the complainant's cousin. In the complainant's fourth police interview she read out what she had written down, as she had been requested to do in her first police interview. One of the notes she read out was that, "…once he said…I think that he had sex with my cousin…". In cross-examination during the complainant's pre-recorded evidence the complainant maintained her account that the appellant had told her that he had had sex with his niece. She denied that she had made this up.

Verdicts of Not Guilty

Count 2

[20] The complainant said in her second police interview and she maintained in cross-examination in her pre-recorded evidence that the appellant had showed her a video of adults having sex. The complainant mentioned a paper containing the words "Catalina Capers", but the complainant did not think that was the name of the video. The complainant's mother gave evidence that she and the appellant had a video in the house which showed sexual intercourse between men and women and had a label "Rated P-G, Catalina Capers…".

Count 3

[21] In the complainant's first police interview, after she had described the conduct of the kind charged in Counts 1, 4, 8 and 9, the complainant said that the same thing happened in the appellant's bedroom when the complainant's mother and her friend went to Dreamworld. The complainant thought this happened in the appellant's bed whilst S was sleeping in her own room. The complainant referred to this occasion in the three subsequent police interviews. The complainant referred to her mother going to Dreamworld "a few years ago", but she subsequently said that she thought that this would have been about five or six years ago so that she would have been about five or six, or six or seven years old because she was 13 at the time of that interview. She thought this was the first time the appellant tried to have sex with her. In the fourth police interview the complainant said that she could not remember how old she was at the time but she remembered it was the first place in which the family had lived when they came to Queensland. She could not really remember what grade she was in but thought it was grade two or three.

Count 5

[22] Consistently with the particulars of Count 5, in the complainant's first police interview she referred to the appellant having asked her and her cousin B to send the appellant rude pictures of themselves, but she added that "…we didn't sent it to him, he was being silly…". In the second police interview the complainant said that she and B had sent photos of themselves with "glowy eggs" up their shirts to the appellant and the appellant asked them to send him photos of their "rude bits", which they did. The appellant then sent them photographs of his penis and sperm. The school principal found out about this, after B had told other girls, and asked the complainant about it. The complainant lied to the principal. She subsequently talked about it to her mother.

[23] B did not give evidence which supported the complainant's account that the appellant had asked the complainant for the indecent photograph. In B's police interview she said that when the complainant was staying with B the complainant sent a picture of her own vagina to the appellant and "he didn't text back or anything." B said that she didn't know how it started. B did not give a responsive answer to a question by the police officer whether she knew if the complainant had received a text message from the appellant. In cross-examination during her pre-recorded evidence, B said that she could not recall the complainant taking a photograph of B's vagina or that she, B, took a photograph of the complainant's vagina. She agreed that she was prepared to say that it didn't happen. B said that the complainant told her that the appellant had sent the complainant a text asking if she was okay. The complainant did not tell B that the appellant asked the complainant to send any photographs.

Count 6

[24] In the complainant's second police interview she told police of an occasion when the appellant showed her a website about teenage girls having sex with their fathers called "My First Time with Daddy". The appellant said, "just think when you're a teenager whenever you get horny you can just come in and we'll do it". The website showed men having intercourse with girls. In the fourth police interview the complainant read a description from her notes which accorded with what she

had said in the first interview. The Crown and the appellant formally admitted at the trial that a forensic examination of the computer revealed no record of the computer being used to view a website called "My First Time with Daddy"; the absence of a record could mean that the computer had not been used to access that website, or any record of it accessing the website could have been deleted. It was also admitted that the police did not investigate whether a website called "My First Time with Daddy" existed in 2008.

Count 7

[25] In relation to Count 7, the effect of the complainant's evidence in her second and fourth police interviews was that in early May 2008, the appellant asked her whether she wanted to see their dog "go all silly". When the complainant responded that she did, the appellant said to let the dog lick her "wozza"; to go behind the shed, pull her undies across, and let the dog lick her, making sure that her mother did not see it. The complainant declined to do so. In her pre-recorded evidence, the complainant verified the contents of her police interviews and of the notes to which she had referred in interviews after the first interview. In cross-examination the complainant maintained her account, save that she was uncertain about the time when it occurred. Although her notes recorded it as happening in the week or two before 18 May 2008, she agreed that it occurred either then or at some other time during a four year period from when she was about eight to 12 years old.

Count 10

[26] The complainant first made statements about Count 10 in her second police interview. With reference to her notes, the complainant referred to an occasion when the family was at a hotel on the Gold Coast. She said that her mother was asleep and S was drawing at a table. The complainant was lying on the couch in that room with her back to the appellant. The complainant said they "had sex". It was around 2.00 pm to 4.00 pm. The complainant thought that the appellant had called her over to the couch to give him a cuddle. There was a blanket over them. The appellant told the complainant that he was "horny" and asked her to "do it". She said she would and pulled her pants and underpants down a little way. The complainant described conduct similar to that charged in the counts upon which the appellant was convicted. The complainant then went back to her book. The complainant also referred to this incident in her third and fourth police interviews.

[27] In cross-examination, the complainant said that S was a couple of metres away. She said that afterwards the appellant pulled the blanket off to wipe up after ejaculating, so that both the appellant and the complainant were lying naked from the waist down whilst S was sitting two metres away, colouring in. The complainant's mother was in the unit in another room.

Consideration of the differing verdicts

[28] The verdict of not guilty on count 7 is in a different category to the same verdicts on other counts. As senior counsel for the appellant acknowledged, the explanation for the verdict on count 7 might be that the jury was not being satisfied that the complainant's evidence established the alleged attempt. In summing up, the trial judge devoted considerable attention to the requirement that the prosecution prove an "attempt". The trial judge referred to the provision in s 4(1) of the *Criminal*

Code that a person attempts to commit an offence when the person "intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act…", and directed the jury that the prosecution was obliged to establish those matters beyond reasonable doubt and that "… [t]he act relied on as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence …[it] must go beyond mere preparation to commit the offence and must amount really to the beginning of the commission of the crime…". After referring to an example, the trial judge asked the jury to consider where the dog was, the yard, and whether the appellant was "just talking dirty", in which case he would be not guilty. After referring to the element of "unlawfully procure", the trial judge repeated that there must "be proof of attempt, as I said, not just something which is remote from the offence", and the trial judge also repeated the bench book direction.

