SUPREME COURT OF QUEENSLAND

CITATION:	*R v McGrady* [2020] QCA 192
PARTIES:	**R** **v** **McGRADY, Clifford James** (appellant)
FILE NO/S:	CA No 172 of 2018 DC No 1216 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 29 June 2018 (Rosengren DCJ)
DELIVERED ON:	8 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2020
JUDGES:	Fraser, Morrison and McMurdo JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after a trial of two counts of indecent treatment of a child under 16 – where the complainant gave evidence that the appellant touched her genitals twice while they were in a swimming pool – where the complainant told her younger sister about the first occasion soon after it occurred – where the complainant told her mother and older sister about the incidents that evening – where the complainant gave a statement to police shortly thereafter – where the appellant argues that aspects of the complainant's account are implausible – where the appellant points to inconsistencies between the complainant's account and evidence given by other witnesses – whether it was reasonably open to the jury to conclude the appellant was guilty of the offences beyond reasonable doubt – whether the verdicts are unsafe and unreasonable and cannot be supported having regard to the whole of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant submits that the primary judge should have given a "*Jones* direction", informing the jury that they needed to be

satisfied that the alleged touching of the complainant was motivated by sexual interest – where a document was given to the jury which identified the elements of the offence charged, which included that the dealing with the complainant was indecent – where the document explained the meaning of "indecent" in this context – where the primary judge directed the jury that they needed to be satisfied that the touching was deliberate and intentional, not accidental – whether the trial erred in failing to give a "*Jones* direction"

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant submits that the trial miscarried because the trial judge failed to leave accident or mistake of fact to the jury – where the appellant submits the jury should have been told that it was open on the evidence to conclude that the appellant did not intend to touch the complainant's genitals – whether the trial miscarried due to the primary judge's failure to give directions on accident and mistake of fact

Criminal Code (Qld), s 23

R v Harkin (1989) 38 A Crim R 296, cited
R v Hayward [2019] QCA 91, distinguished
R v Jones (2011) 209 A Crim R 379; [2011] QCA 19, distinguished
R v Khaled [2014] QCA 349, considered

COUNSEL: K M Hillard, with R C Taylor, for the appellant (pro bono)
M A Green for the respondent

SOLICITORS: Russo Lawyers for the appellant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** At the end of a trial occupying two days a jury found the appellant guilty of two counts of indecent treatment of a child under 16. The appellant appeals against his conviction upon those counts upon the grounds that the verdict is unreasonable and the trial miscarried because necessary directions were not given to the jury.

[2] The complainant was 12 years old at the time of the alleged offences. The appellant is her aunt's partner. The offences were alleged to have been committed in a small and shallow above-ground swimming pool when the complainant, with her three younger siblings and her mother, visited her aunt, the appellant, and their children. During the day the complainant was in the pool with her siblings, her three cousins, a 14 year old child from a nearby house, and the appellant. There were also two air mattresses floating in the pool. There was a great deal of activity in the pool. The children played various games and the appellant participated in some of those games. At other times the appellant stayed near one side of the pool. The appellant and at least some of the children got out of the pool and back into it at various

times. Whilst children were in the pool the complainant's mother and aunt sat together within no more than a metre from the pool. They faced the pool and talked to each other.

[3] Upon count 1 the prosecution alleged that the appellant unlawfully and indecently dealt with the complainant by placing his hand on the outside of her swimming costume, touching the area of her genitals and her buttocks. Upon count 2 the prosecution alleged that the appellant unlawfully and indecently dealt with the complainant by placing his fingers under the complainant's swimming costume so that he was touching the area of her genitals.

[4] The complainant was interviewed by police on the following day. In relation to count 1, the complainant said "we were playing Marco Polo and stuff and he kept pulling my leg and he was tickling my – both of my rude parts and so I hopped out for a bit". The appellant was sitting in the middle of the pool and when she swam around the pool the appellant grabbed her leg, pulled her towards him, and started tickling her. He tickled her with his hands and she just kept swimming away.

[5] The complainant said that she told her nine year old sister who, the complainant thought, had seen the appellant do it. She told her sister when they had got out of the pool and they were in the toilet. They got back into the pool because the appellant wasn't in it. When the appellant jumped back into the pool, the complainant's sister told the complainant to stay with her and she would try to make sure the appellant did not try to touch her again.

