SUPREME COURT OF QUEENSLAND

CITATION:	*R v Reynolds* [2015] QCA 111
PARTIES:	**R** **v** **REYNOLDS, Geoffrey Thomas** (appellant/applicant)
FILE NO/S:	CA No 185 of 2014 DC No 279 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Beenleigh – Unreported, 18 June 2014
DELIVERED ON:	23 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2015
JUDGES:	Chief Justice and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The orders of the Court are that:** **1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant filed an appeal against conviction – where the appellant claimed that the verdict reached by the jury was unreasonable or insupportable due to inconsistencies and ambiguity in the evidence of the complainant – where evidence of the appellant's offending was almost exclusively dependent on the evidence given by the complainant – whether the jury verdict was unreasonable or insupportable on the evidence – whether the evidence was sufficient to support the guilty verdicts CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant filed an appeal against conviction – where the appellant argued that the trial judge erred in failing to deliver a *Robinson* direction to the jury – whether the trial judge was

required to give the jury a *Robinson* direction – whether the trial judge gave the jury a *Robinson* direction – whether failure to deliver a *Robinson* direction amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROSECUTORIAL DUTIES – FAILURE TO TENDER RELEVANT EVIDENCE – where the appellant filed an appeal against conviction – where the appellant contends that the failure of the Crown to tender a record of interview amounted to a miscarriage of justice – whether failure to adduce the record of interview breached prosecutorial duties resulting in a miscarriage of justice – whether the failure to adduce the record of interview amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the appellant filed an appeal against sentence – where the appellant was convicted of one count of attempted indecent treatment of a child under 16, with the circumstances of aggravation that the child was under 12 years and under the appellant's care and two counts of indecent treatment of a child under 16, with the circumstances of aggravation that the child was under 12 years and under the appellant's care – where a sentence of two years' imprisonment was imposed on each count to be served concurrently, with parole eligibility after serving 12 months – whether the sentence was manifestly excessive

Criminal Code (Qld), s 432, s 632, s 668D, s 668E, s 671B
Evidence Act 1977 (Qld), s 21AK, s 93A

Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92; [2012] HCA 14, considered
BCM v The Queen (2013) 88 ALJR 101; [2013] HCA 48, considered
Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, considered
Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, cited
Elias v The Queen; Issa v The Queen (2013) 248 CLR 483; [2013] HCA 31, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, considered
Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered

Mahmood v Western Australia (2008) 232 CLR 397; [2008] HCA 1, distinguished
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Apostilides (1984) 154 CLR 563; [1984] HCA 38, considered
R v Bartzis [2012] QCA 225, considered
R v Bathgate (1946) 46 SR (NSW) 281; [1946] NSWStRp 21, considered
R v Callaghan [1994] 2 Qd R 300; [1993] QCA 419, considered
R v CBI [2013] QCA 186, cited
R v Dwyer [2008] QCA 117, cited
R v MBX [2014] 1 Qd R 438; [2013] QCA 214, considered
R v MCD [2014] QCA 326, considered
R v Nguyen [2013] QCA 133, considered
R v PAH [2008] QCA 265, cited
R v Porter; ex parte Attorney-General (Qld) [2009] QCA 353, considered
R v SCD [2013] QCA 352, cited
R v Spina [2012] QCA 179, considered
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, considered
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, considered
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, considered
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: S Holt QC, with B P Dighton, for the appellant/applicant
A W Moynihan QC for the respondent

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

[1] **THE CHIEF JUSTICE:** The appellant was convicted in the Beenleigh District Court of:

1. Attempted indecent treatment of a child under 16, with the circumstances of aggravation that the child was under 12 years and under the appellant's care ("***Count 2***");
2. Indecent treatment of a child under 16, with the circumstances of aggravation that the child was under 12 years and under the appellant's care ("***Count 3***");
3. Indecent treatment of a child under 16, with the circumstances of aggravation that the child was under 12 years and under the appellant's care ("***Count 4***").

[2] The appellant was sentenced to two years imprisonment on each count to be served concurrently, with parole eligibility after serving 12 months. The appellant's parole

eligibility date is 18 June 2015. The appellant was acquitted of a further charge of indecent treatment of a child with the circumstances of aggravation that the child was under 12 years and under the appellant's care ("***Count 1***").

[3] The principal issue in dispute at trial was the veracity of the allegations. The respondent's case consisted almost exclusively of the uncorroborated oral testimony and pre-trial accounts offered by the complainant. The appellant's case consisted of claims that the testimony supporting the complaint was inherently unreliable, or was the product of mere fantasy or imagination. The appellant did not contend that the evidence of the complainant was contrived or the product of improper coaching.

[4] At the commencement of the appellate hearing, the appellant was given leave to amend the Notice of Appeal. The appellant abandoned and replaced the original grounds of appeal with three new ones and added a challenge to the sentence.

[5] The appellant appeals against conviction on the grounds that:

1. The jury's verdict on Counts 2, 3 and 4 were unreasonable or could not be supported by the evidence;
2. The trial judge erred in failing to provide a *Robinson* direction to the jury; and
3. A miscarriage of justice arose as a result of the respondent failing to lead the appellant's record of interview as part of the respondent's case.

[6] The appellant appeals against sentence on the ground that it is manifestly excessive.

[7] Prior to examining the legitimacy of the grounds of appeal, it is convenient to briefly summarise the factual matrix underpinning the allegations.

Overview of Factual Matrix

[8] The events forming the substance of the allegations transpired between 3.30 pm and 9.30 pm on Saturday 12 November 2011 at the residence of the complainant, also occupied by her parents (Mr MT and Mrs MD), and her two younger brothers, R and L. At the time of the alleged offending, the complainant was aged six years, and her brothers were aged two years respectively.

[9] The appellant was apparently a close friend and work colleague of the complainant's father, Mr MT. At 2.00 pm on 12 November 2011 the appellant attended the residence of the complainant for the purposes of babysitting the complainant, R and L on the invitation of the complainant's parents whilst they attended a social function. The complainant's parents departed the premises after 3.30 pm and returned at 9.30 pm on the same evening.

[10] The sequence, chronology and substance of the events precipitating within the relevant time interval are somewhat uncertain. This is because the only admitted direct evidence of the happenings is the testimony of the complainant. The complainant gave at least five separate accounts of the events: (1) to Mrs MD; (2) to Mr MT (3) to a police officer under s 93A of the *Evidence Act*; (4) the first pre-record; and (5) the second pre-record under s 21AK of the *Evidence Act*. As a result of her considerable youth and immaturity, and the confusing and embarrassing nature of the alleged events, the complainant's testimony is in various respects uncertain and non-specific. Despite this, there were substantial and significant commonalities. The following may be reconstructed from the totality of the complainant's evidence.

[11] At some time during the evening, the complainant accompanied the appellant into the bedroom to settle R and L into bed. The complainant claims that the appellant requested the complainant to remove the appellant's undergarments. The complainant declined. The appellant thereupon removed his undergarments. According to the complainant, the appellant requested the complainant to touch his penis, which she refused. The complainant described the appellant's penis as a "doodle", and observed that similar organs were possessed by her father and brothers. These events form the foundation of Count 2, for which the appellant was convicted.