[29] The complainant's uncertainty about the time of the event alleged in count 7 when she gave her pre-recorded evidence at least four years after that time was understandable. That uncertainty did not require the jury to harbour any reservation about the complainant's credibility or the general reliability of her evidence. Nevertheless, that uncertainty and the arguable doubt whether the complainant's evidence established an attempt supply a compelling explanation of the not guilty verdict on count 7.

[30] The not guilty verdicts upon other counts are explicable by differences in the quality of the evidence upon those counts and the quality of the evidence upon the counts upon which the appellant was convicted.

[31] In relation to count 2, unlike the counts upon which the appellant was found guilty, there was no evidence of a relevant admission by the appellant, the complainant's mother and D did not give evidence of a preliminary complaint by the complainant about the appellant's alleged conduct, and there was no evidence supporting the complainant's account such as was given by S and A in relation to the counts upon which the appellant was found guilty.

[32] Count 3 was the only count charging that the appellant had engaged in conduct of this kind at the unit before the family moved to the house. Upon the complainant's account S (who must have been very young at the time) was asleep in her own bedroom at the time of the events charged in count 3. Accordingly the jury could find that S's evidence about the appellant crouching over the complainant on the complainant's and her parents' bed related to the house, rather than in the unit. On that basis, there was no evidence to support the complainant's evidence on this count. In addition, the trial judge reminded the jury of defence counsel's reference to the varying estimates the complainant gave about how old she was and what grade she was in at school, and the complainant's account in the second police interview linked this event with count 2, which the complainant had not mentioned in the first, third or fourth police interviews. On this evidence, whilst the jury might have accepted that the complainant was doing her best to describe the first occasion upon which the appellant engaged in conduct of this kind, the jury might also have harboured a doubt about the accuracy of her recollection about events occurring at such a young age.

[33] In relation to count 5, there was no other evidence which supported the complainant's account that the appellant had asked the complainant for the indecent photograph. Similarly, there was no other evidence which supported the complainant's

account in relation to counts 6 and 10. Further, in relation to count 10, at the end of the first police interview the complainant responded "um, no" when she was asked whether "it" had ever happened anywhere apart from the unit and the house she was currently living in. The jury could reasonably have attributed the inconsistency between that statement and her subsequent accounts about count 10 to the complainant's youthfulness and the difficult predicament in which she found herself. Nevertheless, the jury might have taken a cautious approach in light of that inconsistency and the absence of other evidence verifying the complainant's account.

[34] The circumstance that the jury may have required supporting evidence before finding the appellant guilty of sexual offences does not necessarily involve any rejection of the complainant's evidence. That point was made by Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen*:

> "A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility."[1]

[35] Furthermore, as Jerrard JA pointed out in *R v CX*,[2] different verdicts may "reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt." The trial judge gave conventional directions to the jury that they "must consider each charge separately, evaluating the evidence relating to that particular charge, to decide whether you are satisfied beyond reasonable doubt that the [p]rosecution has proved the essential elements", that if the jury did not accept the complainant's evidence relating to one or more of the charges and the uncharged acts, the jury must take that into account in considering the complainant's evidence relating to the other charges, and that "[i]f you have a reasonable doubt concerning the truthfulness or the reliability of the complainant's evidence in relation to one or more counts… then this must be taken into account in assessing the [truthfulness] or reliability of her evidence generally.". Of particular relevance here are the trial judge's further directions that:

> "A situation may arise where, in relation to a particular count, you get to the point where, although you're inclined to think she's probably right, you have a reasonable doubt about an element or elements of the particular offence. Now, if that occurs, of course you must find the defendant not guilty in relation to that particular count. That does not mean necessarily you cannot convict on any other count. You will need to consider why you have a reasonable doubt about that part of her evidence and whether that doubt about that aspect of her evidence causes you also to have a reasonable doubt about that part of her evidence relevant to any other account."

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1 *MFA v The Queen* (2002) 213 CLR 606 at 617 [34] (Gleeson CJ, Hayne and Callinan JJ).

2 [2006] QCA 409 at [33].

[36] The differences in the verdicts in this case are consistent with the jury having faithfully followed those directions whilst accepting that the complainant was a credible witness whose evidence was generally reliable. There is no inconsistency between any of the guilty verdicts and any of the not guilty verdicts.

The trial judge's findings for the purpose of sentence

[37] The guilty verdicts reveal that the jury rejected the appellant's evidence and found that, notwithstanding his evidence, they were satisfied beyond reasonable doubt that the appellant was guilty of counts 1, 4, 8 and 9. The guilty verdict on the maintaining count (count 1) could be sustained with reference to the complainant's evidence in relation to counts 4, 8, and 9 and her evidence that the appellant had engaged in the same kind of conduct on numerous other occasions. The trial judge found for the purpose of sentence that the unlawful sexual relationship occupied two or three months from about mid 2007 until September 2007, when the complainant was 11 years of age, and that about once a week the appellant rubbed his penis on or near the complainant's genital area to ejaculation without penetration. The trial judge's findings stemmed in part from the jury's not guilty verdicts on some counts which, for reasons already given, did not require the jury to doubt the general reliability of the complainant's evidence or her credibility in relation to count 1.

[38] That the trial judge found that the offending charged in count 1 occupied a shorter period than was charged and indicated by the complainant's evidence does not justify a conclusion that the guilty verdict on count 1 is inconsistent with the not guilty verdicts on other counts.

Conclusion

[39] The first ground of appeal is not established.

Second ground of appeal: There has been a miscarriage of justice because of a fundamental irregularity in the conduct of the trial, namely, the way in which a juror was discharged from it.