[6] In relation to count 2, the complainant said "then when I hopped back in, he hopped back in and then like at the end of the day he stuck his fingers inside my togs and tried to stickin' (sic) his fingers up near my baby hole". The complainant said that she didn't like it. The complainant said that she was wearing a one piece swimsuit that was cut down so that her hips and part of her back weren't covered. The appellant "would just stick his hand up and just started wiggling his fingers", tickling her vagina. She illustrated that movement to the police officer. The appellant "grabbed my leg to pull me closer to him and … pulled down the togs and then he stuck his fingers in there"; "he like turned his hand and then went like this with his fingers and then he went like that and I just, I kicked off the side of the pool and his arm slipped out from my togs and then I hopped out"; "he was wiggling them, his fingers and then he like its like he went to jab me but he like he missed and I just and then I just kicked off the side of the pool". She described what she meant by "he went to jab me": "he tried to stick one of his fingers up my vagina hole and um and I just swam away", and "he was tickling me all day and he um and then at the end of the day he just done that and um he just kept tickling me and stuff and well it like hurt me when he done that and, and he tried, he tried to stick his finger up".

[7] The complainant said that the appellant wanted her to stay the night but she "just made up an excuse and said I was sick and I wanted to go home" because she didn't feel comfortable. During the drive home the complainant told her mother. After that she told her older sister. She later told the police.

[8] The complainant was cross examined when she gave pre-recorded evidence about seven months later. She agreed with defence counsel's suggestions about the many games played in the pool in which the appellant participated, including by holding

the legs of children doing handstands, lifting up the end of blow-up mattresses so the girls would tumble into the water, and playing a game in which the appellant pretended to be a shark and grabbed children by their arms or legs. She agreed that she and her nine year old sister became a bit over excited and the appellant told them to settle down, as did their mother and aunt. The complainant disagreed with the suggestion that her nine year old sister at one point grabbed her by the crotch of her togs. The complainant disagreed with the suggestions that the appellant did not touch her on her private parts on the outside of her togs and he did not put his hand inside her togs or try to put his finger in her vagina.

[9] In re-examination the complainant said that they were playing the shark game and making whirlypools when the appellant touched her on the first occasion and they were playing tiggy when the appellant touched her inside her togs.

[10] The complainant's nine year old sister was interviewed two days after the relevant occasion. After saying that the complainant kept hopping out of the pool for some reason, she said that when she went to the toilet the complainant told her what the appellant was doing to her. The complainant told her that the appellant "tried to get up there" but the complainant "kicked off the wall and … tried to get away … but he kept following her"; "he tried to put his finger up" the complainant's vagina. She told the complainant to stay near her. The complainant did so. The appellant was trying to get closer to her. He swam under the mattress every time they did. They tried to get away from him by playing tiggy. She referred to the journey home in the car, during which the complainant said that she had made up that she was sick because she didn't want to stay.

[11] In cross examination during her recorded evidence about seven months later, the complainant's sister agreed that her mother and aunt were sitting not far from the pool and the appellant was playing games with the children in the pool. She did not agree that she and the complainant got a bit over excited from time to time.

[12] The 14 year old neighbour was interviewed by police about 15 months after the events. She was cross examined during recorded evidence about three weeks later. It was not suggested that she had seen any of the conduct of which the complainant complained. She agreed that the complainant's mother and aunt were sitting close to the pool. She did not think they were watching what was happening but she wasn't sure. She recalled that the complainant and her younger sister became over excited from time to time. She could not recall the appellant telling them to settle down. She thought she remembered seeing the complainant's younger sister grabbing the complainant by the crotch of the togs. She agreed that people were bumping into each other in the pool. She understood that the complainant left in the afternoon because she had started to look pale, hadn't checked her insulin levels, and was becoming sick. That was the reason the complainant gave to leave the house.

[13] The appellant's daughter who was 15 at the time of the relevant occasion gave pre-recorded evidence about 16 months after that occasion. She did not see her father do anything untoward to the complainant. When the shark game was being played, she was sitting up against the wall of the pool with the complainant and the 14 year old neighbour. The whirlpool game was played after that and the appellant was sitting in the middle of the pool. She heard one of her sisters ask the complainant if she wanted to stay the night. The complainant said she did but had to ask. The appellant's daughter said that her sister asked and was told "yes". She subsequently

heard the complainant tell her mother that she felt sick. The complainant's mother replied that it was probably because the complainant hadn't checked her blood sugar all day and was having a low. The appellant's daughter said that she remembered seeing the complainant's nine year old sister grab the complainant by the crotch of the togs whilst they were in the pool. She remembered the appellant telling them to settle down. Her mother and the complainant's mother also told those girls to settle down a bit.