[12] The complainant also gave evidence that, having removed his undergarments, the appellant proceeded to masturbate in her presence. According to the evidence, it is unclear whether the appellant achieved climax. The complainant provided a graphic and detailed description of the process of masturbation, noting that "[the appellant] like pulls it up and like covers the top. And he can put it on top of his belly." These events form the foundation of Count 3, for which the appellant was convicted.

[13] The complainant gave further testimony that the appellant requested the complainant to remove her undergarments. The appellant thereupon digitally stimulated her vagina, or otherwise stroked her vaginal region. There is limited evidence of the extent of penetration. The appellant gave an immature but insightful description of the act associated with the vaginal stimulation, claiming that he was "scrubbing" the part of her body that "you wee with". The appellant later described that part of her body as her "private part". These events formed the foundation of Count 4, for which the appellant was convicted.

[14] The complainant also claimed that at some time during the evening, the appellant requested the complainant to manually stimulate the penis of her younger brother, R. The complainant declined this request. This allegation formed the basis of Count 1, for which the appellant was acquitted.

[15] When Mr and Mrs MT returned at approximately 9.30 pm, they observed the complainant lying asleep on the appellant's lap. Mr MT claimed that this aroused certain unspecified suspicions. Mr and Mrs MT enquired as to their children's behaviour, the appellant stated that they were "very good, very funny and cheeky" and that they had walked in on him in the toilet. The appellant subsequently left the premises, and Mr and Mrs MT retired to their bedroom for the evening.

[16] The following morning, on 12 November 2011, the complainant entered the bedroom of Mr and Mrs MT at just before 6.00 am. At the time Mrs MD was in bed, but Mr MT was in the shower. The complainant stated that she had something to tell Mrs MD. The complainant stated, without prompting, that the appellant had shown her his "doodle". Mrs MD subsequently asked where this happened, and the complainant stated that it occurred in the bathroom. Mrs MD enquired into whether the complainant was sure that she had not merely seen the appellant on the toilet. The appellant said no, in the bathroom. Mrs MD and the complainant both went into the lounge room, and asked the complainant the same questions, who confirmed her prior statements. Mrs MD asked if he had touched her, and complainant stated that the appellant had asked her to take her pants off, but she declined. Mrs MD repeated the question, and the complainant stated "yes, like a hundred times".

[17] Mrs MD then notified Mr MT, who was in the shower, of the statements of the complainant. Mr MT then made his own enquiries with the complainant, the results

of which were substantially similar to that given to Mrs MD. Mr and Mrs MT then took the complainant to the local police station to file a complaint.

Ground of Appeal 1: Jury Verdict Unreasonable or Insupportable on the Evidence

[18] The appellant appeals against conviction on the basis that the jury's verdict in respect of Counts 2 – 4 were "unreasonable" or "insupportable on the evidence".

[19] The appellant appeals on the basis of s 668D(1)(b) of the *Criminal Code* (Qld). Section 668E(1) of the Code provides that:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

[20] The law governing an appellate court intervening on the basis that a jury verdict is "unreasonable" or "insupportable on the evidence" is relatively settled. Accordingly, only a brief exegesis of the applicable law is required.

[21] The Court will only declare a jury verdict "unreasonable" or "insupportable" by the evidence where it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[1]

[22] In making this determination, the Court must give significant weight to the fact that the jury is the tribunal of fact vested with primary responsibility for determining guilt and innocence.[2] Within Queensland's adversarial criminal justice system, the jury apparatus is designed to aggregate the collective knowledge, experience and wisdom of twelve lay members of the community to determine the factual matrix of the alleged offence. An aspect of this function is that the jury must weigh the credibility and reliability of witness testimony and, in accordance with common experience and discretion, derive appropriate inferences and conclusions.[3]

[23] The jury system ensures that the community discharges an essential role in the dispensation of criminal justice. Firstly, it recognises that criminal offences are wrongs not merely to victims or those directly affected by the impugned behaviour, but are wrongs against the State and its constituency. Secondly, the jury system incorporates community values into the criminal decision-making process, promoting alignment between adjudicated outcomes and social codes of conduct.

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1 *M v The Queen* (1994) 181 CLR 487, 493; [1994] HCA 63; *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13; *R v PAH* [2008] QCA 265, [29]; *R v Jeynes* [1927] St R Qd; *Mullen v R* [1938] St R Qd 97; *R v Heltib* [1939] St R Qd 1.

2 *M v The Queen* (1994) 181 CLR 487, 493; [1994] HCA 63; *R v PAH* [2008] QCA 265, [31]; *MFA v The Queen* (2002) 213 CLR 606, [49]; [2002] HCA 53.

3 *Doney v The Queen* (1990) 171 CLR 207, [74]; [1990] HCA 51.

[24] The Court must also give appropriate weight to the immeasurable advantage secured by the jury in observing the evidence adduced at trial.[4] However, if the record of evidence displays material discrepancies, inadequacies or attaint, or otherwise substantially lacks probative force, such that the appellate court – making proper allowances for the advantages of the jury – perceives a significant possibility that an innocent person has been convicted, the court must intercede to avoid a miscarriage of justice.[5]

[25] The respondent's case at trial depended, almost exclusively, on the testimony of the complainant. Accordingly, the strength of the respondent's case was substantially predicated on the complainant's credibility and reliability. The appellant claims that the evidence of the complainant was marked by such profound inconsistency and ambiguity that it raises a significant possibility that an innocent person has been convicted.

[26] There are several features of this case which the appellant claims, in combination, render the evidence of the complainant unreliable:

1. The complainant was relatively young, aged six years, at the time of the relevant offence;
2. There were fundamental inconsistencies in her description of the circumstances forming the foundation of Count 1, namely whether she touched one or both of her brothers at the appellant's request, the location of the touching, and the time at which the alleged touching occurred;
3. The complainant provided inconsistent statements regarding whether she had removed her undergarments at the request of the appellant prior to the digital stimulation of her vaginal region forming the foundation of Count 4;
4. The complainant initially only reported to her parents that the appellant had exposed his genitalia to her. The complainant only later reported to police that he had masturbated in her presence, stimulated her vaginal region, and requested her to touch her brothers inappropriately;
5. The complainant did not appear to remember observing her father in the bathroom, despite having made that statement during the s 93A recording;
6. The complainant could not accurately recall the number of times she had previously met the appellant;
7. The complainant indicated that she could not remember observing the appellant on the bathroom that evening; and
8. The complainant was uncertain of the location and chronology of certain parts of the alleged offending.

[27] The appellant correctly identifies that the evidence given by the complainant is, at times, inconsistent and vague. Indeed, the complainant appeared uncertain as to the chronology and location of certain acts forming the foundation of the allegations. In some circumstances, it becomes evident from the transcripts relating to the recorded interviews that the complainant was often confused regarding the meaning of certain questions. In other circumstances, such as the s 93A interview, the complainant appeared to be embarrassed when relaying information to the interviewing police officers, and asked to speak with a female support officer. This behaviour is broadly consistent with the ordinary conduct of child victims of sexual offences,

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4 *M v The Queen* (1994) 181 CLR 487, 493; [1994] HCA 63; *MFA v The Queen* (2002) 213 CLR 606, [49]; [2002] HCA 53.