Third ground of appeal: **There has been a miscarriage of justice because the information provided to the trial judge about juror number 4 was insufficient to support her discharge**.

[40] The *Jury Act* 1995 provides, in s 56(1)(a), that a judge may discharge a juror without discharging the whole jury if "it appears to the judge (from the juror's own statements or from evidence before the judge) that the juror is not impartial or ought not, for other reasons, be allowed or required to act as a juror at the trial…". On the fourth day of the trial the trial judge discharged a juror pursuant to that provision. The trial continued with a jury of 12, one of the two reserve jurors replacing the juror who was discharged. The appellant contends that there were errors in the process by which the juror was discharged and that, although the discharged juror's place was taken by a reserve juror, and although no reason appeared to doubt the impartiality and capacity of the 12 jurors to reach proper verdicts, the verdicts of guilty should be set aside because of the errors in the process of discharging the juror.

[41] The evidence at the trial concluded on the morning of the fifth day of the trial. On the morning of the fourth day of the trial the trial judge received a note from the jury in the following terms:

> "We're all concerned about juror number 4. She does not seem to understand the importance of this task and has no input with discussions. Facebook is more important."

[42] The bailiff informed the trial judge that the bailiff had been informed that, when two jurors were discussing the case and mentioned a particular witness (who was the complainant's mother), juror number 4 asked who the witness was. The trial judge observed that he was inclined to discharge juror number 4 and replace her with a reserve juror. He sought submissions from counsel. The prosecutor stated that juror number 4 had been reacting "inappropriately to things", particularly inappropriately laughing and smiling when the tapes were played, but the prosecutor added that her concerns had not been such as to lead her to raise them with defence counsel or the trial judge. Defence counsel stated that his instructing solicitor had not noticed anything peculiar about juror number 4's behaviour, but counsel said he thought the juror displayed "a fairly unusual facial expression" and his impression was that she "seems to have an odd look about her – being kind to her." The trial judge indicated an intention to question the speaker and any other jurors who may have spoken to her. Neither counsel opposed that course.

[43] The speaker was brought into the courtroom. The trial judge asked the speaker to expand on the problems with juror number 4. The speaker said that "on her own admission she never listens to anything." Juror number 4 had told the speaker that she never listened to anything. Juror number 4 had to ask the speaker who the complainant's mother was when her name was called. When the jurors were out of court during legal argument earlier on the same day, juror number 4 was on her phone. The speaker told juror number 4 that discussions were more important than Facebook. Juror number 4 responded that she could do both. Juror number 4 would not join in discussions, had no interest in wanting to know anyone else's opinion, and would not listen.

[44] The trial judge invited the prosecutor to question the speaker. The prosecutor elicited a variety of opinions from the speaker. For example, when the prosecutor asked whether the juror had said anything to the speaker "about any physical or mental conditions that she might suffer from…", the speaker responded in the negative but added that the juror "just seems very immature to all of us." The prosecutor went on to ask questions about what the juror did for a living, whether she had children or was in a relationship, and about her level of education. Defence counsel accepted the trial judge's invitation to question the speaker. He asked the speaker whether on her assessment, the juror had difficulty comprehending things, so that in addition to immaturity "there may also be some delay in her ability to reason…". The speaker agreed. The speaker was then asked to leave and was separated from the rest of the jurors.

[45] The trial judge sought submissions about the decision in *Omid*,[3] in which a juror who claimed to be psychic was discharged and a question on appeal was whether the trial judge should have discharged the jury rather than continuing the trial with the remaining 11 jurors. The trial judge referred to observations in *Omid* by the President that it would have been prudent for the trial judge to have brought all of the remaining jurors into the court room and enquired whether any of them had spoken to the self-proclaimed psychic and, if any juror answered affirmatively, to have questioned that juror in open court in the absence of the other jury members about that conversation and whether it was communicated to other jury members.

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3 *R v Omid* [2012] QCA 4 at [59].

[46] After hearing submissions from counsel, the trial judge had all of the jurors except the speaker brought into court. The trial judge told the jurors that they would be asked to come into court individually and questioned. The trial judge directed the jurors that they were not to speak to anyone else on the jury about the questions they were asked. That process was followed in relation to six jurors. In each case the trial judge asked a few questions and, at the trial judge's invitation, the prosecutor and defence counsel also questioned the juror (save that defence counsel did not question one of the jurors). By this process a variety of opinions, including some conflicting opinions, were elicited from the jurors.

[47] One juror observed that juror number 4 was "quite bored with the whole proceedings…". It was that juror who had raised concern when juror number 4 had enquired about the identity of a particular witness. This juror agreed with a leading question that juror number 4 had a reasoning ability similar to a primary school aged child. Juror number 4 had not engaged other jurors in discussion, other than in terms of Facebook or what was for lunch. Another juror told the prosecutor that juror number 4 was incapable of making decisions and tended to agree straight away with what others said. Juror number 4 had not put forward any opinions about anything. The prosecutor asked this juror to estimate the intellectual age for juror number 4. That elicited an answer that this juror knew some "silly adults". The juror agreed with the leading question that there appeared to be something odd about juror number 4. Another juror said that the juror had no concerns about juror number 4 being involved in the case, saw no problems with juror number 4's approach to the case and had talked to her about social matters. Defence counsel elicited negative answers to questions whether juror number 4 was compromised in any way, a little bit delayed in her reasoning, or immature.

[48] The questioning of one juror, which elicited such information as that juror number 4 might have been annoying some of the other jurors and that the speaker had a strong personality, occupied about eight pages of transcript. The prosecutor was allowed to question that juror both before and after defence counsel questioned the juror. Another juror, juror number 11, responded to a question by the prosecutor whether that juror had noticed that juror number 4 had any lesser ability to comprehend information, reason and form opinions than the other jurors in the affirmative. Juror number 11 added that juror number 4 said irrelevant things and that, when juror number 1 returned to the court room juror number 4 asked questions and enquired whether the jurors were allowed to talk about it and answer questions. Other jurors answered that they could not do so because five minutes earlier they had been told by the judge not to ask questions. Juror number 11 thought that juror number 4 had not comprehended what the judge had told the jurors.