[14] The appellant's partner gave evidence that she did not see anything untoward happen between the appellant and the complainant. She referred to the children playing, jumping around, laughing and being in a great mood in the pool with a lot of energy. Her sister decided to leave at around 5 pm. She asked the complainant if she was staying and the complainant said "yes". They went out to the car to get the complainant's diabetic bag. When they arrived at the back gate the complainant said she was feeling unwell. The complainant got into the car with her family. The complainant's mother told the complainant she was probably having a low because she hadn't had anything to eat or her insulin all day.

[15] In cross examination the appellant's partner agreed that she saw the children playing games in the pool. She did not remember one of the games being Marco Polo. She remembered a game called sharks. Her understanding was that the appellant was only playing that game with her younger nieces. She and her sister sat next to the pool all day. They were always facing the pool. From time to time she was keeping an eye on the children in the pool. She was careful to keep an eye on what was happening. Her sister told one of the young children to get out of the pool because the complainant had kicked her in the head twice while jumping around. She told the complainant that if she kept going she would have to get out of the pool. The complainant settled down a little bit but not much. On another occasion the appellant told the complainant to settle down because she was becoming a bit unruly. The complainant reacted in "More of a ignorant way" and continued what she was doing.

[16] The complainant's mother gave evidence. She and her sister were sitting very close to the pool keeping an eye on what was happening. She could not recall games. She remembered the children jumping up and down on a blow up mattress. The appellant called out that he thought the complainant was staying the night. She and her sister said that the complainant was sick and it could be from her diabetes. The complainant had told her mother that she felt sick. The appellant came over, felt the complainant's forehead, and said he thought she was sick. After they had driven down the road the complainant said that she did not want to stay because the appellant was touching her. The complainant said that was not all. The appellant was putting fingers in her togs, touching her baby hole. The complainant was sobbing.

[17] The complainant's mother rang her eldest daughter (who was 18 at that time), who arrived with her boyfriend five to ten minutes later. The complainant explained to them what had happened. The complainant's mother heard the complainant say that the appellant was touching her and touching her baby hole.

[18] That daughter, the complainant's eldest sister, gave evidence that after her mother rang her, she drove to her mother's house. The complainant was crying. The complainant explained that the appellant had touched her baby hole. The appellant

had kept trying to pull her leg. When the complainant's nine year old sister wanted to go to the toilet the complainant hopped out with her and explained what had happened to her. They both went back into the pool. The appellant kept trying to get closer to them. They decided to play a game of tiggy to keep away from him.

[19] That daughter's boyfriend gave evidence that the complainant said the appellant had touched her baby hole.

[20] A police officer gave evidence of his investigation, including the dates upon which he took statements. In cross examination he agreed that his investigation was incomplete in that he did not seize the clothing the complainant was wearing in the pool and he did not take any photographs of the scene. In those respects the jury did not have the full picture. He agreed he had charged the appellant before he had obtained statements from the appellant's partner, one of the daughters of the appellant, and the child who was a near neighbour. When the appellant was charged his investigation was incomplete.

Unreasonable verdict

[21] The appellant contends that the verdicts are unsafe and unreasonable and cannot be supported having regard to the whole of the evidence. It is not suggested that, if it was reasonably open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences, the verdicts were unsafe for any other reason.

[22] The prosecution case on both counts depended upon the jury accepting that the complainant's evidence of the offences was credible and reliable. The complainant's evidence of the acts charged in counts 1 and 2 was coherent, consistent and detailed. The complainant's younger sister's evidence that the complainant told her that the appellant kept following her and had tried to put his finger "up there" was consistent with the complainant's evidence and for that reason could be regarded as supporting the credibility of her account in relation to count 1. The complainant's sister's evidence that when they returned to the pool the appellant was trying to get closer to the complainant supported the complainant's evidence to the same effect. The evidence of each of the complainant's mother, eldest sister, and eldest sister's boyfriend about the complainant's statements was substantially consistent with and could be regarded as supplying support for the credibility of the complainant's evidence in relation to both counts.

