SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAS* [2021] QCA 65
PARTIES:	**R** **v** **LAS** (appellant)
FILE NO/S:	CA No 47 of 2020 DC No 110 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal Against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 4 March 2020 (Coker DCJ)
DELIVERED ON:	9 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2019
JUDGES:	Morrison and Philippides JJA and Wilson J
ORDERS:	**1. Allow the appeal.** **2. Set aside the convictions and order a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where evidence consisted of pre-recorded evidence and a police transcript of two child complainants admitted under s 21AK and s 93A of the *Evidence Act* 1977 (Qld) – whether that evidence contained inconsistencies to the extent that there was a significant possibility that the appellant was wrongly convicted – whether evidence contained in the pre-recorded evidence and police transcript was prejudicial to the appellant because of alleged inconsistencies – whether the police interview contained leading questions – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – where the appellant was charged on six counts, two being against one complainant and four being against another complainant – whether the learned trial judge erred in failing to direct the jury about the use of evidence of other offences or misconduct against each complainant – whether evidence of sexual contact with multiple complainants was cross-admissible – where defence counsel

did not seek redirections – where no application was made during trial to exclude the evidence of one complainant on the basis that it was not cross-admissible against the other complainant – whether the learned trial judge erred in directing the jury about uncharged sexual interest evidence – where a direction against propensity reasoning was given in respect of uncharged acts but not in respect of charged acts – whether the learned trial judge erred in giving no directions on the use which could or could not be made of one complainant's evidence in the case involving the other complainant – whether a retrial should be ordered

Evidence Act 1977 (Qld), s 21AK, s 93A

Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12, applied
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, applied
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, applied
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v CBM [2015] 1 Qd R 165; [2014] QCA 212, applied
R v HAB [2006] QCA 80, applied
R v Sun [2018] QCA 24, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: C K Copley for the appellant
G J Cummings for the respondent

SOLICITORS: Martin Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** Between January 2017 and February 2018 the appellant lived as the de facto husband of a woman who had two young sons. I shall refer to the sons as "Tim" and "Joe".

[2] Complaints were made by Tim and Joe about the conduct of the appellant. Tim was aged four to five and Joe aged five to six at the time.

[3] As a consequence of the complaints the appellant was charged with six counts of sexual offences against the two boys. They were as follows:

(a) Count 1 – indecent treatment of a child under 12 years old and under care; this was particularised as having urinated in Tim's mouth;

(b) Count 2 – rape; particularised as having penetrated Tim's mouth with his penis;

(c) Count 3 – indecent treatment of a child under 12 years old and under care; particularised as having urinated in Joe's mouth;

(d) Count 4 – rape; particularised as having penetrated Joe's mouth with his penis;

(e) Count 5 – rape; particularised as having penetrated Joe's mouth with his testicles;

(f) Count 6 – rape; particularised as having digitally penetrated Joe's anus.

[4] Ultimately count 5 was the subject of a *nolle prosequi*. At the end of a trial the appellant was acquitted of count 1, concerning Tim. He was convicted of counts 2, 3, 4 and 6, all concerning Joe.

[5] The appellant challenges his conviction on four grounds:

(a) the verdicts were unreasonable and not supported by the evidence;

(b) the trial judge failed to direct the jury about the use that could be made of evidence of offences and other misconduct against each complainant in proof of the counts concerning the other complainant;

(c) the trial judge failed to direct the jury on the use to which they could put the evidence of discontinued count 5;

(d) an aggregation of errors made during the trial resulted in a miscarriage of justice.

Unreasonable verdicts

[6] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[1] requires that this Court perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[7] The role of the appellate court was recently restated in *Pell v The Queen*:[2]

> "The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."

[8] The High Court restated the pre-eminence of the jury in *R v Baden-Clay*.[3] As summarised by this Court recently in *R v Sun*,[4] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[5] in which the court must have "particular regard to the

---

1 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

2 (2020) 94 ALJR 394 at [39]; [2020] HCA 12; internal footnote omitted.

3 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.

4 [2018] QCA 24 at [31].

5 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.

advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[6]

The evidence

Interview with Tim

[9] Tim was six years old when he was interviewed by police. His evidence consisted of the police transcript admitted under s 93A of the *Evidence Act* 1977 (Qld), and his pre-recorded evidence admitted under s 21AK of that Act.