[49] After the speaker and six other jurors had been examined in that way, they left the courtroom and juror number 4 was questioned by the trial judge, the prosecutor, and defence counsel. The trial judge's questioning elicited that juror number 4 had completed grade 12 at school and passed all subjects apart from a couple. She had since worked delivering pamphlets and in a take-away food café. She was on medication for anxiety and was well. She had been listening to the evidence and there had not really been any problems in her discussion with other jurors. She had contributed a little bit. When asked whether she had any problems remembering the names of any witnesses she said that she was not very good with names. In the course of questioning by the prosecutor, the juror said that she thought that being a juror was an important job "[b]ecause he could do it again… to older people or

young people…if he wasn't found guilty…". The juror agreed that one of the matters she would contribute to discussion in the jury room in the course of deciding whether or not the appellant was guilty was whether the appellant could do it again. The prosecutor then asked a series of personal questions, enquiring whether the juror lived with other people (she lived with her parents), whether she had brothers and sisters and how many (she had an older sister and an older brother), whether they lived with her parents too (they did not), whether her parents looked after her a bit, cooked her dinner at night, and did her washing (they did). The juror thought she and everyone else on the jury had the skills to have a good discussion and to make a good decision. In answer to a question by defence counsel, juror number 4 made it clear that she had not already contributed to any discussion with the other jurors that she thought it important that the appellant would do it again if he was not found guilty.

[50] In a subsequent discussion between the trial judge and the prosecutor, the trial judge identified three grounds for discharging juror number 4: first, that the juror would take into account and contribute to discussion about the verdict that the appellant could do it again; secondly, that she seemed incapable of following the trial judge's directions in that immediately after the trial judge had directed members of the jury not to speak to anyone else in the jury about the questions they were asked, juror number 4 had asked questions contrary to those directions; and, thirdly, that the trial judge's clear impression of juror number 4's evidence was that she did not have the intellectual capacity to engage in a meaningful discussion.

Arguments about the discharge of juror number 4

[51] The appellant argued that the information given by the speaker did not justify the enquiry upon which the trial judge embarked. Jurors should not have been questioned separately because the issues raised by the note concerned the ability of the jury to work together as a whole. The trial judge might instead have directed the jury as a body to focus upon the evidence and contribute to discussions within the jury. The trial judge could have directed the bailiff to take jurors' mobile phones from them whilst they were in the jury room. The trial judge could have questioned the speaker to obtain more information about the concerns raised by the note and decided what to do when that information was supplied. In the course of oral submissions, the appellant acknowledged that any authors of the note other than the speaker could have been asked to elaborate upon their concerns, but submitted that it was inappropriate for questions to be asked of jurors who did not contribute to the note. The appellant argued that the trial judge erred by permitting the prosecutor and defence counsel to question jurors.

[52] The appellant also argued that the information obtained upon that enquiry did not justify the discharge of juror number 4. The trial judge read too much into juror number 4's statement about the appellant doing the same thing again, failed adequately to explore what that juror meant by that statement, erred by allowing jurors to state their opinions about juror number 4's intellectual capacity, and erred by taking those statements into account. If it was appropriate to embark upon the enquiry, the trial judge erred in not questioning every juror. If, contrary to the appellant's argument, the note raised a question about the deliberative capacity of juror number 4, it was not inappropriate for the trial judge to question that juror, but the process of questioning only some of the other jurors was inappropriate.

[53] The respondent argued that it was not appropriate to confine enquiries to the jury as a body. The note and the information given by the bailiff suggested that a number of jurors were concerned about an individual juror during the stage of the trial when evidence was being adduced. The respondent emphasised that trial judges must have a broad discretion to take which ever course appeared best suited to the circumstances of the case. It was not obligatory for the trial judge to question all of the jurors. It was within the trial judge's discretion to permit the prosecutor and defence counsel to question the jurors. The trial judge's decision to question juror number 4 after only seven of the other 13 jurors (including the two reserve jurors) had been questioned was made at the suggestion of defence counsel. The respondent pointed out that s 56(1)(a) contemplated information being obtained either from the statements by the juror in question or from evidence. It was appropriate for the trial judge to elicit as much evidence as was necessary to make an appropriate decision. Whilst permitting counsel to question jurors should only occur after a cautious examination by the trial judge, it was within the trial judge's discretion to permit it in this case. The prosecutor acknowledged that, with the benefit of hindsight, the issue should have been dealt with differently, but submitted that the Court should also bear in mind that the trial judge had the advantage of presiding over the trial and seeing and hearing juror number 4 and the other jurors who were questioned. The respondent argued that the evidence was amply sufficient to justify the trial judge in discharging juror number 4 and emphasised that defence counsel agreed that juror number 4 should be discharged.

Consideration

[54] Before explaining why I have concluded that the enquiry which preceded the discharge of juror number 4 miscarried, the difficulties often faced by trial judges in cases of this kind should be acknowledged. The issue usually arises with no warning. In effect, trial judges are obliged to expect the unexpected in this as in other aspects of criminal trials. The trial judge must decide upon the appropriate response on the run and in circumstances in which the trial judge has the onerous duty of ensuring that the trial is in that and all respects conducted fairly and in accordance with law. Furthermore, the difficulty of the trial judge's task may be increased by the circumstance that the trial judge may be obliged to adopt a course which was not advocated for either party or even (though no doubt very rarely) which both parties advocated against. It is also necessary to bear in mind that an appeal court cannot fully capture the atmosphere at the trial. In particular, the appeal court lacks the trial judge's advantage of seeing and also sometimes (as in this case) hearing from jurors as the trial unfolds. Acknowledging all of those difficulties, this Court nevertheless may be obliged to intervene if the fairness of the trial was put at risk by the course adopted by the trial judge.