5 *R v PAH* [2008] QCA 265, [31].

who often experience embarrassment and difficulties associated with recollecting traumatic events.

[28] However, the inconsistencies relating to the location of the alleged offending, the chronology and sequence of events, and the number of times she had previously met the complainant are inessential to the facts required to establish the relevant offences. Similarly, difficulties associated with recollecting whether she had seen her father in the lavatory appear to be unrelated to the subject sexual offences. Furthermore, the complainant never claimed to have observed the appellant on the lavatory; that is an assertion of the appellant, and its denial should not adversely affect the credibility or reliability of the evidence given by the complainant.

[29] Despite the ambiguity surrounding the evidence of the complainant in respect of inessential circumstances relating to the alleged offending, her accounts of the relevant conduct forming the gravamen of the offences were broadly coherent and, in some cases, remarkably graphic. She provided a detailed account of the act of masturbation by the appellant, stating that "[the appellant] like pulls it up and like covers the top. And he can put it on top of his belly." The complainant also described the external digital stimulation as being similar to a "scrubbing" on the "one you wee with". Although the complainant appeared inconsistent regarding whether she had removed her undergarments, this is explicable by embarrassment and uncertainty regarding the significance of the fact. The complainant was consistent regarding whether the appellant asked her to touch his penis. The descriptions of masturbation and vaginal stimulation provided by the complainant would not ordinarily be within the knowledge of a child complainant aged only six years.

[30] The primary allegation significantly and materially affected by inconsistency was the allegation that the complainant had "touched" her brothers. There was inconsistency in whether she had touched both brothers, or just one, and whether she had touched them at all. There was further inconsistency regarding the time and location of the alleged offending behaviour. However, these inconsistencies infected only Count 1, for which the appellant was acquitted. Although the appellant appears to claim that acquittal on Count 1 ought to have created reasonable doubt on the remaining counts, this does not logically follow. The essential facts comprising of the allegations contained within Count 1 are not necessary to establish Counts 2 – 4. Furthermore, the fact that the appellant was acquitted on Count 1 does not mean that the jury did not believe the complainant; it only establishes that they experienced a reasonable doubt regarding Count 1. Merely because the jury experienced a reasonable doubt on Count 1 does not mean that they necessarily experienced a reasonable doubt in relation to Counts 2 – 4. Indeed, the differential verdicts demonstrate the discerning and sophisticated decisional process implemented by the jury, and their recognition of the onerous and grave nature of their functions as tribunal of fact.

[31] The appellant has not made material allegations that the complainant was "coached". However, the appellant has claimed that the complainant was "suggestible". The appellant takes this to mean that many of the disclosures were made in response to prompting by persons questioning the complainant. A disclosure need not be entirely unprompted to be unreliable. In relation to child sex offences, prompting is often required to obtain a fulsome overview of the factual circumstances. Experience shows that young children, and indeed many adults,

suffering from traumatic sexual violations may seek to initially conceal information they perceive will be prejudicial or embarrassing. The fact that the information was not fully disclosed in the form of a comprehensive and eloquently expressed narrative of all applicable factual circumstances at the earliest possible opportunity should not undermine the reliability and credibility of the complainant.

[32] The appellant has placed significant reliance on the young age of the complainant and the fact that her evidence was substantially uncorroborated. In cases of child sex offences it is desirable, but not necessary, that the Crown adduces evidence corroborating the allegations of the complainant. Very young complainant's present a special risk of exaggeration, imaginative reconstruction, or an inability to distinguish between reality and fantasy. This risk is particularly poignant having regard to the grave and stigmatic consequences of conviction for child sex offences.

[33] Notwithstanding this, the propensity of very young complainants to unintentionally convey inaccurate or imagined information, or difficulties associated with differentiating between reality and fantasy, is well within the common knowledge and experience of the jury. Therefore, any danger associated with relying on the uncorroborated evidence of very young complainants may be dissipated by providing appropriate directions. In this case, the learned trial judge provided the following detailed instructions to the jury:

1. The trial judge cautioned the jury to scrutinise the evidence of the complainant very carefully;
2. The trial judge cautioned the jury in relation to the very young age of the complainant; and
3. The trial judge drew the jury's attention to certain inconsistencies in the statements made by the complainant.

[34] In the context of the common knowledge and experience of the jury, and the detailed instructions provided by the trial judge regarding the immaturity of the complainant, the jury would have been able to safely analyse and consider the reliability, credibility and probative force of the uncorroborated testimony of the complainant, even if affected by certain inconsistencies. As Queensland's accusatorial and adversarial criminal justice system vests the fact finding function in the jury, this Court should be slow to interfere with a considered decision of a properly instructed jury. Having considered the quality and sufficiency of the evidence adduced at trial,[6] it is clear that a conviction on Counts 2 – 4 was properly and reasonably open to the jury, despite some inconsistencies within the accounts provided by the complainant. Accordingly, this ground of appeal must fail.

Ground of Appeal 2: Failure to Deliver Robinson Direction

[35] The appellant contends that the learned trial judge erred in failing to deliver a *Robinson* direction to the jury. This ground of appeal raises three interrelated questions:

1. Whether the learned trial judge was required to deliver a *Robinson* direction to the jury;
2. Whether the learned trial judge delivered a *Robinson* direction to the jury; and
3. Whether a miscarriage of justice resulted from a failure to deliver a *Robinson* direction to the jury.

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[6] As is required by *SKA v The Queen* (2011) 243 CLR 400, [14]; [2011] HCA 13; *M v The Queen* (1994) 181 CLR 487, 492-493; [1994] HCA 63; *BCM v The Queen* [2013] HCA 48, [31].

Requirement to Deliver a Robinson Direction:

[36] Section 632(1) of the *Criminal Code* (Qld) provides a person may be convicted of an offence on the uncorroborated testimony of a single witness, unless the *Criminal Code* expressly provides to the contrary.[7] A trial judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of any single witness.[8] Although a trial judge may nevertheless make a comment on the evidence which is appropriate in the interests of justice, they must not warn or suggest to the jury that the law regards any category of persons as unreliable witnesses.[9]

[37] Section 632 of the *Criminal Code* (Qld) is intended to proscribe warnings required by the common law in respect of certain categories of evidence delivered by witnesses who were deemed inherently reliable. It does not abrogate the general requirement to deliver a warning where it is necessary to avoid a miscarriage of justice.[10]

[38] A *Robinson* direction is intended to ensure that the accused receives a fair trial.[11] In determining whether to issue a *Robinson* direction, trial judges must eschew mere reliance on factual similarities, and examine the underlying principle expressed in *Robinson v The Queen.*[12] As held in *Robinson*, the direction is required in circumstances which would give rise to a perceptible risk of a miscarriage of justice.[13] Notwithstanding the undoubted accuracy and wisdom of this statement, this formulation is relatively unhelpful, as reasonable minds may differ regarding the circumstances which may give rise to a "perceptible risk of a miscarriage of justice", and it provides limited clarity on the nature of the risk which attracts the *Robinson* direction.