[10] In the course of his police interview Tim said:

(a) he, Joe and the appellant were in the shower when the appellant "accidentally peed in my mouth";[7] he got out of the shower and wiped his mouth; he was trying to get a drink of water from the shower when the appellant accidentally peed in his mouth;

(b) when asked to tell the police more about that, Tim said that when it happened he got out of the shower and nothing else happened;[8] at the time the other children in the family were playing in the backyard, which he knew because he joined them to play once he had got out of the shower;[9]

(c) shortly thereafter Tim expanded on his account saying that they arrived home with the appellant and when they got out of the car the appellant proposed that the three of them have a shower; they did so and "that's when [the appellant] peed in my mouth" … "[the appellant] needed to pee and he peed where I was gonna' get a drink and peed so high and it accidentally peed in my mouth";[10]

(d) when they were in the shower he knew that the appellant needed to pee because "first he done a little pee and … it went onto my hand then I knew he was going to do a big one";[11]

(e) he said "it tastes gross",[12] and was a dark colour; he added that it tasted "like the little bit, like off lemon";[13]

(f) questioning then turned to whether the appellant had made Joe do something to the appellant; as to that, having initially said he did not know what it was, and having been prompted that it was the time that the appellant made Joe suck his penis,[14] Tim responded, "Oh he made me suck Joe's dick more" and "And he said, and oh, and I didn't wanna' do that … I don't wanna do and then … [the appellant] just like this, push, push and [INDISTINCT] and then

---

6 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.
7 Appeal Book (**AB**) 124.
8 AB 131.
9 AB 132.
10 AB 134.
11 AB 137.
12 AB 137.
13 AB 138.
14 The subject of count 4.

yeah. I, I just pulled back and he just pushed me. I couldn't get any breathe";[15]

(g) he continued the narrative saying that the appellant "always makes Joe … suck my thing. I call it willy";[16]

(h) he referred to the appellant making Tim clean up his room, even though the mess had been made by Joe, and how the appellant "gives you three minutes to clean up the bedroom", and agreed to the police officers prompting that if it was not clean the appellant made Tim suck Joe's willy;[17]

(i) Tim went on to say that the appellant made them do it and smacked him if he did not suck Joe's willy;[18] he said it happened first when they were in Townsville and he thought that he was four when that happened;[19]

(j) Tim described the appellant telling him to suck on Joe's willy and forcing him to do so by "pushing my head";[20]

(k) he said he was made to suck Joe's willy "a lot of times";[21]

(l) right at the end of the police interview Tim was taken to the matters the subject of count 2 and this exchange ensued:

"POLICE: And has [the appellant] ever made you suck, made you suck his willy?

Tim: That? I think yes or no, only [INDISTINCT], made me, only one time he made me.

POLICE: Only one time, oh okay, well tell me about that one time.

Tim: Oh well that's when [INDISTINCT]. Ah I don't know if we were or we weren't.

…

POLICE: So tell us about that time, what happened then?

Tim: Nothink else.

POLICE: Okay. Do you remember it, anything about that time?

Tim: Nah."[22]

Tim's pre-recorded evidence

---

15 AB 139.
16 AB 139.
17 AB 140.
18 AB 141-142.
19 AB 144.
20 AB 146-147.
21 AB 148.
22 AB 149.

[11] Tim was seven and a-half years old when he gave his oral evidence. He affirmed that he had told the police the truth in his interview. In cross-examination the following points emerged:

(a) Tim confirmed that he had told the police everything about what the appellant had done to Tim and everything that he had done to Joe;[23]

(b) he reiterated that the appellant, Joe and Tim were all in the shower together when the appellant peed in his mouth;[24] he said that his mother had helped him out of the shower and had given him some mouthwash to use; he told his mother what had happened and that it was an accident;[25]

(c) Tim agreed that he thought it was an accident because it was only for a very short time and when it happened he was running around the appellant to the front side of him;[26]

(d) after giving some evidence about his dislike of the appellant because the appellant would make him do chores and punish him if he did not, he explained that the punishment "sometimes … would be me putting … my mouth on Joe's willy";[27]

(e) it was put to Tim that the only thing the appellant did to him was to accidentally pee on him and to smack his bottom; Tim responded that he used to do one more thing, which was put Tim into time out, and it was not all of the naughty things the appellant did, because "he used to make me put my mouth on Joe's willy";[28]