[55] The suggestion in the note that juror number 4 did not "seem to understand the importance of this task" plainly did not convey that juror number 4 lacked what is sometimes called "deliberative capacity", that is, the necessary intellectual capacity to act as a juror. In the context of what followed, it was no more than an expression of opinion about juror number 4's attitude to her role as a juror. If, as was indicated by the bailiff's information, juror number 4 enquired of other jurors about the identity of a named witness (the complainant's mother, who did not have the same last name as the complainant), that may have indicated no more than that she had a poor memory for names (as juror number 4 subsequently explained) and appropriately wished to identify the witness. Substantial variations in jurors'

intellectual capacities would simply reflect the same variation in the whole community from which jurors are drawn. A poor recollection of names is an example. It is an affliction borne by many people in all walks of life and has no material bearing upon a person's capacity to serve as a juror. As to the concern expressed by the prosecutor, her acknowledgment that it was insufficient to justify her raising it with defence counsel or the trial judge tends to confirm that it did not justify any inquiry. The same is true about defence counsel's cryptic remarks about juror number 4's looks and facial expression, which bring to mind the adage about a book and its cover.

[56] The substance of the note was a complaint that juror number 4 did not discuss the evidence with other jurors but instead looked at Facebook on her mobile phone. All or many of the jurors may have had a mobile phone with them during the trial before the jury retired to consider their verdicts.[4] I have not found any indication in the record that the jurors were asked not to use their mobile phones during that period. As to the related suggestion that juror number 4 did not participate in jury discussion, that is not significant because the evidence had not been completed. In *R v Roberts*,[5] Cullinane J, with whose reasons McPherson JA and White J agreed, said that a juror's refusal to discuss the evidence prior to deliberations did not of itself constitute a ground for discharging the juror:

> "Whilst it is the practice in our courts to tell jurors from the outset that they may discuss matters between themselves as much as they wish there are other parts of the common law world where jurors are warned against discussing the evidence until it has all been presented. Whilst free and open discussion between the jurors from the outset may be commendable I do not think the fact that a juror refuses to discuss the evidence at that time constitutes a basis for his discharge."

[57] The information given to the trial judge did not suggest that it might be necessary to discharge juror number 4, although it was certainly appropriate for the trial judge to take some action in response to the note. Amongst other possible responses, the trial judge might have spoken to the jury as a whole, reminded them to pay close attention to the evidence, asked them to consider the desirability of discussing the evidence amongst themselves whilst keeping in mind that the evidence was not complete, directed them to leave their mobile phones with the bailiff whilst the jury were kept together, and reminded them that any of them could raise any concern about such matters. The trial judge could then have dealt appropriately with any subsequent expression of concern by or about juror number 4.

[58] However, whilst those or similar instructions to the jury as a whole might well have been sufficient, I would accept that the trial judge might reasonably have thought that the brief note did not fully express the author or authors' concerns. It was not outside the trial judge's discretion to question the speaker (who seemed to be the author of the note, or one of the authors) separately from the other jurors to elicit more information about the concerns which prompted the note.

[59] The additional information obtained in response to the trial judge's questions also did not establish any ground for concluding that juror number 4 should be

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4 It was not suggested that there was any breach of the restrictions upon communicating with jurors in s 54(1) of the *Jury Act* 1995.

5 [2005] 1 Qd R 408 at 416 [40].

discharged. Whilst some of the speaker's statements indicated that juror number 4 did not listen to anything, those statements apparently concerned only jury number 4's failure to participate in discussions between jurors. As I have mentioned, that was not a ground for thinking that it might be necessary to discharge that juror.

[60] In my respectful opinion, it was at this stage of the process that the trial judge erred. Acknowledging that "this is an area in which prescription should be avoided and flexibility is important",[6] the information available to the trial judge was clearly insufficient to justify the trial judge either in permitting the prosecutor or defence counsel to question any juror or in embarking upon a wide ranging enquiry of jurors. The authorities demonstrate that trial judges should be extremely cautious about adopting either course. *R v Roberts* was a different kind of case because the issue arose after the jury had retired to consider the verdict, but is nonetheless instructive. A note to the trial judge from a juror asserted that eleven of the jurors were in agreement, and that the dissenting juror would not discuss the matter with the other jurors, was aggressive, and the jurors were concerned for their safety, extremely distressed, anxious, and very much in need of the judge's help. The trial judge questioned the juror who had written the note separately from the other jurors and thereafter separately questioned two other jurors. In the course of considering the appropriateness of the trial judge's approach of speaking to the jurors separately, Cullinane J quoted the following passage from the judgment of the Court of Appeal in *R v Orgles & Orgles*:[7]

> "(a) Each member of a properly constituted jury has taken an individual oath to reach a true verdict according to the evidence; or has made an affirmation to the like effect.
>
> (b) Circumstances may subsequently arise that raise an inference that one or more members of a jury may not be able to fulfil that oath or affirmation.
>
> (c) Normally such circumstances are external to the jury as a body. A juror becomes ill; a juror recognises a key witness as an acquaintance; a juror's domestic circumstances alter so as to make continued membership of the jury difficult or impossible; so far, we give familiar, inevitably recurring circumstances. Less frequent, but regrettably not unfamiliar, is the improper approach to a juror, alternatively a discussion between a juror and a stranger to the case about the merits of the case, in short, that which every jury is routinely warned about.
>
> (d) Occasionally, as in the instant case, the circumstances giving rise to the jury problem are internal to such as a body. Whereas the duty common to all its members normally binds the 12 strangers to act as a body, such cannot always occur. From time to time there may be one or more jury members who cannot fulfil the duty, whether through individual characteristics or through interaction with fellow jury members.
>
> (e) However the circumstances arise, it is the duty of the trial judge to inquire into and deal with the situation so as to

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6 *R v Roberts* [2005] 1 Qd R 408 at 415 [36] (Cullinane J).