[39] The functional purpose of the *Robinson* direction is to convey to the jury the importance of cautiously scrutinising the evidence of the complainant. As the *Robinson* direction is of a special and exceptional nature, it will generally only be required in circumstances where the factual matrix giving rise to the "perceptible risk" is outside the ordinary experiences of the jury.[14] Accordingly, although not a substitute for the "perceptible risk" test, a cogent indicator of the need for a *Robinson* direction is the existence of a forensic disadvantage to the accused emanating from the factual matrix which is perspicuous to the trial judge, but not necessarily to lay members of the community.

[40] The forensic disadvantage may possess any number of potential sources. It may derive, as it did in *Robinson*, from the intercession of a substantial interval of time between the alleged offending and the trial, which prejudices the capacity of the

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7 *Criminal Code* (Qld), s 632(1).

8 *Criminal Code* (Qld), s 632(2).

9 *Criminal Code* (Qld), s 432(3).

10 *Robinson v The Queen* (1999) 197 CLR 162, [19]-[20]; [1999] HCA 42.

11 *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42; *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60; *R v Van Der Zyden* (2012) 2 Qd R 568, 582; [2012] QCA 89.

12 *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56, [50]-[54]; *R v Tichowitsch* [2007] 2 Qd R 462, [68]; [2006] QCA 569.

13 *Robinson v The Queen* (1999) 197 CLR 162, [19], [26]; [1999] HCA 42; *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56, [172]-[186]; *R v Tichowitsch* [2007] 2 Qd R 462, [74]; [2006] QCA 569.

14 *R v Tichowitsch* [2007] 2 Qd R 462, [69]-[73]; [2006] QCA 569; *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56, [178]; *R v MBX* [2014] 1 Qd R 438, [67]-[70]; [2013] QCA 214; *R v B, J* [2009] SASC 110, [32].

accused to mount an effective defence.[15] It may, in certain circumstances, emanate from a special quality of the complainant whereby they are susceptible to fantasy about sexual matters.[16] It may also derive from circumstances where the complainant was exceptionally suggestible and may have been subject to coaching or persuasion.[17] Regardless, the appellant must identify a peculiar or exceptional factor which prejudiced their entitlement to a fair trial.

[41] What is clear from the established cases is that a *Robinson* direction is not required merely because the Crown's case relies on the uncorroborated testimony of a very young complainant.[18] Any such proposition would be patently inconsistent with s 632 of the *Criminal Code* (Qld). Accordingly, where the behaviour, nature and temperament of a child witness is of an ordinary and unexceptional nature, the trial judge will not be required to deliver a *Robinson* direction. This, however, does not preclude the trial judge from making other prudent directions cautioning the jury to scrutinise the evidence of the complainant carefully.

[42] In conjunction with the relative youth of the complainant and the uncorroborated nature of her evidence, the appellant substantially relies on the following factors as giving rise to a requirement for the *Robinson* direction:

1. The inconsistencies in the complainant's evidence; and
2. The "suggestibility" of the complainant.

[43] The alleged inconsistencies in the complainant's evidence have been discussed above at [18] – [34]. As has been made clear, the inconsistencies primarily related to inessential factual circumstances connected with the alleged offending, such as location, chronology, and prior knowledge of the appellant. Such inconsistencies are ordinarily characteristic of the evidence of relatively young complainants who have experienced traumatic events. Indeed, one may not expect a six year old child to appreciate the significance of recollecting such contextual facts for later criminal proceedings. Other inconsistencies, such as whether she removed her undergarments, are explicable by embarrassment. One must also consider the possibility of her recollection improving or changing, as would occur among ordinary witnesses, between different interviews.

[44] The complainant's evidence was relatively consistent and persuasive in respect of the gravamen of the offending behaviours. The notable exception, namely the improper contact with her brothers, was the subject of an acquittal. The fact that the appellant was acquitted on Count 1 does not indicate that the jury regarded the complainant as an incredible witness. It merely demonstrates that the onerous burden of "beyond reasonable doubt" had not been sufficiently discharged.

[45] Although the appellant claims that he was deprived of the opportunity to cross-examine the complainant by reason of the inconsistencies in her testimony, this does not appear from the transcript. Indeed, the record book indicates that the complainant was effectively cross-examined by appellant's counsel. Although the appellant points to the apparent confusion of the complainant in respect of certain

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15 *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42.

16 *Longman v The Queen* (1989) 168 CLR 79, 100-101 (per Deane J); [1989] HCA 60.

17 *Robinson v The Queen* (1999) 197 CLR 162, [25]; [1999] HCA 42.

18 *R v Tichowitsch* [2007] 2 Qd R 462, [68]; [2006] QCA 569; *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42; *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56.

questions during cross-examination, and the ambiguous nature of certain responses, these features are common within child sex offence trials and were not of such a nature as to deprive the appellant of his right to a fair trial or give rise to a perceptible risk of any miscarriage of justice.

[46] The appellant claims that the complainant displayed a "hint" of suggestibility. The appellant appears to define "suggestibility" as failing to deliver a complete and fulsome account at the earliest opportunity, and responsiveness to prompting by the complainant's parents and police interviewers. "Suggestible", an attributive adjective, means "capable of being influenced by suggestion".[19] In this respect, it describes an intrinsic characteristic or quality of the subject individual. To an extent, all reasonable persons – regardless of age or disposition – are susceptible to "suggestion"; if they were not, they could not be a functioning member of the community.

[47] In the context of witnesses said to be "suggestible", the colour of meaning is that the witness is unreliable or incredible as they are willing to develop or modify their accounts in a manner compatible with propositions or statements advanced by other persons. Despite the assertions of the appellant that the complainant was "suggestible", little evidence was advanced to that effect. Indeed, in the course of oral argument the appellant's counsel expressly disavowed any reliance on suggestion or that any facts were deliberately planted in the mind of the complainant. Rather, he merely made a statement that there was some "concern" regarding the way the narrative developed, particularly surrounding Count 1. Significantly, the appellant was acquitted of Count 1, and the appellant has pointed to very little evidence establishing improper suggestibility, with the exception of the complainant's responsiveness to police questions.

[48] Although not relied on in the written submissions of the appellant, there is a brief passage in the transcript of the trial during the cross-examination of the complainant whereby the complainant was asked whether it was a lie that the appellant had interfered with her, and the complainant responded "yes". I raise this matter because it was relied on during oral submissions before the trial judge in relation to whether a *Robinson* direction should be given, and that had the complainant in fact knowingly made inconsistent admissions regarding the veracity of her complaint, the circumstances might be of such a nature as to attract a *Robinson* direction.

[49] This particular exchange is a poignant example of the limitations of an appellate court relying on the transcript of cross-examination in proceedings. What appears to be a clear affirmative response expressed in text should not necessarily be attributed such a meaning. A "yes" could plausibly mean that the complainant was confirming or agreeing with the substance of the question, or that the complainant was merely acknowledging having heard the proposition put by counsel. The meaning of the word "yes" will be determined by its verbal and non-verbal context, including accompanying facial expressions, gesticulations, intonation, and any drawing out of syllables. An appellate court lacks the advantage of observing such conduct.