(f) Tim recounted that if he was naughty the appellant would "make me do stuff" which he identified as putting his mouth on Joe's willy, and one day "he actually pushed my mouth onto his willy";[29]

(g) Tim also said that on occasion the appellant made him suck Joe's penis, "but most of the time he used to … make Joe do it to me";[30]

(h) Tim said that on occasion his mother watched the appellant make him do it, but did nothing about it;[31] he was specific in saying that his mother "used to watch [the appellant] put my mouth on Joe's thing";[32]

(i) shortly thereafter Tim explained how the appellant would tell Joe to take his pants off and then "wished for me to put my mouth on Joe's thingy";[33]

(j) Tim reiterated shortly thereafter that the appellant "did push my mouth onto his willy",[34]

(k) he explained that he did not tell other people because he was scared;

---

23 AB 154.
24 AB 155.
25 AB 155-156.
26 AB 156.
27 AB 157 line 12.
28 AB 159 line 6.
29 AB 161 lines 16-20.
30 AB 162 line 28.
31 AB 162-163.
32 AB 163 line 26.
33 AB 164 line 27.
34 AB 165 line 14.

(l) he denied the suggestion that the appellant had not made him suck Joe's penis saying "no, actually, [the appellant] did do that to me";[35] and

(m) he also denied the suggestion that he had made the story up.[36]

[12] In cross-examination Tim reiterated that the appellant would make him suck Joe's penis. He also gave evidence relating to the events of count 2 in these terms:[37]

> "Right. So he's never made you suck his willy, has he?---Once he made me do that, though.
>
> Right?---Once. And then that's all the other things.
>
> Now, did you forget about that thing, did you?---Yes, I did.
>
> Well, again … I say that he … never made you [suck] his willy?---He did make me do that once, though.
>
> So you're saying he made you do that once?---Yes.
>
> And where was that?---In his room."

[13] In re-examination Tim said he thought the episode where the appellant peed in his mouth was an accident because the appellant "said sorry".[38]

Police interview with Joe

[14] Joe was seven years old when he was interviewed by the police. In the opening parts of the interview he said that the appellant would always smack them and was mean to them, used the F word and was really annoying. He said that the appellant "says the F word to us kids" and sent them into time out.

[15] Eventually the police interviewer prompted Joe by saying that he had heard that the appellant had peed in Tim's mouth. When asked to tell the police officer about that, Joe's response was that "he did it to me twice".[39] He then immediately said that the appellant "always … let us suck his willy".[40] Having referred then to the appellant pulling his pants down, Joe was taken back to the incident of the appellant peeing in Tim's mouth or Joe's mouth. Joe responded "both ours, yeah".[41] He said that occurred in Townsville, but not in the shower but rather "in the room" and that they were in the hallway when it occurred.[42]

[16] Joe described what the pee looked like, saying it was yellow and that "we can't spit it out, we need to drink it".[43] Asked why he had to drink it he responded:[44]

> "um 'cause [the appellant] said drink it and, and I spat it out, he said you spat it out, … you will now go in the [time out]."

---

35 AB 165 line 37.
36 AB 165 line 46.
37 AB 167 lines 6-21.
38 AB 168 line 20.
39 AB 202.
40 AB 203.
41 AB 203.
42 AB 204.
43 AB 205.
44 AB 205.

[17] Joe identified that as occurring after breakfast and that it happened twice.[45]

[18] Shortly thereafter Joe was asked to expand on the topic of the appellant putting his penis in Joe's mouth:[46]

> "Joe: Yeah, you know those, ball things, in, in your willy?
>
> POLICE: Yeah, you got, you got the little willy and little two balls things?
>
> Joe: Yeah.
>
> POLICE: Yeah.
>
> Joe: He … he shove it in our mouth too.
>
> POLICE: His ball things?
>
> Joe: Yeah."

[19] Asked to reveal more about that incident, Joe reverted to saying that the appellant would say something rude, namely "suck my willy" which was something he said to Tim.[47]

[20] Joe said that he told his mother about the incident of the appellant peeing in his mouth, and told his sisters about the appellant putting his penis in Joe's mouth.[48]

[21] Joe was asked how many times the appellant had put "those two ball things in your mouth", and he responded "five times".[49]

[22] Joe reiterated that the appellant would use the F word and say "suck my willy now", whereupon they would go into Joe's room where the appellant would lock the door.[50] The appellant then said that Joe had to "suck my willy now or I'll put … my butt on you … suck my willy now or I put the bum on your face".[51] When that happened the appellant made Joe "suck his willy".

