SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAZ* [2021] QCA 16
PARTIES:	**R** **v** **FAZ** (appellant)
FILE NO/S:	CA No 116 of 2020 DC No 98 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Childrens Court at Beenleigh – 1 May 2020 (Chowdhury DCJ)
DELIVERED ON:	12 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2020
JUDGES:	Sofronoff P and McMurdo JA and Boddice J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where a judge found the appellant guilty of indecent treatment of a child under 12 under care – where the appellant appeals against the verdict of guilty on the ground that it was unreasonable – where the appellant submitted the trial judge ought to have had a reasonable doubt as to the appellant's guilt – whether the trial judge was bound to "accept the uncontested evidence of the witness" – whether there was an error in particular findings of fact or otherwise in the reasoning of the trial judge – whether the appeal should be allowed *Criminal Code* (Qld), s 668D, s 668E *Evidence Act* 1977 (Qld), s 17 *Youth Justice Act* 1992 (Qld), s 116 *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29, cited *Fleming v The Queen* (1998) 197 CLR 250; [1998] HCA 68, cited *R v Macfie (No 2)* (2004) 11 VR 215; [2004] VSCA 209, cited *R v MRW* (1999) 113 A Crim R 308; [1999] NSWCCA 452, cited *Richardson v The Queen* (1974) 131 CLR 116; [1974] HCA 19, cited *Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL: H Fong for the appellant
D Nardone for the respondent

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

[1] **SOFRONOFF P:** A judge found the appellant guilty of indecent treatment of a child under 12 and under care. He was aged between 12 and 14 at the date of the offence. He appeals against that verdict on the ground that it was unreasonable and could not be supported by the evidence. The appellant's basis for that ground is narrowly confined and so the facts of the case can be related succinctly.

[2] The complainant was a seven year old girl whose mother used to work at night. She had a twin sister and an older brother. The appellant's family and the complainant's family were friends. On a particular night when the complainant's mother was working, she engaged the appellant and a friend of his, Rob,[1] to babysit her children. According to the complainant's evidence, she and her sister went to bed. The complainant was "half asleep" and was lying facing the wall. She then felt the appellant in her bed. He "grabbed my hand and … was like put it down his pants". She said that, at first, she thought that she was touching the appellant's wallet and then "the second thing … that came to mind was his thingy". In further evidence she made it clear that the appellant had put her hand onto his erect penis. The appellant then left the room. The complainant's sister had gone to sleep immediately and had been unaware of anything that might have happened.

[3] The next morning the appellant told her sister what had happened. She did not tell her parents because she "was scared of … how they were going to react". Two or three years later, the complainant also confided in two school friends.

[4] The complainant's mother gave evidence that she recalled a night when she had engaged the appellant and Rob to babysit the children. When she came home from work she saw the appellant and Rob coming out of the girls' bedroom. She asked, "What are you doing in the kids' bedroom?" She said that the two boys giggled and ran past her. About three years after these events, the complainant told her what had happened. She and the complainant's father then met with a school counsellor and took advice. Some time later police contacted the family and the complainant and other members of the family were interviewed.

[5] The complainant's older brother gave evidence that he had had occasion to see the appellant and Rob in the girls' bedroom but it is apparent that that was not on the night the offence was said to have been committed. The relevance of the evidence was to contradict the evidence to be given by the appellant's friend Rob.

[6] Rob was called as a prosecution witness. He recalled babysitting the children but said that he had never been inside the girls' bedroom. He said there was never any reason for him or for the appellant to go there. He said that he could not recall any occasion on which the complainant's mother had challenged him about being in the bedroom. He said that he would have remembered the complainant's mother "having a go" at him if that had happened. He denied that he or the complainant had ever been in the girls' beds.

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1 A pseudonym.

[7] In a detailed judgment, the learned trial judge, Chowdhury DCJ, considered this evidence although, of course, in greater depth than it has been necessary to set out here. His Honour correctly identified the exculpatory evidence of Rob as a central issue for him to consider. His Honour said:

> "[107] The evidence of [Rob] poses the most problems for the prosecution case. He was slightly hesitant in his evidence, but I accept that he was endeavouring to tell the truth, as the prosecution submitted. He was a close friend of the defendant at the time of the alleged incident, and remains a close friend. On his evidence, neither he nor the defendant had any occasion to go into the girls' bedroom, nor were they around at the time the girls would go to bed. He denied ever being in one of the girls' beds with one of the girls, nor did he see the defendant in a bed with one of the girls. He agreed with the suggestion that he would be with the defendant at all times when they were at the house, because they were best friends. Common sense would dictate that they would not be together at all times, for example when one had to go to the toilet.
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> [108] He specifically denied the suggestion that they had been at the house babysitting late at night. He also specifically denied the suggestion that he and the defendant were caught by the complainant's mother coming out of the bedroom and being accosted by the mother, and then the boys giggling and laughing."

[8] His Honour observed that Rob's evidence was contradicted by the evidence of the complainant's mother. Chowdhury DCJ found that the mother "gave credible and convincing evidence" and preferred her evidence over that of Rob. His Honour observed that Rob's denial that he and the appellant had ever entered the girls' bedroom was also contradicted by the evidence of the complainant's brother, albeit that that evidence was not directed to the night in question but to different afternoon. Nevertheless, it bore upon Rob's absolute denial that he and the appellant had ever entered the bedroom. His Honour accepted the brother's evidence.

[9] After analysing the content of the complainant's evidence, in the course of which his Honour gave specific reasons for putting aside matters that might have impinged upon its reliability, Chowdhury DCJ found himself satisfied of the appellant's guilt.

[10] The appellant's point on this appeal is that his Honour ought to have regarded the evidence of Rob as conclusive against a verdict of guilty. Mr Fong of counsel, who appeared for the appellant, submitted that his Honour ought to have accepted Rob's evidence as "uncontested evidence"[2] and, upon that basis, taking into account the other factors that impinged upon the complainant's reliability, which his Honour had considered, his Honour ought to have had a reasonable doubt as to the appellant's guilt.[3]

[11] That submission cannot be accepted.