[23] The appellant contends that it was implausible that count 1 was deliberate when a game was being played that involved chasing, in which accidental touching could well occur. Despite the apparent likelihood that the appellant would come into contact with one or more of the children during their vigorous activities in the crowded, small and shallow pool, findings that the appellant twice deliberately used his hand to touch the complainant in the area of her genitalia could safely be drawn from the combined effect of the evidence given by the complainant and her younger sister that the appellant persistently pursued the complainant and, most significantly, the complainant's evidence that (in relation to both counts) after the appellant caught her leg he pulled her towards him and then he (count 1) tickled both of her "rude parts" and (count 2), after the complainant left and subsequently returned to the pool, he pulled down her togs, stuck his fingers inside her togs, and jabbed her in an attempt to stick his fingers "up near my baby hole".

[24] The complainant's evidence just described supplied strong support for the conclusion that the appellant's conduct was deliberate in relation to count 2. If the evidence directly relating to count 1 otherwise might have allowed for a reasonable doubt about the deliberateness of the appellant's act charged in that count, any such doubt would readily be resolved by the complainant's evidence of the appellant's continued pursuit of her and of the manifestly deliberate way in which he touched the area of her genitalia in count 2.

[25] The appellant contends that there was an "evolution of the complainant's version" about what happened in the pool and when the things happened, and an inconsistency between the complainant's account of the games being played and accounts given by other witnesses of the games being played. In the complainant's first version in her police interview, she said that when the appellant jumped in they were playing "Marco Polo and stuff and he kept pulling my leg and he was tickling my – both of my rude parts and so I hopped out for a bit and … at the end of the day he stuck his fingers inside my togs and tried to stickin' (sic) his fingers up near my baby hole …". That game related only to count 1, and the words "and stuff" preclude a conclusion that the complainant intended to convey that Marco Polo was being played when the appellant touched her. Contrary to the appellant's argument, that first statement is not inconsistent with the complainant's next statement, in which she commenced by referring to the children playing Marco Polo but, after referring in general terms to the appellant grabbing children and saying "you're it", she said "but then and then he was tickling me and um and every time like when I was making a whirly pool and I swam around he would be sitting in the middle and when I swam around the pool um he grabs my leg and pulls me towards him and then he starts tickling me". Nor is there any necessary inconsistency between either of those statements and the passage in the cross examination of the complainant during her pre-recorded evidence in which she simply identified "some of the things" that she was doing with the appellant in the water, or her statement in re-examination that when the appellant touched her on the vagina on the first occasion, they were "playing the shark game and were making whirlypools". It also must be borne in mind that there was a great deal of activity by the many children in the pool and, whereas as a 12 year old child could be expected to recall an event that hurt the child or made her feel uncomfortable, it would be unsurprising if the child could not clearly recall the nature of a particular game played at that time. Such uncertainty as exists in the complainant's accounts of the game (or games) being played when count 1 was alleged to have been committed lacks substantial significance for the reasonableness of the jury's verdicts.

[26] The appellant contends it is implausible that count 1 could have occurred during a game of "whirlpool" when the evidence was that the appellant was in the centre of the pool. Why that would be implausible is not apparent in light of the complainant's evidence that the appellant grabbed the complainant's leg and pulled her towards him before he touched her in the area of her genitalia.

[27] The appellant contends that the complainant's account of her swimsuit being pulled down for count 2 is implausible because she was wearing a one piece swimsuit. The evidence supplies no reason to think that it was impractical for the appellant to pull down the swimsuit to facilitate the insertion of his hand underneath it in the area of the complainant's genitalia. In cross examination defence counsel suggested that the appellant "did not put his hand inside your togs". It was not suggested to

the complainant that there was any particular difficulty in pulling down the swimsuit or putting a hand inside it.

[28] The appellant relies upon the absence of any evidence or photographs of the swimsuit. The jury could take this into account, but there is no basis in the evidence for thinking that the photos or the swimsuit might have revealed the existence of any difficulty in the manoeuvre described by the complainant in count 2.