[23] Joe reiterated that the appellant had made him suck his testicles, saying "suck my balls".[52]

[24] Joe recounted that the appellant had put his penis in his mouth, held his head and shoved it "in really far to the end", which caused him to vomit.[53] He described how the appellant shoved it in "really fast", and he could not breathe.[54] When the appellant did so he said "Oh, that feels good".[55] Joe said that the appellant had done that twice.[56]

---

45 AB 205-207.
46 AB 208.
47 AB 208.
48 AB 215.
49 AB 217.
50 AB 219-220.
51 AB 220.
52 AB 221.
53 AB 222.
54 AB 222-223.
55 AB 225.
56 AB 226.

[25] Later in the interview Joe explained that the appellant had shoved a finger into his anus, identifying the finger as the "rude finger", being "shoved … in my butt".[57] He said that it was shoved "really far in".[58] That happened in the morning, outside in the yard. He said that Tim saw that happen, and it was done to Tim as well.[59]

Joe's pre-recorded evidence

[26] In Joe's pre-recorded oral evidence he affirmed that he had told the police the truth. Then in cross-examination the following points emerged:

(a) he described the appellant as being very strict, administering punishment including time out, smacking and yelling;[60]

(b) he said the appellant would show the rude finger and use the F word, and as well would watch rude videos;[61] he described what he saw on one of the rude videos;

(c) Joe then said that the appellant "put his willy in our bottoms", that occurring in the morning in a hallway while the mother was still asleep and the sisters were watching TV;[62] he was asked to describe whether the appellant's penis was hard or soft, and he responded that it was hard, and hurt;[63]

(d) Joe maintained that it was the truth that the appellant had put his penis into Joe and Tim, even though Joe had not told his mother, nor the police, about what had happened;[64]

(e) he was referred to what he had said about the appellant peeing in his mouth, and Joe said it happened to both he and Tim but whilst Joe spat it out, Tim swallowed it; and that they had both peed on one of the sisters because the appellant told them to;[65]

(f) Joe's account was that the peeing happened in the hallway and some got on the floor; the mother had asked what had happened but the appellant did not tell her; the mother did not see the pee on the floor but just walked out; the mother was not there when the appellant was doing it to them;[66]

(g) Joe maintained that his account of the appellant peeing in his mouth in the hallway was true, and that it only happened on the one time;[67]

(h) Joe said he did not see the appellant pee in Tim's mouth in the shower because the appellant locked the door;[68]

(i) Joe then responded to a question about whether the appellant had made Joe and Tim do anything to each other, by saying that Tim had been made to "put

---

57 AB 227.
58 AB 228.
59 AB 231.
60 AB 171-172.
61 AB 172.
62 AB 179-180.
63 AB 180.
64 AB 182.
65 AB 182.
66 AB 182-183.
67 AB 183.
68 AB 183-184.

his willy in my bottom" and that they then swapped around and "I did the same that [Tim] did";[69] the appellant made them do that, again in the hallway;

(j) Joe said again that the appellant "shoved his finger in me and [Tim's] bottom";[70] he said there was only one finger that had been put into his bottom;[71] when that occurred Joe almost vomited;[72] and

(k) when it was put to Joe that none of those things had happened, Joe maintained it was the truth in each case.

Evidence of other witnesses

[27] Joe's great-aunt (also their foster carer) gave evidence that on an occasion in June 2018 she and her husband had a conversation with Joe and Tim in which:

(a) Joe said the appellant "made me suck his cock";

(b) Tim said that the appellant had done that to him as well, and "he peed in my mouth once"; and

(c) Joe and Tim said the appellant "made them do it to each other as well";[73] as a consequence she contacted authorities and took the boys to the police station.

[28] Cross-examination did not challenge her evidence as to what they were told, but focused on whether Joe and Tim got on well together, whether one was "dobbing on" the other, whether they were excitable and whether they seemed distressed.

[29] Her husband (the complainants' great-uncle) gave evidence relating to the same conversation. He said Joe and Tim were talking over each other but Tim said that "[the appellant] had put his cock into his mouth and done wee in his mouth", and Joe said the appellant "had put his cock into … [Joe's] mouth".[74] He continued "then they were sort of made to do that to each other". Once again, cross-examination did not challenge the account of what was said, but focused on whether the boys were excited, were disciplined, and whether they were distressed.