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2 Outline of Submissions at [33].

3 Appeal Transcript, page 1-6, line 29.

[12] Rob had given a statement to police that was consistent with his evidence at the trial. It follows that the prosecutor must have known that the evidence that Rob would give if called as a witness would conflict with the Crown case. Nevertheless, it is part of the function of a prosecutor,[4] and it is was the duty of the prosecutor in this case, to ensure that the jury has the whole of the facts before it.[5] Part of those facts lay in the evidence that Rob could give. A prosecutor need not call a witness whom the prosecutor regards as unreliable, but it is not enough that a prosecutor merely has a suspicion or even a belief about the unreliability of the evidence; there must be identifiable circumstances that clearly establish unreliability.[6] Although this exercise of the discretion whether to call a witness is unreviewable, a breach of duty may have consequences because a breach may result in an unfair trial. In this case, the prosecutor must have regarded himself as obliged to call Rob notwithstanding that Rob's account was going to be inconsistent with the Crown case.[7]

[13] A party who calls a witness is generally taken thereby to be asserting the credibility of the witness. Further, a party whose case conflicts with the evidence of a witness is generally obliged to put the contrary case to the witness for a response.[8] This particular obligation means that a failure to put the opposing case to a witness usually implies that the evidence of the witness is accepted. These are simply concomitants of the adversarial system of litigation.

[14] Also, generally a party who calls a witness is not entitled to call other evidence to show that the witness is unworthy of credit. This is the old rule that a party is not entitled to impeach a witness called by that party.[9] In Queensland, s 17 of the *Evidence Act* 1977 (Qld) provides that a party who has called a witness "shall not be allowed to impeach the credit of the witness by general evidence of bad character".

[15] There are other limits to how far a party can criticise the evidence of the party's own witness. Relevantly for the present case, a prosecutor is not at liberty to use a final address to attack the credit of an adverse witness called by the prosecution upon bases that were not put to the witness.[10] This is simply an instance of the duty of any counsel not to make submissions to a tribunal of fact that are injurious to the credit or character of a witness if they are matters which counsel was obliged to put to the witness for a response.[11] The rule is not just a matter of ensuring fairness to a witness, although that is also a factor. When there has been a failure to put a relevant matter to the witness for a possible response, a submission to a tribunal of fact about matters to which the witness might have had an answer denies the tribunal of fact the material which it needs in order to consider the validity of the

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4 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 *per* Dawson J.

5 *Richardson v The Queen* (1974) 131 CLR 116 at 120-121 *per* Barwick CJ, McTiernan and Mason JJ; *R v Apostilides* (1984) 154 CLR 563 at 575-576.

6 *R v Goncalves* (1997) 99 A Crim R 193 at 215 *per* Wheeler J, citing *Apostilides*, *supra*, with whom Malcolm CJ and Heenan J agreed.

7 *Whitehorn*, *supra.*

8 In some instances this is achieved implicitly: *Cross on Evidence*, 8th Australian Edition, [17445-17460].

9 See generally: *Wigmore on Evidence (Chadbourn Revision)*, Volume IIIA, at [896] *et seq.*

10 *R v MRW* (1999) 113 A Crim R 308 at [46]-[48] *per* Greg James J with whom Beazley JA and Newman J agreed at 319; *R v Kennedy* (2000) 118 A Crim R 34 at [37]-[38] *per* Studdert J with whom Heydon JA and Greg James J agreed at 52.

11 *Cf. Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1.

submission. The submission is therefore useless and ought not be made; and *a fortiori* if the submission seeks to impugn the integrity of the witness.[12]

[16] In a criminal case, a submission of that kind by the prosecution might also constitute an ambush upon the defence case if the defence was not given an opportunity to explore relevant facts underlying the submission and thereby lost the chance to answer the attack.

[17] The duty of a prosecutor to call an adverse witness has ramifications for these ordinary expectations. First, the prosecutor does not thereby make the usual assertion of creditworthiness of the witness because the usual reason for calling a witness does not exist. Second, the failure of the prosecutor to cross-examine the witness cannot give rise to an inference that prosecution accepts the evidence of the witness because the reason for the lack of cross-examination is known and does not lie in an acceptance of the truth of the evidence. The possibility that a prosecutor might cross-examine such a witness is remote. An application to have a witness declared hostile carries a heavy burden to establish that the witness is not desirous of telling the truth.[13] A witness of that kind would not have been called in the first place and the cases in which a prosecutor will be taken by surprise by such a person will be rare. It is therefore useless to say that such evidence was "unchallenged".

[18] Nevertheless, a prosecutor can address the adverse evidence even having regard to the existing constraints upon impeaching one's own witness. Indeed, a failure to address the evidence in way that assists the jury might result in an unbalanced trial and might mislead the jury about the significance of the evidence.

[19] Section 17 of the *Evidence Act* also provides that a party who calls a witness may contradict the evidence of the witness by other evidence. This reflects the common law. Further, as Bray CJ held in *Wells v South Australian Railways Commissioner*,[14] a party who calls two witnesses whose evidence differs is at liberty to ask the court to accept one and reject the other. This also follows from the terms of s 17. A Crown prosecutor is not excepted from this and, just like counsel for any party, is entitled to criticise the reliability of the evidence of a prosecution witness whose evidence conflicts with the Crown case[15] provided that the limits referred to above are not overstepped.

[20] An example of a case in which a prosecutor made a proper submission about why the evidence of a witness whom he had called should be rejected was *R v Macfie (No 2)*.[16] The prosecutor did not improperly suggest that the witnesses had concocted their evidence nor did the submission amount to a surprise attack on the defence case.[17] Rather, he invited the jury to reject the evidence by inviting the jury to infer, from other unchallenged evidence in the case, that there were sound reasons why their exculpatory evidence ought not to be accepted.