[29] The appellant describes the evidence of the child from the nearby property that she saw the complainant being grabbed on the crotch by her younger sister as "contradictory". That evidence does not contradict the complainant's evidence that the appellant did the acts she described in her evidence. Whatever view the jury took of the complainant's denial of the event described by the other child, it would not have rendered it unreasonable for the jury to accept as accurate beyond reasonable doubt the complainant's evidence about the offending acts.

[30] The appellant contends that it is implausible that count 2 occurred when the complainant's nine year old sister was staying with the complainant with a view to keeping the appellant away. The fact that, upon the complainant's evidence, this precaution proved ineffective does not seem particularly surprising. A related contention by the appellant is that it is uncertain whether the complainant's sister saw the appellant touch the complainant's vagina or whether the complainant told her of it. For the reasons already given, in either case it was reasonably open to the jury to be persuaded beyond reasonable doubt that the appellant twice deliberately touched the complainant in the area of her genitalia in the way she described in detail.

[31] The appellant argues that the arrangements made for the complainant to stay overnight after at least one of the incidents occurred rendered the evidence of that incident implausible. The appellant refers to the evidence given by his partner that she and the complainant's mother overheard the complainant and one of her cousins talking about it. The appellant's partner said that her daughter asked the complainant and the complainant "wanted" her cousin to ask "because she said, 'I always ask to stay'." The appellant's partner said this discussion occurred at "some stage in the day". That evidence does not support this argument.

[32] The appellant's partner subsequently gave evidence that, after the complainant's mother said that she should go home to bathe her children before dinner and the children got out of the pool, the complainant said "yes" when the appellant's partner asked if she was staying; but the appellant's partner's evidence then was that when they went to get the complainant's diabetic bag, the complainant said that she was feeling unwell. That version is generally consistent with the evidence of the appellant's daughter. The complainant's mother's evidence upon the point is consistent with the complainant's wish to leave being expressed after the appellant said he thought the complainant was staying the night. The jury could resolve the relatively minor conflicts in the evidence upon this topic in a number of different ways that would not require a doubt to be held about the accuracy of the complainant's evidence of the offending acts, including by acceptance of the complainant's evidence that she feigned illness in order to stay away from the appellant, even if the complainant had earlier indicated she wanted to stay with her cousins.

[33] The appellant describes the evidence about the game of "tiggy" said to have been underway when count 2 occurred as "unsatisfactory" and the nature of that game as "unexplained". The complainant's younger sister said in her police interview that "we tried to get away from him by playing tiggy". That is consistent with the evidence the complainant gave in her pre-recorded evidence that on the second occasion they were playing "tiggy" with the other children and the appellant. The jury is unlikely to have needed any explanation of the nature of that game. It is relevant also to note that the complainant's answer in cross examination that the game called "sharks" involved the appellant trying to grab someone by their arm "or just tag us" suggests that game was substantially the same as "tiggy". In any event the point lacks significance for the reasonableness of the verdicts.

[34] The appellant submits that the evidence that the complainant was playing roughly, was excited, and had to be told to settle down added to the unintentional nature of the contact and tickling of which she gave evidence. Those circumstances do not require a doubt to be harboured about the reliability and credibility of the complainant's evidence that the appellant consistently pursued her, pulled her by the leg towards him and then touched her in the area of her genitalia in the way she described in detail.

[35] The appellant submits that it was implausible that deliberate touching would have occurred in a small and shallow pool surrounded by other children with adults at the side of the pool. He relies upon the evidence of witnesses who were present in and outside the pool that they did not observe the appellant do anything untoward to the complainant. These were matters the jury were required to consider. The presence nearby of the two adults makes the conduct of the appellant described by the complainant seem very brazen, but that does not of itself require a reasonable doubt about the honesty and reliability of her evidence. That the adults and some of the children did not see any untoward conduct by the appellant is not an insignificant consideration, but it is also relevant both that the adults might be expected to have focussed their attention at times on the younger children, and that views of the complainant whilst she was in the water seem likely to have been obscured at times by the sides of the above-ground pool (at least so far as the adults are concerned), the presence of many other children in or near the pool, the vigorous activities of those children, turbulence in the water, and the two blow up mattresses.