7 [1994] 1 WLR 108 (Court of Appeal; Nolan LJ, Wright and Holland JJ).

ensure that there is a fair trial, to that end exercising at his discretion his common law power to discharge individual jurors (to a limit of three: see section 16 of the Juries Act 1974), or a whole jury: see *R. v. Hambery* [1977] Q.B. 924.

(f) The question arises as to whether and in what circumstances that duty should be exercised by the trial judge in the absence of the jury as a body. As to this, first, there is no doubt but that the judge's discretion enables him to take the course best suited to the circumstances (see *Reg. v. Richardson* [1979] 1 W.L.R. 1316 for an extreme course) and frequently it is appropriate to commence and continue the inquiry with the juror concerned separated from the body of the jury. Such a course cannot readily be faulted if the circumstance giving rise to the inquiry is external to the jury as a body; indeed if the problem is an approach to a juror, alternatively some external influencing of a juror, only such a course is feasible. The "infection", actual or potential, of one juror must be prevented if possible from spreading to the rest of the jury, and it is common form to have the individual juror brought into open court with the rest of the jury absent so that the trial judge may make an inquiry in the presence of the defendant and counsel without jeopardising the continued participation of the rest of the jury.

(g) However, in our judgment, such separation of a juror for the purposes of an inquiry cannot be justified if the circumstances are internal to the jury. It may be that just one member of the jury is complaining about all or some of the rest, or, as here, two members, but the problem is not the capacity of one or more individuals to fulfil the oath or affirmation, but the capacity of the jury as a whole. When this type of problem arises, then the whole jury should be questioned in open court through their foreman to ascertain whether, as a body, it anticipates bringing in a true verdict according to the evidence. It will be a matter for the judge's exercise of discretion as to how he reacts to the response, that is whether he makes no order, whether he discharges the whole jury, or whether he discharges individual jurors up to three in number.

(h) That which the recorder eventually did, we cannot fault; what we regard as irregular was the initial separation and questioning of the individual members which, given the nature of their respective complaints, should not have happened. The point can be tested. Let it be supposed that one or both had individually intimated an inability to return a verdict, having regard to friction within the jury, what should follow? It could not be right to discharge one or both and leave the rest of the jury to continue, arguably the wrong person or persons would then be discharged, namely those who did heed the nature of the duty. In our view the inquiry could only be with the jury as a whole."

[61] Cullinane J referred to the "obvious difficulties and risks associated with seeking the views of individual members", disclaimed any suggestion that "the court should engage in a process of confronting a juror or jurors against whom allegations are made with those allegations so as to enable a response to be given" and pointed out that such a process "carries the risk of the court being caught between accusation and counter-accusation". His Honour emphasised "the wisdom of the course suggested in the above passages in *Orgles* particularly (h)."[8] Those remarks are applicable in this case.

[62] Where a trial judge has a concern about the deliberative capacity of a particular juror, that would amount to a circumstance "external to the jury as a body", analogous to the illness of a juror (see *Orgles* at paragraph (c)). In some such cases it may not be necessary to question anyone. Information supplied by a court official or some other reliable source may be sufficient. Perhaps in other cases it might be sufficient to question someone other than a juror. If it is appropriate to question any juror, it will usually be appropriate to ask questions only of the juror suspected of lacking deliberative capacity. The President's remarks about the singular problem which arose in *Omid*, to which the trial judge referred, do not suggest any difference in the general approach. Those remarks sanctioned only a single question of the jury as a whole and, depending upon each juror's answer to that question, a very brief and precisely defined enquiry of individual jurors to ascertain whether they might have been affected by a "psychic" juror's supposed vision of the offence alleged in that case. There is no analogy with the enquiry conducted in this very different case.

[63] As to permitting the prosecutor or defence counsel to question jurors, in *R v N*[9] the New Zealand Court of Appeal (Williams and Salmon JJ) held that this was not appropriate where the issue concerned a possible ground of disqualification of a juror. In Queensland the trial judge has a discretionary power to permit the prosecutor or defence counsel to question a juror in relation to the possible discharge of that juror or another juror, but it must be a rare case in which it would be appropriate to exercise that discretion. In *R v Edwards, Heferen & Georgiou*,[10] the Chief Justice observed that the trial judge "would ordinarily be most circumspect about allowing any questioning of the juror by counsel." That case concerned a contravention of the provisions in ss 53 and 54 of the *Jury Act* 1995 prohibiting the separation of jurors until they have given their verdict and any communication with jurors whilst the jury was kept together, but the Chief Justice made the observation in the context of general remarks about the possible discharge of a juror under s 56(1). The same level of circumspection should be adopted whether or not the issue concerns the jury as a body.

[64] A trial judge ordinarily would seek submissions from counsel about the appropriate course in a case of this kind and also may seek assistance in framing the questions to be asked of the juror, but in the end it is one of the trial judge's duties to conduct any necessary enquiry. So far as this case concerns the deliberative capacity of juror number 4, I would respectfully endorse the observation by the New Zealand Court of Appeal in *James v R*[11] that whilst an evaluation of a juror's capability by a judge "might not always be an easy course, we are satisfied that Judges are well

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8 [2005] 1 Qd R 408 at 415 [34] – [35].
9 (2005) 21 CRNZ 621 at 626.
10 [2002] 1 Qd R 203 at 205 [12].
11 [2012] 1 NZLR 353 at 360 [26].

equipped to interview a juror with sensitivity and insight, with the interests of justice and the accused well in mind".

[65] The trial judge's error in embarking upon an extensive enquiry of individual jurors and permitting the prosecutor and defence counsel to question those jurors was compounded by the nature of some of the questions asked by the prosecutor and defence counsel. Those questions predictably resulted in the expression of a variety of unhelpful opinions about juror number 4's capacity without the articulation of facts capable of supporting any of those opinions. In particular, the prosecutor's questions about personal matters, such as juror number 4's living arrangements with her parents, had no bearing upon her deliberative capacity or any relevant issue. An examination of that kind must risk both driving a wedge between the targeted juror and the other jurors and creating enmities by one or more jurors towards counsel or their clients.