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12 *Kennedy*, *supra*; *MRW*, *supra*; and *R v Teasdale* (2004) 145 A Crim R 345 are example of cases of that kind.

13 See eg. *R v Kong* [2009] QCA 34.

14 (1973) 5 SASR 74 at 85; Bray CJ's statement was followed by a unanimous Full Court in *R v Welden* (1977) 16 SASR 421 at 427, 435 and 442.

15 *R v Vollmer* (1996) 1 VR 95 at 139 *per* Southwell and McDonald JJ, with whom Ormiston J agreed at 175.

16 (2004) 11 VR 215.

17 *Ibid*, at [48].

[21] In the present case, the prosecutor, Mr Kaplan, did the same thing. He made the following submission about Rob's evidence:

> "In terms of [Rob's] evidence, it's my submission that he was attempting to be as truthful as he could in all of the circumstances, but this was an unreasonable, or unmemorable, night, I should say, some time ago when he was a young teenager. He specifically did not adopt that he'd ever been in the bedroom, and he did not ever get reprimanded by [the complainant's mother]. So that is a difficulty in that aspect of the offending, but also is explainable in a way that he also accepted that he was best friends with the defendant."

[22] As in *Macfie*, the judge was invited not to accept the evidence of the adverse witness because of what could be inferred about its reliability from other evidence. Rob had been asked to recall events from a few years ago and, not having been party to any offence, it would be understandable that his recollection of events on an unremarkable night would be faulty. Otherwise, the judge was asked to bear in mind that Rob was not a wholly independent witness but was "best friends with the defendant". These were legitimate factors that were capable of bearing upon the reliability of Rob's evidence even if it was accepted that he was an honest witness.

[23] Rob's evidence was "uncontested", as the appellant submits, but the lack of challenge was due to the constraints which, on the one hand, bound the prosecutor to call the witness and, on the other hand, did not permit him to cross-examine an adverse witness. The usual implications of a failure to challenge an adverse witness did not exist. Moreover, Rob's evidence was contradicted by the evidence of the complainant, her brother and the complainant's mother. The appellant's submission that the learned trial judge was bound to "accept the uncontested evidence of the witness" cannot be accepted. If that submission were valid, it would follow that in cases in which a prosecutor is duty-bound to call an adverse witness who speaks to the innocence of the accused the result will always have to be an acquittal. That is not the law.

[24] It follows that for these reasons, as well as the reasons given by McMurdo JA, with whom I agree, it was open to Chowdhury DCJ to accept the evidence of the complainant, her brother and her mother and to reject the evidence of Rob and to find himself satisfied of the guilt of the appellant.

[25] I would dismiss the appeal.

[26] **McMURDO JA:** This is an appeal against a conviction in the Childrens Court, constituted by a judge without a jury. The ground of appeal is that the finding of guilt was unreasonable.

[27] By s 116 of the *Youth Justice Act* 1992 (Qld), chapter 67 of the Criminal Code (relating to appeals or applications for leave to appeal) applies, with any necessary or prescribed modification "in relation to a finding of guilt … for an offence as it applies in relation to conviction … made in a proceeding against an adult for an offence." This engages, amongst other provisions, s 668D and s 668E of the Code.

[28] This appeal is advanced upon the first of the grounds specified in s 668E(1). Where the ultimate finding of guilt is by a judge, that finding must be set aside on the same principle on which a jury's verdict of guilt must be set aside, namely that it was not

open to the tribunal of fact to be satisfied beyond reasonable doubt that the defendant was guilty.[18]

[29] Where the trial has been by a judge alone, the reasoning of the trial judge will be, or should be, apparent. It will be known whether the ultimate conclusion of guilt was based upon certain intermediate findings of fact, and whether the judge was persuaded to accept certain evidence. Nevertheless, for this ground of appeal, the Court's task is not to identify any error in particular findings of fact or otherwise in the reasoning of the trial judge; its task is to consider the whole of the evidence and decide whether it was open to the judge to be satisfied beyond reasonable doubt that the defendant was guilty. As I will discuss, in one type of case, an appellate court will act upon the intermediate findings of fact of the trial judge; but the overall question will always be whether, upon the whole of the evidence, the judge's conclusion was open.

[30] In *Fleming v The Queen*,[19] the High Court considered the operation of the New South Wales equivalent of s 668E(1) for a conviction by a judge sitting without a jury. Referring to the present ground of appeal, the Court said:[20]

> "The first limb [of the NSW equivalent to s 668E(1)] will address attention to the evidence upon which the trial judge acted, *or upon which it was open to the trial judge to act*, in reaching the finding as to ultimate guilt. Approached on that footing, is that finding 'unreasonable' or one which 'cannot be supported'?"
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> (Emphasis added.)

[31] In *Fleming*,[21] the Court left open the question of whether, in cases of a judge's finding of guilt which is challenged under the first or third limb of the common form of criminal appeal provision,[22] the Court should intervene only if it appeared that there was no evidence to support a finding of guilt or the evidence was all one way or where there was a misdirection leading to a miscarriage of justice. That question was answered by the High Court in *Filippou v The Queen*.[23] The Court confirmed that under the first limb, a finding of guilt was also to be disturbed where that finding was otherwise unreasonable, by the application of *M v The Queen*.[24] The Court otherwise affirmed what had been said in *Fleming* as to the first limb.[25]

[32] In his concurring judgment in *Filippou*, Gageler J identified one circumstance in which the appellate court may adopt the intermediate findings of fact of the trial judge. Gageler J said:[26]

> "[83] Irrespective of whether it is applied in an appeal against conviction following a jury trial or in an appeal against

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18 *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14]; [2011] HCA 13 per French CJ, Gummow and Kiefel JJ.

19 (1998) 197 CLR 250.

20 (1998) 197 CLR 250 at 262 [26] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

21 (1998) 197 CLR 250 at 262 [26] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

22 Such as s 668E(1) of the Code.

23 (2015) 256 CLR 47; [2015] HCA 29.