[36] The jury must be presumed to have accepted the complainant's evidence of the offences committed by the appellant. For the reasons already given and the reasons that follow in relation to evidence of the elements of and criminal responsibility for the offences, and bearing in mind the primary responsibility borne by the jury of determining guilt and innocence and its benefit in seeing and hearing the trial unfold before them, I conclude that upon the evidence as a whole it was reasonably open to the jury to be satisfied of the appellant's guilt of both offences beyond reasonable doubt.

Failure to give a "motive" or "*Jones* direction" that the touching had to be sexually motivated

[37] The appellant relies upon a contention made by defence counsel at trial that, pursuant to this Court's decision in *R v Jones*,[1] a direction was required that the jury needed to be satisfied that the alleged touching of the complainant was motivated by

---

1 [2011] QCA 19.

sexual interest rather than another innocent interest. The trial judge ruled that such a direction was not required.

[38] A document provided to the jury (which I will call "the handout") accurately identified the elements of each count. In each case the handout stated that the Crown was obliged to prove beyond reasonable doubt that:

1. The defendant dealt with the complainant.
2. The dealing was indecent.
3. The dealing was unlawful.
4. The complainant was under 16 years.

[39] The first element, a "dealing" with the complainant, was satisfied if, as the jury must have accepted, the appellant touched her in the way the complainant described. I will discuss the third element under a different heading. The fourth element was admitted and also proved. The contention about the "*Jones* direction" concerns the second element.

[40] In each case the handout stated that "'indecent' bears its ordinary everyday meaning, that is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances." No issue is taken with that conventional direction.

[41] In summing up to the jury the trial judge referred to and substantially repeated the content of the handout. In relation to the element of indecency the trial judge added:

> "Can I also say, in relation to that element, that the Defence suggests that the offending may have happened innocently when there was game-playing going on in the pool. This is in relation to both charges, but you, the jury, need to be satisfied that the touching in relation to both counts was indecent, that is, that it was not accidental, but that it was a deliberate touching by the defendant."

[42] After discussing the other elements and the address by the prosecutor, the trial judge returned to the topic:

> "As to the Defence claims that the touching was innocent or accidental, what the Crown says about that is this: there were two offences of escalating seriousness and [the complainant's] evidence of the defendant's deliberate movements, such as the pulling of her leg, the finger movements and the pulling down of her swimmers – those factors indicate that the defendant's actions, according to the Crown, were deliberate and they were also indecent."

[43] The trial judge discussed part of the final address by defence counsel. After referring to defence counsel's submission that various circumstances made the allegations of deliberate touching less likely, the trial judge directed the jury:

> "It is the Prosecution that has to prove that the touching was indecent, as I have already explained to you, and it is the Defence

> case that there is evidence casting doubt on that. It is the Defence case that the Prosecution has to disprove that it was not incidental touching in the context of rough game-play in the pool."

[44] The trial judge described further submissions by defence counsel, including a submission that any conduct was not disproven to be "innocent or incidental or non-deliberate".

[45] In the result, the jury must have appreciated that the appellant must be acquitted if the prosecution did not prove beyond reasonable doubt that the appellant deliberately, and not accidentally, touched the area of the complainant's genitalia in the way described in the particulars of each count (which accorded with the complainant's evidence) and that was "indecent" according to the trial judge's direction about the meaning of that term. The jury's verdicts therefore establish that they found that for each count the Crown proved beyond reasonable doubt that the appellant intentionally and indecently dealt with the complainant.

[46] To return to the contention about the so-called "*Jones* direction", there was no error in the trial judge's directions about indecency. Motive is immaterial in the present context: *Criminal Code*, ss 23(2) and (3).

[47] It is not an element of the offences charged against the appellant that the alleged indecent touching was motivated by sexual interest. A direction that such a motivation was required was necessary in *R v Jones* only because the issue at trial in that case was whether the conduct of the defendant, a paramedic, of deliberately touching the complainant's breasts whilst attaching electrodes required for an ECG examination was indecent because it was motivated by sexual gratification, or whether it was instead not indecent because it occurred in the course of a legitimate medical examination.

[48] In this case, if, as the jury must have found, the appellant intentionally touched the area of the complainant's genitalia in the way she described, that would of itself give the touching a sexual connotation such as to render the touching capable of being held to be indecent, it then being for the jury to determine whether such conduct was in fact "indecent".[2] Nothing in the evidence in this case indicated the slightest possibility of equivocation about the sexual connotation arising from such an intentional touching of a young child's genitalia by an adult.[3] Defence counsel did not make what would have been a very surprising submission that, if the appellant intentionally touched the complainant in that way in the area of her genitalia, the jury might harbour a doubt whether that touching was indecent. Nevertheless, the trial judge prudently and appropriately directed the jury about the requirement that the touching be "indecent".