[50] On these facts, the appellant subsequently unequivocally negatived a further leading question that it was a lie that the appellant had engaged in the asserted offending conduct. Furthermore, the affirmative statement had occurred in the context of

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19 John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

other comments indicating that she was confused. Having regard to its context, I am satisfied that the complainant's affirmative response to the question that she had lied was merely a statement acknowledging she had heard, but not necessarily understood, the question. For the jury to have convicted the appellant on Counts 2 – 4, they must have reached a similar conclusion regarding the interpretation of this exchange.

[51] Importantly, this case is not one involving significant delay. Indeed, the complainant made a complaint to her parents at effectively the earliest opportunity, namely before 6.00 am on the morning following the offence. On the same day, the complainant made a recorded statement to an interviewing police officer. There is little evidence establishing that the complainant was unacceptably suggestible or was subject to suggestion, and even less evidence establishing that she had sexual fantasies.

[52] On balance, the circumstances display no exceptional or peculiar features placing the appellant at a forensic disadvantage which would have been clear to the trial judge, but unobvious to the jury. The matter turned primarily on the credibility, reliability and weight of the uncorroborated testimony of a six year old girl, which is within the common experience and knowledge of the jury, and does not require, on its own, a *Robinson* direction. For this reason, this ground of appeal should fail.

Structure and Content of a Robinson Direction:

[53] Assuming that a *Robinson* direction was required, the appellant claims that the trial judge failed to deliver the direction because:

1. The trial judge failed to utilise the word "warn" in the course of giving his directions regarding the evidence of the complainant; and
2. The trial judge failed to list, immediately before or after, giving the warning the precise inconsistencies in the evidence of the complainant.

[54] The categories of circumstances which may give rise to the necessity for a *Robinson* direction are infinitely variable. Accordingly, the precise terms and structure of the direction will vary depending on the circumstances of the case, and the relevant source of the perceptible miscarriage of justice.[20] Therefore, this Court cannot set down prescriptivist rules dictating the form or substance of the direction.

[55] Furthermore this Court has held, on several occasions, that for a *Robinson* direction to be effective it is not essential to use the terms "warn" or "warning".[21] Rather, the direction must bring to the jury's attention the subject matter of the direction, and convey "a real sense of warning in what they are being told".[22]

[56] On these facts, the learned trial judge delivered a caution in the following manner:

> She's a young girl – a six-year-old girl. There are some inconsistencies in what she said, so scrutinise her evidence very carefully.

[57] Although the learned trial judge had previously declined to deliver a *Robinson* direction, these terms amount to a clear and incontrovertible caution to examine the evidence of the complainant. Although the word "warning" has not been used, the

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20 *R v MCD* [2014] QCA 326, [25].

21 See, for example: *R v MCD* [2014] QCA 326; *R v MBX* [2014] 1 Qd R 438; [2013] QCA 214.

22 *R v MCD* [2014] QCA 326, [25].

phraseology is sufficient to convey a "real sense of warning" in what the jury has been told. Accordingly, the trial judge did not fail to "warn" the jury.

[58] The appellant further claims that it is necessary to identify – in close temporal proximity to the warning – each of the relevant inconsistencies for the jury. According to the appellant, the temporal proximity is required to give "judicial weight" to the relevant inconsistencies and the warning.

[59] The appellant relies on the decision of *R v Nguyen* in support of this proposition, where Lyons J held that:

> "I consider that the trial judge needed to warn the jury that because of those specific variations and inconsistencies, they needed to scrutinise the complaint's evidence with great care. Those features demanded a "suitable warning". A suitable warning included the need for the judge to actually specify what those variations were. He needed to actually list those inconsistencies and variations.[23]

[60] I do not cavil with the proposition expressed by Lyons J in *Nguyen*. Indeed, I accept that it is critically important for a trial judge, especially in the context of making a *Robinson* direction, to expressly list the material inconsistencies in evidence presented by the complainant. This is necessary to provide a judicial imprint on the inconsistencies, to which the jury should attribute significant and appropriate weight.

[61] However, in *Nguyen* the trial judge merely summarised – albeit in detail – the inconsistencies mentioned by defence counsel, but failed to make any specific reference himself to the relevant inconsistencies.[24] Accordingly, the principle expounded by Lyons J does not stand as authority for the proposition that the listing of the relevant matters must be temporally proximate or practically contemporaneous with the delivery of the *Robinson* direction. Rather, it reinforces the duty of the judicial officer to independently explain the inconsistencies in the complainant's evidence.

[62] In the learned trial judge's summation, his Honour listed the majority, if not all, of the significant and material inconsistencies relied on by the appellant. The judicial summation lasted approximately forty minutes, and concluded at 1.03 pm. The jury retired for deliberation, and oral argument was taken before counsel regarding the requirement for a *Robinson* direction. The substantive warning referred to at [56] above was then delivered soon after 2.56 pm. Accordingly, an interval of approximately two hours elapsed between the description of the material inconsistencies and the delivery of the warning to scrutinise the evidence of the complainant, during which time the jury was deliberating on the case. Significantly, the warning was also delivered immediately prior to the jury viewing the police interview of the complainant.

[63] Although it may be preferable for the *Robinson* direction to be delivered in a manner temporally proximate to the judicial listing of the relevant inconsistencies, this is not an essential condition of the delivery of the direction. Different cases subject to diverse exigencies will require a different model, structure or framework for the direction. In this case, the direction was delivered after oral argument wherein the trial judge's attention was first drawn to the apparent need for a *Robinson* direction. In such a case, it would be uneconomic and potentially prejudicial to require the judicial officer to traverse each of the material

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23 *R v Nguyen* [2013] QCA 133, [56].

24 Ibid, [54].

inconsistencies, on a second occasion, following the delivery of the direction. In the circumstances, I am satisfied that the learned trial judge sufficiently drew the jury's attention to the material inconsistencies in the complainant's evidence, and that the direction conveyed a "real sense of warning" requiring the jury to closely and carefully scrutinise the evidence of the complainant.

[64] Accordingly, in the event that a *Robinson* direction was required, I find that one was delivered in a manner consistent with the exigencies of this case. Even if it did not, I would be inclined to hold that the failure to issue a *Robinson* direction in the correct format would not have resulted in a substantial miscarriage of justice.[25]

[65] Therefore, this ground of appeal should fail.

Ground of Appeal 3: Prosecution's Failure to Tender Record of Interview

[66] The appellant further claims that the Crown's failure to tender a record of interview the appellant gave to police on 14 November 2011 gave rise to a miscarriage of justice. The appellant, in effect advances two arguments:

1. That the failure of the prosecution to tender the record of interview resulted in a breach of prosecutorial duties resulting in a miscarriage of justice; and
2. That the failure to adduce the record of interview resulted in a miscarriage of justice.

Framework Governing Miscarriage of Justice:

[67] Section 668E(1) of the *Criminal Code* (Qld) provides that:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that … on any ground whatsoever there was a miscarriage of justice."

[68] Section 668E(1A) of the *Criminal Code* (Qld) establishes the proviso, which is that:

> "However, 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."