24 (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ; *Filippou* (2015) 256 CLR 47 at 53-54 [12] per French CJ, Bell, Keane and Nettle JJ; 75 [82] per Gageler J.

25 *Filippou* (2015) 256 CLR 47 at 53 [9] per French CJ, Bell, Keane and Nettle JJ.

26 (2015) 256 CLR 47 at 76 [83].

> conviction following a trial by judge alone, the question under the first limb is always whether the ultimate finding of guilt was one which was open to the tribunal of fact on the whole of the evidence. In some cases of an appeal against a conviction following a trial by judge alone, consideration of the first limb will require the Court of Criminal Appeal to review for itself the totality of the evidence so as to form its own assessment of whether or not it was open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty without any regard to the reasons for judgment of the trial judge given in compliance with s 133(2) [*Criminal Procedure Act* 1986 (NSW)]. In a case where the argument in the appeal against conviction is that there are particular reasons why it was not open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty, it may be open to the Court of Criminal Appeal to discharge its appellate function under the first limb by reviewing the evidence and forming its own independent assessment of that evidence to the extent necessary to engage with that argument while adopting, without need for independent assessment, other intermediate findings of fact of the trial judge about which no complaint is made in the appeal. But having adopted the intermediate findings of fact of the trial judge about which no complaint is made, and having arrived at its own conclusion on the evidence to the extent necessary to engage with the particular argument, the question for the Court of Criminal Appeal in such a case will remain whether or not the Court of Criminal Appeal has a reasonable doubt about the ultimate finding of guilt which cannot be resolved by taking into account the trial judge's advantage in seeing and hearing the evidence."

[33] Boddice J has well summarised the evidence and the reasoning of the trial judge. As appears from his judgment, the evidence of the witness described by Boddice J as [Z] was of central importance to the outcome of this case. If that evidence was accepted, the offending conduct, according to the complainant's version, could not have occurred. And if the trial judge could not have rejected [Z's] evidence that at no time had he and the appellant been in the girls' bedroom, the judge should have been left in doubt about the appellant's guilt and acquitted him on the charge.

[34] On the other hand, absent [Z's] evidence, it was open to the judge to find that the charge was proved. The complainant's evidence was not affected by such weaknesses, or inconsistencies with other evidence (apart from [Z's] evidence) that the judge should have been left in doubt.

[35] The judge's conclusion of itself shows that his Honour rejected the critical parts of [Z's] evidence. His reasons reveal that he did not consider [Z] to be a dishonest witness, but instead considered that [Z] was innocently mistaken in not recalling the relevant events of being with the appellant in the girls' bedroom and then encountering the girls' mother when she arrived home that evening. I have reached a different view from that of Boddice J, as to whether it was open to the judge to reject the critical elements of [Z's] evidence whilst finding [Z] to be an honest witness.

[36] But in any case, this ground of appeal requires the Court to consider whether it was open to find the appellant guilty, not according to the judge's impressions of the truthfulness of witnesses, but upon the evidence which it was *open* to the judge to believe. This Court is not to assess the reasonableness of the verdict upon the premise that [Z] was in all respects an honest witness. And this is not a case of the kind discussed by Gageler J in the passage in *Filippou* which I have quoted. The intermediate facts found by the judge, despite his impression of [Z], were adverse to the appellant's case.

[37] Having considered the whole of the evidence, I have concluded that it was open to the trial judge to reject those parts of the evidence of [Z] which were inconsistent with the testimony of the complainant and her mother, so that it was open to the judge to be satisfied of the appellant's guilt. The appeal should be dismissed.

[38] **BODDICE J:** On 1 May 2020, the appellant was found guilty of one offence of indecent treatment of a child under sixteen, under twelve, under care. The trial of the appellant, a juvenile at the time of the offence, was conducted in the Children's Court before a Judge alone.

[39] On 1 May 2020, the appellant was sentenced to be of good behaviour for 12 months. No conviction was recorded.

[40] The appellant appeals his conviction. The sole ground of appeal is that the verdict is unreasonable and cannot be supported on the evidence.

Offence

[41] The complainant was a female child. She was approximately seven years old at the time of the offence.

[42] The appellant was aged 13 or 14 at the time of the offence.

[43] The offence was charged as having taken place on a date unknown between 13 May 2014 and 14 May 2016, and was particularised as placing the complainant's hand onto the appellant's penis.

Evidence

[44] The complainant first spoke to police on 23 March 2019. She told police that about three or four years prior, when her mum was away, the appellant and his friend, [Z], would babysit her and her two siblings, a twin sister and an older brother.

[45] On one of these occasions, in winter, when the complainant was in her bed, the appellant grabbed her hand and put it down his pants. She described herself as half asleep and said it was really dark. She first thought it was his wallet he was making her touch, but then realised it was his "thingy".[27] The complainant said she flinched her arm to try and get away. At that time, the appellant stopped and left the room.

[46] The complainant said she told her sister the next morning, but did not tell her parents because she was scared about how they would react. The complainant

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27 AB195/40.

shared the bedroom with her sister. She thought she was about seven years old at the time.

[47] The complainant described the appellant and his friend as aged about 13 years at that time. Her family were friends with the appellant's mother. The appellant would walk home with them from school. The complainant said the two of them were babysitting the complainant and her siblings on the night in question.

[48] The complainant said her sister fell asleep straight away. She thought the appellant was lying in her bed and his friend was in her sister's bed. They were helping them go to sleep. The complainant thought the appellant took his pants off before he hopped into her bed, because she heard him grab something off the floor when he hopped out of bed and heard a sound like putting his pants back on before he walked out of the room.[28]

[49] The complainant said she was facing the wall in her bed when the appellant grabbed one of her hands, that was behind her, with his hand. The appellant did not say anything. She first thought he had made her hand touch his wallet. The complainant said her hand was touching the appellant's skin. She first thought it was a wallet because it was hard and she thought it was leather. The complainant then realised it was too soft to be leather. It was also a bit squishy like a wallet and a bit hard, but not too hard. Her hand touched the appellant's "private bit" for about 10 seconds. She did not know another word for that part but said boys use it for "peeing".[29]

[50] The complainant said she tried to move her hand away slowly so that the appellant would not notice because she was scared of what he would do. Once the appellant realised she was moving, he stopped and hopped out of the bed.