[30] The complainants' mother gave evidence. She said the appellant was "great with [Tim], not so much with [Joe]".[75] She said he showered once or twice with the boys, and that she was not always there for that. She said Tim told her about an incident which happened in the shower and that the appellant "peed on him".[76] The appellant came out to tell her what had happened, which was that he [the appellant] "was peeing and [Tim] was running around him and he got peed on".[77]

[31] Cross-examination explored the layout of the house, and the layout of the bedrooms inside. She said there was no hallway to speak of but doors which opened off a living area. She said that the house was open plan and when she was in the lounge

---

69 AB 184.
70 AB 185.
71 AB 186.
72 AB 187.
73 AB 74.
74 AB 77.
75 AB 80.
76 AB 80.
77 AB 80 line 40.

room she could not see the rest of the house, but from the kitchen you could see everything.[78]

[32] Cross-examination also explored the relationship between the appellant and the boys, that he was very strict towards them and on occasion administered punishment. She could not recall any occasion when there was urine on the floor, or blood evident, or when the boys were physically ill and had to vomit.

Preliminary complaint evidence

[33] The second cousin of Tim and Joe gave evidence that they had told her that the appellant had engaged in sexual matters with them. Those matters were the ones reported to the police. Before that happened there was no conversation she had with them about sexual matters concerning the appellant.[79]

[34] In cross-examination she was asked about the occasion when Joe and Tim made disclosures to their great-aunt and the great-aunt's husband. She said she was not present for the whole conversation but only part of it. She heard "bits and pieces as I was entering and leaving the room".[80] She described Tim and Joe as being confident in what they were saying. She could not recall what might have been said about sexual matters, but the boys spoke about "beatings".[81]

Police evidence

[35] The police officer who interviewed Joe and Tim gave evidence. He was cross-examined about aspects of the boys' responses and his training in terms of asking questions. He said it was his experience that such interviews and videos presented challenges based on the age of the child being interviewed.[82] He also said that young children have difficulty describing events, and particularising events, and because of their young age they could be more susceptible to suggestion. He agreed that initially the boys were not particularly forthcoming about the alleged offending, and expressed concern about the appellant's disciplinarian nature.[83]

Admissions

[36] The only relevant admissions were of the ages of Joe (May 2011) and Tim (July 2012).

Ground 1 – unreasonable verdict - consideration

[37] The appellant's contentions in respect of this ground were essentially that the evidence of Tim and Joe contain so many discrepancies, inadequacies, and otherwise lacked probative force, that there was a significant possibility that the appellant was wrongly convicted. In this respect the appellant's outline drew attention to various aspects where the evidence of Tim differed from that of Joe, the evidence of each changed in some way, matters that were said to go to the credit of Tim and Joe, inconsistencies between the evidence of Tim and Joe on the one hand

---

78 AB 89.
79 AB 91.
80 AB 92 line 11.
81 AB 92 line 21.
82 AB 95.
83 AB 96.

and that of their mother on the other, and prejudicial material that made its way into the evidence. Examples of these matters include the following:

(a) the difference between Tim and Joe in relation to count 1, where Tim's evidence was that the event occurred in the shower, whereas Joe gave evidence of another occasion which occurred in the open area of the house outside the bedrooms, which Joe referred to as "the hallway";

(b) the varying ways in which Tim's evidence as to count 2 came out, and the fact that Joe gave evidence as to count 2 but did not say that he had actually seen it;

(c) Tim did not give evidence about count 3, whereas Joe did;

(d) on count 4, Tim's evidence was said to be "equivocal" and in response to the police leading him on the topic;

(e) on counts 5 and 6 Tim gave no evidence about those offences, whereas Joe did;

(f) the mother gave no particular evidence of preliminary complaint beyond count 1, whereas Joe said he told his mother about count 3;

(g) the preliminary complaint evidence from the great-aunt and great-uncle was limited to counts 1, 2 and 4;

(h) Tim gave evidence about other conduct on the part of the appellant towards both boys, which was not corroborated by Joe, particularly focusing on the frequency with which the two boys were made to suck each other's penises;

(i) there was evidence by Joe about other conduct by the appellant, not corroborated by Tim; this was said to include allegations of penile anal rape of both boys, and between the two boys, putting his tongue in Joe's mouth, putting his bottom in the sister's face, telling the boys to urinate on the sister and digitally raping Tim;