[69] In *Darkan v The Queen* the High Court described the approach adopted by an intermediate appellate court in determining whether there has been a miscarriage of justice:

> "An appellate court invited to consider whether a substantial miscarriage of justice has actually occurred is to proceed in the same way as an appellate court invited to decide whether a jury verdict should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be

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[25] *Criminal Code* (Qld), s668E(1A); *Darkan v The Queen* (2006) 227 CLR 373, 399; [2006] HCA 34; *Libke v The Queen* (2007) 230 CLR 559, [48]; [2007] HCA 30; *Weiss v The Queen* (2005) 224 CLR 300, [44]; [2005] HCA 81.

> guilty of the offence on which the jury returned its verdict of guilty."[26]

[70] Where there has been a material error in respect of the administration of the applicable procedural or substantive law, there will generally be a miscarriage of justice.[27] However, this does not mean that a mere error of law constitutes a *substantial* miscarriage of justice. A substantial miscarriage of justice arises where the jury, on the evidence properly admitted, would not have inevitably convicted the accused,[28] or a fundamental or radical irregularity occurred which struck at the root of the proceedings.[29]

Duty of Prosecution to Adduce Mixed Statements:

[71] In the Queensland adversarial criminal justice system, it is the heavy burden of the prosecution to determine the evidence which is to be presented before the trial judge. The prosecutor, in discharging this lonesome role, must have proper regard to the dictates of fairness, and the essential underlying condition that the defence receives a fair trial.[30] The prosecutor should not, through connivance or inadvertence, compel an unwilling accused to adduce evidence which is both reliable and exculpatory to accrue strategic advantage through the right of reply or cross-examination. The prosecutor ought not to strive for conviction, or be betrayed by feelings of professional jealousy or reputation,[31] as it is in the interests of the State that justice truly be done to the guilty and innocent alike. For these hallowed halls of justice can be brought into no greater disrepute than by the conviction and undeserving punishment of an innocent man or woman.

[72] Despite this, it is ultimately the responsibility of the prosecutor to determine the grounds upon which it proposes to conduct its case.[32] The evidence which is to be adduced or withheld is ordinarily a question exclusively for the prosecutor in exercising his or her prosecutorial discretion.[33] In this respect, the prosecutor need not adduce all potentially exculpatory material before the Court, regardless of its reliability or relevance.[34] The prosecution need only adduce material which is necessary for a fair presentation of the Crown's case.[35]

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26 *Darkan v The Queen* (2006) 227 CLR 373, 399; [2006] HCA 34.

27 *Libke v The Queen* (2007) 230 CLR 559, [48]; [2007] HCA 30.

28 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, [29]; [2012] HCA 14, [29]; *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81; *Wilde v The Queen* (1988) 164 CLR 365; [1988] HCA 6.

29 *Wilde v The Queen* (1988) 164 CLR 365, 373; [1988] HCA 6; *R v McNamara* (QCA, No 261 of 1998, 1 December 1998, unreported). Although the use of the phrase "fundamental defect in the trial" risks distracting from the language of the statute, it is used here as a convenient shorthand expression to denote the category of procedural or formal irregularities which may constitute a substantial miscarriage of justice, despite the fact that the accused would have inevitably been convicted: cf *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 [22]; [2012] HCA 14, [22].

30 *Elias v The Queen; Issa v The Queen* (2013) 248 CLR 483, [35]; [2013] HCA 31; *The Queen v Apostilides* (1984) 154 CLR 564, 575-576; [1984] HCA 38.

31 *R v Bathgate* (1946) 46 SR (NSW) 281, 284-285.

32 *R v Apostilides* (1984) 154 CLR 564; [1984] HCA 38; *Richardson v The Queen* (1974) 131 CLR 116; [1974] HCA 19; *Whitehorn v The Queen* (1983) 152 CLR 657, 663-664; [1983] HCA 42.

33 *The Queen v Apostilides* (1984) 154 CLR 564; [1984] HCA 38.

34 However, if any such exculpatory statement is relevant, the prosecution should make it available to the defence: *Lawless v The Queen* (1979) 142 CLR 659, 667; [1979] HCA 49.

35 *R v Bartzis* [2012] QCA 225, [31]-[32].

[73] The appellant proposes to establish a distinction between entirely self-serving statements and mixed statements. The appellant claims that although it is within the prosecution's discretion as to whether to lead self-serving statements, the Crown is obliged by law to lead all mixed statements. With respect, this distinction creates a false dichotomy and distracts from the fundamental test, which is whether, in the circumstances of the case presented by the prosecution, fair presentation required the adduction of the relevant evidence. "Fair presentation" of the prosecution's case means all evidence necessary to unfold the narrative and give a complete and holistic account of the factual matrix forming the foundation of the prosecution's case has been properly adduced.

[74] This case is clearly distinguishable from *Mahmood v Western Australia*. In that case, the defence sought to tender evidence of an audio-visual recording where the appellant walked the police through the premises within which the he allegedly murdered his wife. The prosecution objected to the adduction of the whole video, and only the portion on which the defence relied was admitted to evidence. During their address, the prosecutor invited the jury to draw negative inferences from the appellant's demeanour during the relevant segment of the video. Justice Hayne, agreeing with the majority of the High Court in a separate judgment, held that:

> "In Western Australia, *Callaghan* has been said to stand for the proposition that "[i]t is a matter for the prosecution to determine whether or not it wishes to lead the evidence as part of its case" of an out-of-court statement that contains both inculpating and exculpating material. The decision in *Callaghan* does not establish that proposition and it is a proposition that is not consistent with the proper presentation of the prosecution case. If there is admissible evidence available to the prosecution of out-of-court statements of the accused that contain both inculpating and exculpating material, fair presentation of the prosecution case will ordinarily require that the prosecution lead all that evidence."[36]

[75] I do not read the relevant passage of the judgment of Hayne J, in the context of the case of *Mahmood*, as holding that the prosecution is required, as a matter of law, to lead evidence of all mixed statements made by the accused, regardless of whether they possess direct or peripheral relevance to the case of the prosecution. Rather, this passage appears to reinforce the importance of the prosecution adducing the *whole* of the relevant mixed statement by the accused if the prosecutor intends to rely thereupon, rather than merely a portion of the mixed statement. This is because selectively presenting portions of mixed statements is liable to distort the overall meaning and effect of the statement. Therefore, as a matter of fairness, the prosecution must generally adduce the whole mixed statement if it intends to rely on any portion of the statement.

[76] On these facts, the prosecution did not seek to rely on the allegedly mixed statement, or any portion thereof. Furthermore, although the appellant claims that the statement is "mixed" because it involves concessions as to presence and opportunity, the statement is largely self-serving and exculpatory in nature.[37] Indeed, where the appellant refers to accidental touching or the failure to "cover up"

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36 *Mahmood v Western Australia* (2008) 232 CLR 397, [41]; [2008] HCA 1.

37 See, by way of analogy: *R v Bartzis* [2012] QCA 225, [31]-[32]; *R v SCD* [2013] QCA 352, [38]-[39].

when on the lavatory, it was framed as a mere possibility in entirely exculpatory circumstances. As the record of interview does not contain any statements against interest, it cannot accurately be described as a "mixed statement". Even if it were a "mixed statement", the circumstances were not such that its adduction was necessary for a fair presentation of the prosecution's case.