[51] The very next thing the complainant recalled was her mum came home. The complainant remembered her saying for them to get out and saying thank you for babysitting the children. The appellant and his friend laughed as they left the room. The complainant thought the friend knew about it because he was laughing as well.

[52] The complainant said she knew the appellant was in her bed because, when she last looked, the appellant went to her bed and his friend went to her sister's bed. She heard the friend get off the bed after the appellant left the bedroom.

[53] The complainant said she spoke to her sister the next morning. She told her sister that, when she was asleep in her bed, the appellant grabbed her hand and put it down his pants. She thought the appellant thought she was asleep. When she moved, the appellant got off her bed, grabbed something from the floor and left the room. The complainant said she then went back to sleep.

[54] The complainant told police that she told her mother about the incident a few weeks before the interview. She then spoke to the school counsellor and her father. The school counsellor said she would like to make a report to the police. The complainant also told some of her friends. She told them exactly what she had told her sister. She thought she spoke to her friends a few days after speaking to her sister.

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28 AB204/15.

29 AB206/50.

[55] The complainant had not said anything to the appellant. The appellant had not ever said anything to her about that incident, nor had his friend. She thought she should tell her mother because she had been keeping it in for a while. She told her sister she was going to tell her mother.

[56] The complainant said the appellant still walked home with them after that incident because her mother did not know what had happened to her. The appellant was a friend of her mother. The complainant had known him for as long as she could remember. She was excited to see him because he would play games with them. Now she was scared to go near him.

[57] The complainant also gave evidence at the hearing. In evidence in chief, she said she thought the appellant took his pants off before he hopped into bed "judging by the sounds after he got off". The complainant heard a zipper or a sound of something being lifted off the carpet. The complainant did not see the appellant's private part. When asked whether she could she feel skin, the complainant replied "no … I felt like a fabric".[30]

[58] In cross examination, the complainant said the incident happened on a school day. The appellant walked home with the complainant and her siblings. It was possible the appellant's friend also came home with them. They played games outside and watched TV before eating and going to bed. The complainant had a shower before going to bed, as did her siblings.

[59] The complainant accepted that, at the time she felt the appellant grab her hand, she was half asleep. The appellant held her hand for only a short period of time and stopped when she moved her hand away. At no time did she turn around or say anything to the appellant. At no time did the appellant say anything to her before leaving the room.

[60] The complainant accepted she was not awake when her mother came home and that she went to sleep pretty well straight after that incident. Whilst she told police that when her mother came home she saw the boys coming out of her room, that was not something that she had seen happen as she was asleep. She had been told that by her mother about four years after the incident.

[61] The complainant accepted that the appellant and his friend were in their bedroom, trying to convince the complainant and her sister to get into bed and go to sleep. She did not accept she could not tell that it was the appellant who grabbed her hand. The complainant accepted that she did not look behind her at any time during the incident but said she saw the appellant get into her bed. His friend was in her sister's bed. She had not seen or felt the appellant get out of her bed before someone took her hand and placed it on their private part.

[62] The complainant's twin sister, [K], also was interviewed by police on 23 March 2019. She told police her mother had gone out for the night and they were being babysat by the appellant and his friend. She went to bed and fell asleep. The next morning, the complainant told her something had happened to her in the bedroom. The complainant did not want to tell her mother or father. [K] told the complainant

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30 AB221/12.

she would not tell them. In the last month or so the complainant had told their mother.

[63] [K] estimated that the incident had happened two or three years ago. She described the appellant as the son of her mother's good friend. She had known the appellant for a long time. She thought the appellant had walked home from school with them. His friend came to their home later that day.

[64] [K[shared a room with the complainant. They had separate beds. Their brother had a separate bedroom. The appellant told them it was bedtime. [K] went fast asleep because she was really tired that day. She did not remember anyone else being in the room. She did not recall hearing any conversation when they were going to sleep. They just said goodnight. She thought the appellant and his friend were in the lounge room on the other side of the house.

[65] [K] said the next day, when they came home from school, the complainant told her something had happened the night before. The complainant said the appellant grabbed her hand and put it in his pants.

[66] [K] said she had seen the appellant and his friend since that incident. Everything seemed normal, like nothing had happened, but the complainant was a bit nervous around the appellant. She did not like to get close to him.

[67] In cross examination, [K] accepted that they were at home with the appellant for quite a few hours before the complainant and [K] went to bed. They were playing games with the appellant and his friend. The appellant told them it was time to go to bed. It was only the next day that she became aware that the complainant was saying something had happened in the bedroom. She agreed she first told police about what she had been told about four years after those events.

[68] [K] accepted she told police that her dog would generally sleep in her bed. She did not recall the appellant and his friend coming into the bedroom. She thought they were at the doorway when they told them to go to bed. She agreed she went to sleep pretty quickly.

[69] The complainant's brother, [R], first spoke to police on 20 May 2019. He did not know much about the incident, only what he had been told by his mother and two sisters. The appellant would babysit them after school. He would always bring over a friend. They would usually be talking with each other and messing around. [R] was most of the time in his bedroom, playing video games. He described his sisters as friendly around the appellant and his friend, just treating them as another friend.

[70] [R] recalled one afternoon the appellant and his friend went into the sisters' bedroom. They were lying on the bed. His sisters were standing up watching them, "laughing heaps". He came out to see what was funny. When he came out of the room, everyone was having fun. He thought it was between four or five o'clock in the afternoon. He did not recall any other time he saw the appellant or his friend in anyone's bedroom, other than once when they came into his bedroom to see his game.