(j) some allegations were raised for the first time in cross-examination, such as Tim giving evidence that the appellant made them lick or wipe his feet, the variation in occasions when Tim said he was forced to suck Joe's penis, and the suggestion of putting his bottom in his sister's face;

(k) there was evidence of a motive to lie because the boys resented the appellant as being "mean" and disliked being disciplined by him;

(l) the boys were competitive so that when Joe was asked about count 1 (regarding Tim) he responded by saying that the events had happened to him more often than in the case of Tim, and similarly with count 4; the competitive demeanour was said to extend to "dobbing" each other in;

(m) matters to do with the credit of each of Tim and Joe, focusing on the police interview, including memory lapses, accounts of various events peripheral to the particular acts, a variable account of what the mother observed and the difference in respect of count 1 (in the shower or not); and

(n) matters touching on the credit of Joe, again including suggested memory lapses, that he was not a clear narrator, his difficulties with accounting for time including days of the week, variations in his evidence about the colour

of the house, evidence where he suggested he had spoken to a ghost, his adoption of the suggested use of boiling a kettle as a means of estimating time which Joe allegedly added in as a detail which actually occurred, discrepancies about where certain events occurred and who was nearby and discrepancies in how things occurred.

[38] In addition, the submissions pointed to the inconsistency in the preliminary complaint evidence, not so much focusing on what was said but in relation to things concerning the layout of the house, whether there was a clothesline, timing of breakfast and other such matters.

[39] Further, the submissions pointed to supposedly prejudicial material being led which included:

(a) leading questions in the police interview;

(b) parts of Joe's police interview where he referred to "the other kids";[84]

(c) pieces of the police officer's testimony, and those of the great-aunt and uncle in their recounting of what they were told;

(d) evidence by the second cousin as to what she could recall of the conversation between Tim, Joe and the great-aunt and uncle; and

(e) the fact that the sisters were not called notwithstanding Joe's assertion that he had complained to them, and suggestions were made in evidence that they had been nearby when various offences occurred.

[40] In my view, the complaints in relation to what was called "prejudicial material" are not made out. It is true that the police interviewer prompted Tim and Joe on occasion by directing their attention to a particular allegation. That was usually in the form of "I heard that [something happened]". Whilst that prompted the attention of the interviewee to a particular topic, it did not suggest a particular answer. What must be borne in mind is that at the time of the police interviews Tim was six years old and Joe was seven years old. It is not surprising that children so young do not respond to an interview in a foreign setting and on uncomfortable topics, in a necessarily logical and chronologically accurate way. In my view, it would also be a notorious fact that children as young as that do not think in sequential form, are prone to distraction and need direction in order to maintain focus.

[41] Comments by Joe in which he commented on the number of pages being used and observed that the blank ones were "for the other kids" would hardly have been seen by the jury as prejudicial. The comments came at the end of an hour long interview of a seven year old. It is hardly surprising that he became distracted by that topic. It did nothing prejudicial. As for the other so-called "prejudicial material", it might be observed that no objection was taken to it and some of it was effectively invited by the way in which the cross-examination was conducted. Given that the defence line of attack was to make out the boys as fabricators of fantastical lies, it is reasonable to assume that the defence did not really mind what extra evidence was laid out as long as it could be used to further that attack.

---

84 AB 229 lines 9-12 and AB 236 line 55 to AB 237 line 5.

[42] As for the suggestion that it was prejudicial that the two sisters were not called, notwithstanding that Joe said in his police interview that he had told them about the appellant putting his penis in Joe's mouth, a number of points can be made. First, not calling them meant that there was no corroboration by way of preliminary complaint evidence of that particular aspect of Joe's evidence. That could not be seen as prejudicial. Secondly, insofar as the evidence of either Tim or Joe concerned conduct that directly affected one of the sisters, or concerned conduct when it was said the sisters were nearby, their absence simply meant that there was no corroboration. None of the charged offences concerned the sisters in the sense that they were said to be in a position where they could see or hear what was occurring. To the extent that they were suggested to be involved in uncharged acts, their absence from the witness box once again meant a lack of corroboration, not something prejudicial. No aspect of Tim's evidence suggested the sisters' involvement. As for Joe, only one of the sisters was involved in the sense that, as part of the uncharged acts, Joe said the appellant told them to pee on that sister, and they did so. It is not evident that the sisters were interviewed by police and by the time of the trial they would be attempting to recall events three years prior.