Miscarriage of Justice due to Failure to Adduce Record of Interview:

[77] The Court has power to receive "new" or "fresh" evidence under s 671B(1) of the *Criminal Code* (Qld). "Fresh evidence" is evidence which did not exist at the time of trial, or which could not have been obtained by the exercise of reasonable diligence. "New evidence" is evidence which did exist at the time of trial and could have been obtained by the exercise of reasonable diligence, but was not adduced at trial.

[78] A distinction is drawn between the two categories of evidence on the basis that there is a public interest in ensuring that the defence properly and comprehensively presents its case at first instance, to avoid the wasted resources associated with conducting another trial on the basis of new evidence.[38] An accused should not be entitled to rely on incompetence, negligence or tactical decisions regarding the presentation of their case to procure a retrial before a different jury on an entirely new basis. Such practices would fundamentally undermine public confidence in the administration of justice.

[79] There is also a public interest in ensuring that innocent persons are not wrongfully convicted due to the absence of certain fresh evidence at their original trial.[39] As discussed earlier, the wrongful conviction of an accused brings the courts and the administration of justice into disrepute, and therefore the presence of materially exculpatory fresh evidence militates in favour of a retrial.

[80] The colour of meaning denoted by "substantial miscarriage of justice" varies depending on the nature of the evidence. Where the evidence is fresh, the applicable test is whether the accused has established a significant possibility or likelihood that, in light of the admissible evidence, including the fresh evidence and that adduced at trial, a jury acting reasonably would have acquitted.[40] Where the evidence is new, a conviction should not be set aside merely because it reveals a mere likelihood that a jury acting reasonably would have returned a verdict of not guilty. Rather, it is necessary to show that, in light of the new evidence, the conviction of the accused was not reasonably open to the jury.[41]

[81] On these facts, the evidence was in existence and known to the defence prior to the commencement of the trial. Nonetheless, the defence failed to adduce the evidence themselves, or request the prosecution to adduce the record of interview on the appellant's behalf. Such failure may have occurred for tactical reasons or mere inadvertence. Assuming that this occurred by reason of inadvertence, the evidence is still not "fresh". The adduction of the evidence does not establish that the

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38 *R v Spina* [2012] QCA 179, [32].

39 Ibid.

40 Ibid.

41 *Ratten v The Queen* (1974) 131 CLR 510, 516-517; [1974] HCA 35; *Lawless v The Queen* (1979) 142 CLR 659, 674-676; [1979] HCA 49; *R v Stafford* [2009] QCA 407, [50]; *R v Davidson* [2014] QCA 348, [34]; *R v Spina* [2012] QCA 179, [32].

conviction of the appellant was not reasonably open to the jury on the basis of the evidence presented at trial and the record of interview. It was open to the jury to reject the self-serving statements of the appellant, and prefer the testimony of the complainant. Accordingly, this does not give rise to a substantial miscarriage of justice.

Conclusion:

[82] The third ground of appeal should be dismissed.

Ground of Appeal 4: Sentence was Manifestly Excessive

[83] The final ground of appeal of the appellant is that the sentence was manifestly excessive. The appellant points to no specific error, but merely asserts that the sentence was "plainly unjust" when contrasted with other comparable decisions. This kind of assertion is within the second category of *House v The King*.[42]

[84] As rightly conceded by the appellant, it is not sufficient to establish that the relevant sentence is "markedly different to sentences imposed in similar cases", rather than the sentence is "unreasonable or plainly unjust".[43] It is manifestly inappropriate to compare aggravating and mitigating factors in comparable cases in an attempt to inexorably divine the single correct sentence.[44] Although reasonable judicial minds may differ regarding the preferable nature and quantum of sentence, provided the sentence imposed is within the bounds of judicial discretion and is just in all the circumstances, it should be upheld.

[85] The appellant complains that the sentencing judge only referred to the decisions of *R v Craig; ex parte Attorney-General*[45] and *R v Moffat*[46] during sentencing submissions. This is because both decisions were handed down when the maximum penalty was fourteen years rather than the twenty years that applied when the appellant was sentenced. Apparently, according to the appellant, this limits their utility. The absurdity of this submission is reflected in the fact that an increase in the maximum applicable penalty correlates with an elevation in the perceived seriousness or gravity of an offence by the community. As community values and expectations are incorporated into the sentencing process, if anything, the submission of the appellant in this respect would seem to justify the imposition of a greater sentence.

[86] I have given close consideration to the cases advanced by the appellant.[47] However, those sentences provide no more than a yardstick against which to evaluate whether the sentence imposed involved a sound exercise of discretion.[48] The appellant sexually interfered with a six year old under his care and control. The circumstances of the offence involved a gross breach of trust, and an exploitation of the immaturity and

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42 *House v The King* (1936) 55 CLR 499, 504-505; [1936] HCA 40; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [62]; [2011] HCA 10.

43 *R v CBI* [2013] QCA 186, [22]; *Hili v The Queen* (2010) 242 CLR 520, [58]-[59]; [2010] HCA 45; *Wong v The Queen* (2001) 207 CLR 584, [58]; [2001] HCA 64.

44 *R v Dwyer* [2008] QCA 117, [37].

45 [2002] QCA 414.

46 [2003] QCA 95.

47 See, for example: *R v CBI* [2013] QCA 186; *R v KT; ex parte Attorney-General (Qld)* [2007] QCA 340; *R v Horvath* [2014] QCA 344.

48 *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2.

vulnerability of the complainant. The appellant has demonstrated no remorse for his offending.

[87] Having regard to the abovementioned factors, the sentence imposed by the primary judge, two years imprisonment with parole eligibility after twelve months, is patently not manifestly excessive or plainly unjust. This Court should not be required to waste its valuable and scarce resources in tinkering or making minor adjustments to sentences which were clearly within the relevant judicial discretion. Rather, it should be slow and hesitant to interfere with the exercise of judicial discretion by sentencing judges, particularly in the absence of some feature of the case transparently and cogently indicating that the sentence was unjust. Otherwise, this Court would become a venue for the resentencing of criminal offenders *de novo*, and appellants would be encouraged to maintain illegitimate grounds of appeal in the hope of striking upon an especially sympathetic or inordinately pedantic court. This would result in an exorbitant waste of public resources, undermine the finality of proceedings, frustrate and delay justice to the victims, and ultimately degrade public confidence in the judicial system.

[88] Accordingly, the application for leave to appeal against sentence on the grounds that it is manifestly excessive should be refused.

Proposed Orders:

[89] The orders of the Court should be that:

1. the appeal against conviction be dismissed; and
2. the application for leave to appeal against sentence be refused.

[90] **FRASER JA:** I agree with the reasons of Gotterson JA and, like his Honour, I agree with the orders proposed by the Chief Justice.