[66] Whilst the enquiry elicited some information which raised concerns about juror number 4, the manner in which the enquiry was conducted makes it difficult to conclude that the information justified her discharge. Her statement that one of the matters she would contribute to discussions in the jury room would be whether the appellant could do it again was certainly concerning, but she might merely have expressed herself poorly. Perhaps she intended to convey only that if the appellant was guilty it was important that he be found guilty for the reason she gave. She was not asked any question about what she meant to convey or how she reconciled her statement with the trial judge's directions at the commencement of the trial to keep an open mind and that the onus was on the prosecution to adduce evidence which proved beyond reasonable doubt that the appellant was guilty. It was left uncertain whether this concern was really justified or whether it might be remedied by appropriate directions. There was also a basis for the trial judge's concern that juror number 4 might have disregarded the trial judge's direction to all members of the jury not to speak to anyone else on the jury about the questions they were asked in the course of the enquiry, but again juror number 4 was not questioned about her conduct or attitude in that respect.

[67] The third ground for discharging juror number 4 was the trial judge's conclusion that she lacked "the intellectual capacity to engage in a meaningful discussion."[12] It appears that in reaching this conclusion the trial judge relied upon the opinions of some jurors about juror number 4's intellect and maturity. In the absence of any stated factual basis for those broadly expressed opinions they were of no weight. The trial judge did not advert to anything in juror number 4's demeanour or answers as being relevant to this topic. Nothing in the transcript suggests that she was so lacking in intellectual capacity as to be unsuited to the role of a juror. The reliable information relevantly established little more than that juror number 4 had completed grade 12 at school without passing all subjects and that since then she had been gainfully employed. More precise and focussed questions by the trial judge only of juror number 4 might quickly have established whether or not there was a reasonable basis for concluding that her capacity was so limited as to exclude her from that very broad range of community members from whom juries are properly drawn. In my respectful opinion the available information plainly did not warrant the conclusion expressed by the trial judge.

[68] Nevertheless the order discharging juror number 4 was appropriate. The process adopted by the trial judge – which, I should add, was endorsed by both the

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12 Transcript, 12 December 2013, at 4-78.

prosecutor and defence counsel – must have made it seem to juror number 4 that she was on trial. The questions asked of her were such as to suggest that she had been singled out and that other jurors had been questioned about her capacity and attitudes. It would be unsurprising if she was aggrieved by the questioning of one or both of the prosecutor and defence counsel. The appellant did not contend that the enquiry made it unsuitable in any respect for the other jury members to remain as jurors, but the way in which the enquiry was conducted made it untenable for juror number 4 to remain on the jury.

[69] It follows that although the necessity for an order discharging jury number 4 arose from errors in the conduct of the preceding enquiry, there was no error in the order discharging juror number 4.

Arguments about the consequences of the errors

[70] The remaining issue raised by the second and third grounds of appeal concerns the effect of the errors in the process which resulted in the discharge of juror number 4. The second and third grounds of appeal invoked the provision in s 668E(1) of the *Criminal Code* that "on any ground whatsoever there was a miscarriage of justice". As I understood both parties' submissions, they assumed that errors in the process adopted by the trial judge resulted in a "miscarriage of justice", so that the question was whether the Court should exercise the power conferred by the proviso in s 668E(1A) that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[71] The appellant argued that the errors were fundamental and of such a nature as to render the proviso inapplicable. The appellant accepted that the errors did not cast a "shadow of injustice over the verdict"[13] but argued that the departure from good practice was "so gross…that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."[14] That was so because the errors concerned more than mere error in the exercise of the trial judge's discretion. They involved inappropriate, personal questioning about and of juror number 4 and inadequately based findings that she was partial and lacked the intellectual capacity to serve on any jury.[15] They resulted in an unjustified change to a properly constituted jury into whose charge the appellant had been placed. The respondent argued that there was no miscarriage of justice because juror number 4 was lawfully discharged, it was not suggested that there was any error in the trial judge's decision to continue the trial with a jury of 12 persons with one of the two reserve jurors replacing the discharged juror, and the appellant was not prejudiced by the trial continuing with that jury of 12 persons.

Consideration

[72] Although the necessity for the order discharging the juror was most clearly justified by errors in the anterior process itself, the order for her discharge was made

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13 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [55] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

14 *Randall v The Queen* [2002] 1 WLR 2237 at 2251 [28] (Lord Bingham of Cornhill, delivering the judgment of the Privy Council on appeal from the Court of Appeal of the Cayman Islands).

15 Juror number 4 was discharged both from the trial and from any further jury service.

lawfully. The appellant did not argue that there was any error in the trial judge's consequential decision to continue the trial with a jury of 12, with a reserve juror taking the place of juror number 4. The *Jury Act* 1995 treats a reserve juror who takes a vacant place on the jury as being a juror in all relevant respects.[16] It follows that the jury which found the appellant guilty was constituted in conformity with the provisions of the *Jury Act* 1995. It is not to the point to embark upon a speculative enquiry whether juror number 4 might have adopted an approach which was more favourable to the appellant than that which might have been adopted by the reserve juror, but I note that, after juror number 4 had told the trial judge that she would contribute to the jury discussion her view that it was important that the appellant could do it again if he was not found guilty, defence counsel agreed "[a]bsolutely"[17] that the juror should be discharged. Putting that last matter aside, the proper conclusion is that the appellant was found guilty by a properly constituted jury after a fair trial.