[71] [H], a school friend of the complainant, first spoke to police on 12 August 2019. She said, one lunchtime, at school in 2019, the complainant told her that, when she was younger, maybe in grade three or four, her mother went out and left her with her sister and brother and a babysitter. After she went to bed, the babysitter grabbed the complainant's hand and put it down his pants. The complainant described the babysitter as having curly hair.

[72] [H] said the discussion occurred more towards the start of the year, in term one. The complainant's twin sister, [K], and another friend, [G], were present for the conversation. The complainant was quiet and not laughing at any of the jokes. She was looking down quite a lot and did not make eye contact with them. [H] asked her what was wrong. They comforted the complainant after she told them what had happened, before finishing eating and walking away to their lockers.

[73] [G], another school friend of the complainant, spoke to police on 18 August 2019. She said, whilst walking with the complainant at school one day, the complainant calmly said the male babysitter touched her at her house, when she was little, about three or four. The babysitter touched her in the private. The complainant said she told her sister. The complainant did not give a name for the babysitter and did not describe anything about him.

[74] [Z], the friend of the appellant, spoke to police on 3 April 2019. He remembered babysitting with the appellant two or three times. He estimated he was aged 13 at the time. His role was to help look after the complainant and her siblings until their parents came home. They would sit in the lounge room whilst the girls were running around. He did not ever recall a time when they were in the girls' bedroom. They did not have any reason to go into that bedroom.

[75] [Z] described the girls as easy to look after, they would do their own thing. He was aware there was an allegation that the appellant had felt up one of the twins. He was told it by his parents. He did not know which twin but said he did not see anything like that when they were babysitting. He had not spoken to the appellant about the allegation.

[76] [Z] described the relationship between the appellant and the girls as good. They loved the appellant and enjoyed having him around. There was never an occasion when he or the appellant laid down with the girls, whilst going to bed. The routine was to look after them, to be with them at the house. They did not cook dinner. That was done for them. They would just be there until the parents came home.

[77] In cross examination, [Z] estimated that the last time they babysat was about five years before the trial. They were paid to babysit by the children's mother. He accepted he had a close relationship with the appellant. They were very good friends.

[78] [Z] could not remember what time the mother came home. He thought it might be getting dark at that time. They were usually not around by the time the girls went to bed. Both of them had gone home by that time. He did not recall ever being at the house when the girls went to bed.

[79] [Z] said there was never an occasion when he was in one of the girls' beds or the appellant was in bed with one of the girls. He would be with the appellant at all times. There was never an occasion when they came out of the girls' bedroom and

were accosted by the girls' mother as they giggled or laughed and walked past her. That could not ever have happened. They would leave when the mother returned back home. They babysat for a few hours during school term. It was after school. He thought he was still in primary school.

[80] [Z] did not see there was ever a problem at all between the appellant and the twins. They attended his house on Australia Day. There were photographs of them. [Z] said the appellant never had curly hair.

[81] The complainant's mother gave evidence that she was working four days a week, between 8 am and 6 pm, in 2014. On occasions, she would also work an extra day. She would arrive home at about 6.45 or seven o'clock, sometimes a little later. On a few occasions, she organised for a babysitter to look after the children at her house until she returned home from work. The appellant was one of those people. She was best friends with the appellant's mother.

[82] The appellant would walk home with the children. The walk would take five or ten minutes. She thought he babysat the children two or three times. She could not recall whether she gave the appellant money for babysitting the children. When the appellant looked after the children, he had his best friend come them. She was aware the friend was going to be at the house, with the children. She was more than happy for that to occur as it was an extra, older person at the house.

[83] There were no specific rules for babysitting. They could watch TV and help themselves to the fridge. She did not give any specific time that the girls had to be in bed. She did not expect the appellant or his friend to put the girls to bed.

[84] The complainant's mother said there was one occasion when she asked the appellant to babysit the children at night. When she returned home on that occasion, the house was dark. She expected the children to be in the lounge room, watching a movie. She walked through the house. As she got to the end of the hallway, the two boys came out of the girls' room. The door to the bedroom was open, but the light was off.

[85] The complainant's mother said to the boys, "What are you doing in the kids' bedroom?" or "What are you doing in the girls' room?". They just giggled and ran past her. She did not think anything more of it at the time.[31]

[86] The complainant's mother said on the morning of 4 March 2019, before school, the complainant wanted to have a private conversation. The complainant said that, on the night a few years ago when the appellant and [Z] babysat them, the appellant was in her bed and [Z] was in [K]'s bed. The appellant took her hand and put it down his pants.

[87] The complainant said yes, when the complainant's mother asked "Were you touching his penis?". The complainant said at first she thought she was touching his wallet because it was hard but squishy. She then realised what she was touching and froze. The complainant felt really guilty that she froze.

[88] The complainant's mother said she was flabbergasted. She rang her partner. Later, she rang the appellant's mother. She also rang the complainant's father before

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31 AB91/30.

booking an appointment with the school counsellor later that day. She was contacted by police within a couple of weeks of speaking to the school counsellor.

[89] In cross examination, the complainant's mother agreed there was only one occasion when she came home later than normal. She thought the time was between nine and 12 midnight. She could not remember the day of the week. She thought it was autumn 2015. She had made arrangements for the appellant and his friend to babysit the children. She had cooked meals for them. She did not have any expectation that the boys would have to put the girls to bed.

[90] The complainant's mother agreed that, when she asked the boys what they had been doing in the girls' bedroom, she did not, "in her wildest dreams", think that that would have happened in the bedroom. She simply asked them the question. They giggled and ran past her. She thought nothing more of it. She checked on the girls. They both appeared to be asleep. Nothing was out of the ordinary in the bedroom. She was not worried and said "see you" to the boys. She could not remember if she paid them at that time.