[91] **GOTTERSON JA**: I have been provided with draft reasons prepared by the Chief Justice. I agree with his Honour's proposal that the appeal against conviction be dismissed and that the application to appeal against sentence be refused. I also agree with the summary of the proceedings and overview of facts at paragraphs [1] to [17] of his Honour's reasons. I shall state briefly my reasons for supporting the orders proposed. It is convenient to deal firstly with the grounds of appeal against conviction.

Ground 1

[92] This ground of appeal seeks to engage the first two limbs for setting aside a jury's verdict listed in s 668E of the *Criminal Code*, namely, that it is unreasonable and that it cannot be supported by the evidence. An independent assessment of the sufficiency and quality of the whole of the evidence is required to determine whether the guilty verdicts on Counts 2, 3 and 4 can be supported.[49]

[93] His Honour has undertaken that exercise at paragraphs [25] to [33] of his reasons. I agree with his conclusion that the verdicts of guilty can be supported for those counts. The cogency and specificity of the complainant's evidence of acts done to her by the appellant and identified at paragraph [29] is telling in this regard.

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[49] *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 per French CJ, Gummow and Kiefel JJ at [21], [22].

[94] With respect to unreasonableness, it need be borne in mind that one of the appellant's abandoned grounds of appeal was that the convictions on Counts 2, 3 and 4 could not be "reconciled or supported" with the acquittal on Count 1. Whilst there is no direct counterpart to that ground in the amended grounds, the appellant's submissions with respect to unreasonableness draw to some extent upon notions of inconsistency in the verdicts and doubt on Count 1 which, it is argued, should have reflected in doubt on the other counts.

[95] Those notions have little resonance here. The complainant's evidence concerning Count 1 was marked with inconsistency with respect to whether she touched the penis of one or each of her brothers at the appellant's request[50] and as to where or when any such touching occurred. As well, the complainant did not report any touching to a brother to either parent on the following morning, as she had done with respect to the physical acts carried out by the appellant on himself and then on herself. It is understandable then that the jury was not satisfied beyond reasonable doubt on Count 1. However, the difference in quality of her evidence concerning the other counts sufficiently explains why similar doubt did not attend them.

Ground 2

[96] Whilst the trial judge refused a request from the appellant's counsel at trial that a *Robinson* direction be given, he cautioned the jury during a re-direction in terms set out in paragraph [56] of the Chief Justice's reasons. No further re-direction was sought.[51]

[97] I agree with his Honour's conclusion that a *Robinson* direction was not required and his reasons for that conclusion. There was no error of law on the part of the learned trial judge in refusing the request for the direction. Nor did the failure to give the direction give rise to a miscarriage of justice. The caution that was given brought home to the jury the need to scrutinize the evidence of the complainant with great care. By the terms in which the caution was given, it conveyed to the jury the substantive import of a *Robinson* direction[52] and, moreover, it adopted the substance of the direction that defence counsel had submitted be given.[53]

Ground 3

[98] The subject of this ground of appeal is a record of a police interview of the appellant which took place at Holland Park Police Station on 14 November 2011. The document is exhibited to the affidavit of the appellant's instructing solicitor at trial, Mr Samit Seth, sworn 9 January 2015. Defence counsel, Mr David Funch, has also sworn an affidavit on 9 January 2015 in which he states that on 11 June 2014, some five days before the commencement of the trial, he received an email from the prosecutor advising him that "as discussed" she would not be playing the record of interview in the prosecution case.

[99] Both these affidavits were filed in support of an application for leave to adduce the record of interview filed on 9 January 2015. At the hearing of the appeal, counsel for the appellant clarified that the record of interview was relied upon only to

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50 Compare Complainant's Record of Interview (Exhibit 2) p20 with her s 93AK evidence: AB51; Tr1-10 ll1-37.

51 AB114 ll24-26.

52 *Robinson v The Queen* [1999] HCA 42; (1999) 197 CLR 162 at 171.

53 AB108 l47 – AB109 l3.

advance this ground of appeal and that it was not sought to adduce it as evidence to supplement any of the other grounds of appeal.[54] It is, in my view, open to the Court to have regard to the record of interview for the use intended by the appellant without having to rule upon the application to adduce it as evidence.

[100] Underpinning this ground of appeal is the appellant's characterization of the record of interview as "mixed", that is to say, that it contains inculpatory matter, as well as exculpatory matter. I have read the record of interview. The matter identified by the appellant[55] elaborates upon an oral report which the appellant gave that evening to the complainant's parents after they returned home to the effect that the children had walked in on him when he was seated on the toilet.[56]

[101] I do not regard the matter identified by the appellant as inculpatory such as might give the record of interview a mixed character. This matter is not concessionary of the offending or of opportunity for the offending as described by the complainant. Like the rest of the record of interview, the matter is exculpatory in nature, in this instance, proffering an innocent explanation of how the complainant might have observed his penis that evening.

[102] The record of interview consists of self-serving hearsay. Consistently with the decisions of this Court in *R v Callaghan*[57] and *R v Bartzis*,[58] there was no obligation on the prosecutor to adduce the record of interview in evidence. I do not accept the appellant's contention that by not adducing the record of interview, the prosecutor breached prosecutorial duties resulting in a miscarriage of justice.

[103] Nor do I consider that as a result of the record or interview not having been adduced, a miscarriage of justice otherwise occurred. In addition to the matters to which I have referred, I note that defence counsel did not request that it be adduced, raise with the learned trial judge that it was not being adduced, or seek to cross-examine the police officer who interviewed the appellant, and who testified, in relation to it.

[104] There are objectively reasonable explanations why none of those courses was taken. Counsel may have appraised the record of interview as not inculpatory, wholly self-serving and not admissible. He may have considered them not to have been in the appellant's interests. When the defence case was that the alleged offending did not happen, counsel may well have thought that evidence of the ready volunteering of this explanation by the appellant may have been viewed sceptically by the jury.

[105] For these reasons, I am of the view that this ground of appeal cannot succeed.

Sentence application

[106] The seriousness of the appellant's offending is apparent. The complainant was very young. She was exposed to the appellant performing a sexual act on himself; he invited her to touch his penis; and he actually touched her vaginal area. This conduct manifested a gross breach of trust. The appellant has demonstrated little remorse.

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54 Appeal transcript 1-34 ll15-34.
55 Outline of Argument fn 41.
56 The complainant's father gave evidence of this report: AB92; Tr2-12 ll4-21.
57 [1994] 2 Qd R 300 at 303, 304.
58 [2012] QCA 225 at [31], [32].

[107] In terms of comparability, the decision of this Court in *R v Porter*[59] is instructive. There, the offender pleaded guilty to indecent treatment of a Grade 2 student who was his pupil. The offending involved two acts of masturbation in front of the complainant to ejaculation, an invitation to place her mouth on his penis which she refused, and showing the complainant his penis when they were in a sleeping swag. The offender was sentenced to two years' imprisonment suspended after serving 248 days (which he had served by the time of sentence) with an operational period of three years. An Attorney-General's appeal against the sentence as manifestly inadequate was dismissed.

[108] Here, the appellant's conduct was worse than that of the offender in *Porter* in that it involved actual touching of the complainant's vaginal area. Allowing for that, I am unable to accept the appellant's submission that the sentence imposed on him is manifestly excessive.

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59 [2009] QCA 353.