Accident and/or mistake of fact

[49] The appellant argues that the trial miscarried because the trial judge failed to leave accident or mistake of fact to the jury. In relation to mistake of fact, the appellant referred to *R v Hayward*.[4] In that case, a defendant charged with indecent assault upon a fellow police officer by grabbing her breast with a "pinch" motion gave

---

2 See *R v Harkin* (1989) 38 A Crim R 296 at 301 – 302 (Lee CJ at CL, with whom Wood and Mathews JJ agreed), quoted with approval by Gotterson JA (McMurdo JA and Bradley J agreeing) in *R v Hayward* [2019] QCA 91 at [41].

3 See *R v Hayward* [2019] QCA 91 at [45] – [47].

4 [2019] QCA 91.

evidence that when he grabbed the complainant's breast he was not looking at her and had intended to grab a different police officer in the ribs as a practical joke. The trial judge directed the jury that if they concluded that the defendant honestly and reasonably believed that he was grabbing the male police officer in the ribs he would not be criminally responsible to any greater extent than if that was the case. It is not necessary to discuss that case further. No similar circumstance, or any other circumstance possibly requiring a direction about mistake, was raised by the evidence in this case.

[50] In relation to accident, s 23(1)(b) of the *Criminal Code* provides that a person is not criminally responsible for "an event that … the person does not intend or foresee as a possible consequence; and … an ordinary person would not reasonably foresee as a possible consequence." The appellant referred to *R v Khaled*.[5] In that case, the defendant was convicted of two counts of indecent treatment of a girl under 12 by touching her "bum" in various ways and by touching her breast and squeezing it. The defendant denied committing either offence. He conceded it was possible he might have accidentally touched the complainant at the time one of the counts was alleged to have occurred. The effect of the trial judge's directions in that case was that the prosecution must prove beyond reasonable doubt that the appellant touched the complainant on the place and in the way she described intentionally for his own sexual gratification and not accidentally or inadvertently. McMurdo P, with whose reasons Gotterson and Morrison JJA agreed, considered that the directions properly placed before the jury the real issues of law and fact in the trial. Additional directions involving questions of foreseeability rather than intent would not have assisted the defence and would have confused the jury.

[51] The trial judge's directions in this case were to the same effect, apart from what I have concluded is the appropriate absence in this case of a reference to a motivation of sexual gratification. The directions very clearly required the prosecution to prove beyond reasonable doubt that the appellant intentionally touched the complainant on her genitalia in the way she described. If, as the jury must have found, the touching described by the complainant was intentional, it cannot have been accidental in the sense described in s 23(1)(b). In this case, as in *Khaled*, to give a direction about foreseeability could have served only to confuse the jury and would not have assisted the defence.

[52] In short, the evidence did not give rise to any issue about mistake of fact and no miscarriage of justice arose from the trial judge's omission to give directions upon that topic or from the trial judge's directions about intention and accident. The evidence did not give rise to any other issue concerning the third element of the offences, unlawfulness.

The trial miscarried because of the failure of the trial judge to refer in the written handout provided to the jury to the need to be satisfied that the touching must have been intentional, non-accidental, and deliberate, with sexual interest.

[53] For the reasons given in relation to the so-called "*Jones* direction", it was unnecessary for the trial judge to direct the jury that the appellant was motivated by a sexual interest to touch the complainant.

---

5 [2014] QCA 349.

[54] The context in which the trial judge directed the jury included the issues joined in the closing addresses upon the questions whether the touching was deliberate and indecent, rather than accidental and not indecent, which the trial judge summarised. In that context, and bearing in mind the trial judge's clear directions in this short trial that the jury must be satisfied that the touching was not accidental and was a deliberate and indecent touching by the defendant, no miscarriage of justice arose from the absence of any reference in the written handout itself to the need for the jury to be satisfied that the touching was intentional and not accidental.

Proposed order

[55] I would dismiss the appeal.

[56] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[57] **McMURDO JA:** I agree with Fraser JA.