[91] The complainant's mother agreed she was good friends with the mothers of the appellant and [Z]. On Australia Day, they would usually attend a barbecue at [Z]'s parents' house. They did so for two or three years after these events. Both her daughters and her son would play with the appellant and [Z]. She did not see anything that appeared to be "out of whack" with their relationship.[32] She "didn't think for a second that there was anything to worry about".[33]

[92] The complainant's mother said, when the complainant spoke to her on 4 March 2019, she first used the word penis. The complainant could not say the word but knew what a penis was at that time. The complainant did not make any mention of the mother catching the boys at home in the bedroom. She did not believe she had mentioned that to either of her daughters at that time or when the complainant told her what she said had occurred that night. The mother did not know whether the complainant had heard her speak when the boys came out of the room that night. Both girls appeared to be asleep when she looked into the room. They did not respond to her.

[93] The complainant's mother agreed that, at the meeting with the school counsellor, the complainant did not say anything to the counsellor. The counsellor gave the complainant a couple of options as to how to communicate, one of which was that the mother tell the counsellor what her daughter had told her and that the complainant could say something if the mother got anything wrong or if she wished to elaborate further. The complainant did not add any more details at that time. She did confirm to the counsellor that what her mother had said had happened that night.

[94] The school counsellor, [MH], gave evidence that she met with the complainant and her mother and father on 4 March 2019. The complainant confirmed she had told her mother that morning that approximately three and a half years earlier, when she was being babysat by two boys, one of the boys had attempted to help her get to sleep by getting into bed with her. While they were in bed, he took her hand, put it down his trousers and onto his penis. The complainant said she froze and did not know what to do. She told her sister about it the next morning.

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32 AB99/26.

33 AB99/30.

[95] Ms MH agreed it was the complainant's mother who outlined what was said to have happened to the complainant. The complainant was very uncomfortable. The complainant agreed her mother could repeat what she had told her mother. The complainant would nod and make any changes as they went along. The complainant nodded after each sentence said by her mother and definitely answered herself when Ms MH asked her what happened next.

[96] As best she could recall, the words used by the mother were that the complainant's hand had been put down this person's trousers and forced to hold his genitals. That was the word she used in the notes she made shortly after they left her office. It is possible the complainant's mother used the word penis, rather than genitals. Her report was a formal report of what had been said to her in the meeting. She also put in that report that the complainant had stated she had had more contact with the appellant, because they were family friends but that she had not ever been alone with him again.

[97] At the conclusion of the Crown case, formal admissions were made that the complainant was, at the relevant time, under the age of 12 years and under the appellant's care and that the appellant had capacity to know he ought not to have committed the alleged act.

[98] The appellant declined to give or call evidence at the conclusion of the Crown case.

Primary decision

[99] The primary Judge recorded that the prosecution had particularised the unlawful and indecent dealing as being occasioned by the appellant moving the complainant's hand into his pants and placing it on his penis. The primary Judge then set out, in detail, the evidence of the respective witnesses.

[100] After setting out the elements of the offence and the relevant principles, the primary Judge recorded specific directions in relation to the use of preliminary complaint witnesses, the importance of delay in the complaint being brought to the attention of police and features relevant to the reliability of the complainant. The primary Judge found that the combination of those features, together with the delay, meant it would be dangerous to convict on the complainant's evidence alone unless, after scrutinising with great care, the primary Judge was satisfied beyond reasonable doubt of its truth and accuracy.

[101] After outlining the closing submissions of both the Crown and the defence, the primary Judge found that the complainant was an intelligent, articulate girl with a good memory of the events. Her description of how she was lying in bed when she was grabbed by the appellant had "a clear ring of truth to it" although there was an inconsistency in an aspect of her account, namely, whether the defendant was wearing shorts at the time he was in the bed or had taken them off before getting into bed.

[102] The primary Judge also found that the evidence from the complainant's sister was generally consistent with what the complainant said happened, as was the evidence of the complainant's friend, [H], although the evidence of the complainant's friend, [G], was at odds with those other preliminary complaint witnesses.

[103] The conversation the complainant had with her mother was also generally consistent with the complainant's account. Little weight was, however, to be placed on the meeting with the guidance counsellor as it essentially involved the complainant's mother relaying to the counsellor the complainant's complaint to her that morning.

[104] The primary Judge observed that the evidence of [Z] posed the most problems for the prosecution case. The primary Judge accepted that [Z] was endeavouring to tell the truth but noted that he was, and remains, a close friend of the appellant. Importantly, on his evidence, neither he nor the appellant had on any occasion been in the girls' bedroom. He also specifically denied that he had ever been at the house babysitting late at night or that he and the appellant had ever been caught by the complainant's mother coming out of the bedroom, giggling and laughing.

[105] The primary Judge found that [Z]'s evidence was contradicted on two critical issues by the evidence of the complainant's mother. First, as to whether the boys ever babysat the children late at night. Second, as to whether the boys had been observed coming out of the girls' bedroom when the mother came home. The primary Judge found the complainant's mother's evidence credible and convincing, with a ring of truth about it. He preferred that evidence over [Z]'s evidence, noting that there was no reason for [Z] to have remembered the event.

[106] The primary Judge also found that [Z]'s evidence about never having been in the girl's bedroom was contradicted by evidence given by the complainant's brother, of having observed the boys messing around in his sister's bedroom. The primary Judge accepted that that occasion was described by the complainant's brother as involving the boys lying on the beds and messing about, whilst the girls were laughing.

[107] Having considered the evidence as a whole, the primary Judge found that, whilst the complainant's sister did not give evidence of [Z] being in her bed on any occasion, the sister accepted she fell asleep pretty quickly and, in those circumstances, it was possible that [Z] hopped into her bed after she was asleep and she may not have been aware of it. Importantly, her evidence supported the complainant's evidence that the complainant and [Z] were at the house at the girl's bedtime.

[108] The primary Judge further found that, whilst the complainant's evidence was that she was half asleep at the time of the alleged events and there was a conflict in her initial account to police and her evidence in Court as to what she thought she first touched when her hand was put into the appellant's shorts, her description of what she touched was consistent with an erect or semi-erect penis and had a clear ring of truth about it. The sound of a zipper that she said she heard after the event may well have been the zip of a bag being done up.