[73] A conclusion that there was no miscarriage of justice derives limited support from the decision in *Katsuno v The Queen*.[18] In that case from Victoria, the Sheriff sent a copy of the panel from which a jury was to be struck to the Chief Commissioner of Police, who provided to the Director of Public Prosecutions details of convictions which were not such as to disqualify the relevant persons from serving as jurors. That involved a contravention of a statutory provision which implied that such a report could be sent only to the Sheriff. The prosecutor peremptorily challenged one potential juror solely upon the basis of the unlawfully supplied information. In the High Court it was held by majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ, McHugh and Kirby JJ dissenting) that the prosecutor's use of the information was not a defect in the criminal process, much less a fundamental failure to observe the requirements of that process.[19] There were two main reasons for that conclusion. The first was that were that there was no "failure to observe a mandatory legislative provision relating to the constitution or authority of the jury",[20] the complaint instead being that a particular person was not a member of the jury finally chosen. The second reason was that the prosecutor was entitled to make a peremptory challenge for any reason, the reason actually chosen being irrelevant. The second reason, which has no application by analogy in this case, suggests that in *Katsuno* there was no relevant defect in the trial at all. The first reason, however, may be regarded as having some relevance here, in so far as the jury was properly constituted by jurors who were qualified and randomly selected in accordance with the relevant legislation, and the complaint is about errors in the process which led to a particular person being replaced by a different person as a member of the jury. The appellant sought to distinguish *Katsuno* on the ground that the unlawfulness in that case occurred before the jury was selected, but that was relevant in *Katsuno* to a conclusion, which is of no relevance in this case, that the unlawful conduct did not deny the accused his right to trial by jury under s 80 of the *Constitution*.[21]

[74] This case is quite unlike *Smith v Western Australia*, in which the prospect that one juror had unlawfully intimidated another juror during deliberations could be regarded as "a serious breach of the presuppositions of the trial".[22] Nor does this

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16 See *Jury Act* 1995, s 34.
17 Transcript, 12 December 2013, at 4-78.
18 *Katsuno v The Queen* (1999) 199 CLR 40.
19 (1999) 199 CLR 40 at 63 [45].
20 (1999) 199 CLR 40 at 62 – 63 [44].
21 (1999) 199 CLR 40 at 65 [52].
22 (2014) 250 CLR 473 at 486 [54].

case resemble *Randall v The Queen*,[23] in which it was held that the prosecutor had conducted himself "as no minister or justice should conduct himself."[24] Whilst the irrelevant personal questioning about and of juror number 4 is to be deprecated, it was not nearly as offensive as the conduct in *Randall v R* and it did not result in the trial of the appellant being unfair. Another case upon which the appellant relied, *R v Panozzo; R v Iaria* is distinguishable on the ground that the jury in that case was not constituted as required by the governing legislation so that the jury was not authorised by law to try the issues; it could not be said of the jury in this case, as was said of the jury in that case, that it was "unlawfully constituted".[25]

[75] In *Katsuno* it was held that the relevant contravention did not involve a miscarriage of justice which required the conviction to be set aside.[26] That is also the proper conclusion in this case. The second and third grounds of appeal fail because the appellant did not establish the miscarriage of justice for which he contended.

The proviso

[76] There is therefore no need to consider the proviso in s 668E(1A) of the *Criminal Code*. Nevertheless, I will discuss the questions which would arise in relation to the proviso if, contrary to my own view, the errors in the process adopted by the trial judge resulted in a miscarriage of justice. Those questions are whether the errors were of such a nature to exclude any application of the proviso, whether no substantial miscarriage of justice has actually occurred, and whether the Court should exercise the discretion to dismiss the appeal despite the (assumed) miscarriage of justice.

[77] Authorities upon the first of those questions were recently discussed by the High Court in *Lee v The Queen*.[27] The proviso does not apply where an irregularity in the trial process "is such a departure from the essential requirements of the law that it goes to the root of the proceedings",[28] "…where impropriety or unfairness permeated or affected a trial to an extent where it ceased to be a fair trial according to law…",[29] where there was a "failure to observe the requirements of the criminal process in a fundamental respect",[30] or where there was "such a serious breach of the presuppositions of the trial" as to deny the application of the proviso.[31] The necessary generality of those various descriptions of circumstances in which the proviso is inapplicable may leave considerable scope for conflicting views about the result in a range of cases, but for the reasons already given the present case is not within any of those descriptions. The process for selecting and discharging jurors is undoubtedly important and the errors were important from the perspective of the discharged juror, but the errors had no material consequence for the fairness of the trial or the legitimacy of the verdicts.

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23 *Randall v The Queen* [2002] 1 WLR 2237.

24 [2002] 1 WLR 2237 at 2251 [29].

25 (2003) 8 VR 548 at 555 – 556 [29]. Connolly J's conclusion in *R v A Judge of District Courts and Shelley; Ex Parte Attorney-General for Queensland* [1991] 1 Qd R 170 at 174 that there was no trial because the jury was not properly constituted (the proceeding was "coram non juratoribus"), and the cases there cited, are distinguishable for the same reason.

26 (1999) 199 CLR 40 at 51 [7] (Gleeson CJ), 63 [46] (Gaudron, Gummow and Callinan JJ).

27 (2014) 88 ALJR 656 at 665 [47] – [49] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

28 *Wilde v The Queen* (1988) 164 CLR 365 at 372 – 373.

29 *Lee v The Queen* (2014) 88 ALJR 656 at 665 [47] – [49] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

30 *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [35].

31 *Weiss v The Queen* (2005) 224 CLR 300 at 317 – 318 [43] – [46].

[78] As for the second and third questions, it is apparent from the survey of the evidence in the first section of these reasons that upon the whole of the evidence the guilty verdicts were reasonably open to the jury notwithstanding the appellant's sworn denials. In most cases that would not be a sufficient basis for applying the proviso, but it is necessary also to take into account the jury's verdicts. This is one of those quite unusual cases in which the nature of the errors compels the conclusion that they had no significance for the jury's verdicts.[32] Taking those verdicts into account, there was no substantial miscarriage of justice and the proviso should be applied.

[79] As I have explained, however, I would reject the second and third grounds of appeal on the ground that the appellant did not establish the miscarriage of justice for which he contended.

Proposed order

[80] The appeal should be dismissed.

[81] **ATKINSON J:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[82] **JACKSON J:** I agree with Fraser JA.

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32 See *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].