[109] The primary Judge did not consider that the complainant's suggestion to police that she heard a conversation between her mother and the appellant and [Z] detracted from her overall truthfulness, as the complainant clarified later in the interview that that was something she was told by her mother years afterwards. He also did not consider the complainant's truthfulness or reliability was affected by the fact that she had continued to participate in activities with the appellant in the following years. Those activities took place as part of a much larger group, in circumstances where the complainant's mother was good friends with the appellant's mother. The complainant's delay in telling her mother about the incident was also explicable having regard to her young age.

[110] The primary Judge found that, even having full regard to the matters said to affect the reliability of the complainant's account, there was no real possibility the complainant had mistaken the identity of the appellant and it was, in any event, never suggested that [Z] may have been the person in the complainant's bed.

[111] The primary Judge found the prosecution had proved its case beyond reasonable doubt.

Appellant's submissions

[112] The appellant submits that, whilst the primary Judge published detailed and extensive written reasons, the reasoning with regard to [Z]'s evidence was wrong. That evidence was unchallenged and found to have been given honestly. There was no basis, therefore, to reject its accuracy.

[113] The appellant further submits that the primary Judge effectively reversed the onus of proof by failing to accept that uncontested evidence. That circumstance, together with the significant discrepancies in the complainant's account as to what she felt, namely, fabric; the lack of support for the complainant's account from her sister as to [Z] being in the sister's bed; and the unreliability in the mother's evidence that two young male students would be babysitting at her home after 9 pm and before 12 pm on a school night, meant it was not open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt.

Respondent's submissions

[114] The respondent submits that the verdict was not unreasonable. The complainant's evidence was clear. Her account was not implausible. Cross examination did not reveal any material inconsistency. The complainant's evidence that she was half asleep did not affect the reliability of her account. Any inconsistencies did not go to the root of the offending or materially impact upon her overall credibility. The primary Judge was entitled to accept the complainant as both honest and reliable.

[115] The respondent submits that the primary Judge did not reverse the onus of proof. Whilst the prosecutor could not challenge [Z]'s credit, there was evidence given by other witnesses which called into doubt the reliability of [Z]'s account. [Z] could not be correct in his evidence that there was never an occasion when he and the appellant were in the complainant's bedroom. That provided a foundation for the primary Judge to reject [Z]'s evidence as unreliable. Once that rejection took place, there was no reason why the primary Judge could not accept the complainant's account as credible and reliable and sufficient to found proof beyond reasonable doubt.

Consideration

[116] The sole ground of appeal is that the verdict of guilty was unreasonable and cannot be supported by the evidence.

[117] In determining that ground, this Court must undertake its own independent assessment of both the sufficiency and quality of the evidence and determine whether, notwithstanding that there is evidence upon which a tribunal of fact might convict, it would be dangerous in the circumstances to permit the verdict of guilty to stand.[34]

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34 *SKA v The Queen* (2011) 243 CLR 400 at [14].

[118] In undertaking that assessment, this Court must give due regard for the benefit the primary Judge had to see and hear the witnesses. If, however, the evidence contained discrepancies, inadequacies, was tainted or otherwise lacked probative force in such a way as to lead this Court to conclude that, even allowing for the advantages enjoyed by the primary Judge, there is a significant possibility that an innocent person has been convicted, the verdict of guilty is to be set aside as unreasonable.[35]

[119] Central to the appellant's contention that the verdict was unreasonable and cannot be supported by the evidence is the evidence of [Z]. The primary Judge accepted [Z] "was endeavouring to tell the truth" in his evidence.

[120] The primary Judge correctly observed there was other evidence which called into doubt the reliability of [Z]'s evidence in two material respects. First, that there had never been an occasion when he and the appellant had babysat the girls late at night, such that they had gone to bed. Second, that on no occasion had he or the appellant been in the girls' bedroom.

[121] The evidence of the complainant's mother directly called into question the reliability of that first aspect of [Z]'s evidence. She gave clear evidence of an occasion when the appellant and [Z] undertook babysitting of her children at least until 9 pm that night, which was past the girls' bedtime.

[122] The evidence of the complainant's mother and the complainant's brother called into question the accuracy of that second aspect of [Z]'s evidence. The complainant's mother recounted an occasion when she had observed the boys leaving the girls' bedroom, giggling and laughing, albeit in circumstances where, at the time, she did not see it as giving rise for any concern. The complainant's brother gave evidence that he had observed the appellant and [Z] in the girls' bedroom, albeit in circumstances where, whilst they were lying on the bed, it was not bedtime and the girls were standing up and laughing with the boys.

[123] The evidence of the complainant's mother and of the complainant's brother provided a sound basis for the primary Judge to conclude that, notwithstanding that [Z] was giving evidence honestly, his evidence was unreliable in material respects.

[124] However, that conclusion does not mean it was open, on a consideration of the evidence as a whole, to reject [Z]'s clear, evidence to the effect that, on no occasion, had he or the appellant been in the girls' beds, with the girls *(my emphasis)*. That evidence was crucial, and is not explained by there being no reason for [Z] to remember that occasion.

[125] On the complainant's account, [Z] knew what had happened to her in her bed as the boys were laughing and giggling as they left the room. There would be good reason for [Z] to remember that event. He knew the appellant had touched the complainant sexually.

[126] Further, the complainant's mother's account of that event is inconsistent with a sexual touching of the complainant by the appellant. On her account, the boys had been caught "red handed" in the bedroom yet, both, knowing what had occurred, ignored her question and their conduct was of so little concern to her that she did not pursue an answer.

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35 *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.

[127] Those features of the evidence raises a discrepancy of such a nature as to give rise to a reasonable doubt as to the appellant's guilt of the offence.

Conclusions

[128] A review of the record as a whole gives rise to a significant possibility that an innocent person had been convicted of the offence.

[129] The verdict of the jury was unreasonable.

Orders

[130] I would order:

(1) The appeal be allowed.

(2) The verdict of guilty be set aside.

(3) A verdict of not guilty be entered on the count.