[43] A substantial proportion of the complaints otherwise raised by the appellant relate to inconsistencies or discrepancies in the evidence of Tim and Joe. This was not a case like that in *Pell v The Queen*[85] where there was a separate credible body of evidence which was unchallenged. Here the jury had to sift through various discrepancies and inconsistencies, both internal to each of Tim and Joe's evidence, and as between their evidence. The jury plainly accepted the evidence of Tim and Joe as credible and reliable on the counts of which the appellant was convicted. That is a relevant factor when an appellate court is reviewing the evidence at a trial where the ground of appeal is unreasonable verdict.[86]

[44] Once again one must bear in mind that the police interviews were of Tim when he was six and Joe when he was seven. When they came to give their pre-recorded oral evidence Tim was about seven and a-half years old and Joe was eight years and eight months old. Witnesses of such a tender age are not likely to be reliable historians in the sense of presenting a chronological and complete narrative, divorced from inattention, distraction and the impact of being interviewed by authority figures in an unfamiliar setting. It is entirely predictable that the accounts will be in a form that is, to a trained and logical mind, haphazard. But that does not mean that such accounts are unreliable or that the discrepancies and inconsistencies they exhibit because of the youth of the interviewee, should warrant rejection of the evidence. Nor is it surprising that extra information might be extracted at a later stage, such as when giving oral evidence, when compared to the earlier interview.

[45] Here the issue was complicated by the approach taken by defence counsel, which was to encourage additional statements of offending so as to bolster the overall attack, which was that the two complainants were telling fantastical lies, possibly borne out of their dislike of the appellant for his authoritarian approach. Thus, somewhat remarkably, cross-examination included questions such as:

---

85 (2020) 386 ALR 478.

86 *Pell* at [39].

> "So, [Joe], you listened to the recording of what you said to police. So just thinking about that, is there any other bad things that [the appellant] did to you?"[87]
>
> and
>
> "All right. Now, just back to that question about whether [the appellant] had done any other bad things to you. Can you remember any other things now?"[88]

[46] Resolution of inconsistencies and discrepancies is quintessentially a job for a jury in a case like the present where there is no independent body of unchallenged evidence which might stand in contradiction. Here, like so many cases, the attack is based upon inconsistencies and discrepancies arising out of what was said by young witnesses in what must have been, to them, unusual and disconcerting circumstances.

[47] Much of the attack on the identified inconsistencies and discrepancies in the evidence of Tim and Joe tended to treat everything said by either of them as literally true, as though they were adults bringing an adult level of attention to statements made in a setting which was familiar. Of course, the contrary is the case. Examples of that sort of unreasonable treatment of a child's evidence appears in the submissions attacking the credit of Tim and Joe on the basis that they said things which raised concern or should have raised concern for the jury. In Tim's case there are several examples which make the point:

(a) at the very start of Tim's police interview he said that he had forgotten "what he done first", adding that "first thing I was a baby", and then "I wasn't with him, I was with my real dad …";[89] he then added "he can turn people back into babies"; just what he was referring to is unclear but it could hardly be considered to be a literal statement, and the surrounding passages show that Tim was fidgeting and had to be persuaded to sit on the chair;[90]

(b) it was after that he was told that he should only report things that really happened, being things that he saw and things that he heard;

(c) shortly thereafter Tim was relating how the appellant put his hands on Tim's mother's neck and pushed her to the wall; in the course of what was obviously a free form and uncoordinated account of making breakfast, playing a game, and other matters, he volunteered a comment about the appellant which, he said, was "not bad of [the appellant]"; it consisted of a story that whilst they were in a tent the appellant thought there was something on his face, "but it wasn't, it was a red back spider on his eye and it bit his … this eye";[91] given that Tim was six years old at the interview it is unrealistic to treat the story as a verbatim account of something that actually happened, and therefore affecting his credit adversely because it was fantastical or because the mother could not remember anything about a redback spider;

(d) other examples were said to be Tim's differing accounts of the colour of a car and his struggle to answer with precision what colour the appellant's pee was; and

---

87 AB 179 line 26.
88 AB 184 line 5.
89 AB 122.
90 AB 122.
91 AB 124-125.

(e) equally unrealistic is criticism directed at a six year old struggling to estimate the number of times something happened.[92]

[48] As for Joe's evidence, examples of the unrealistic way criticism was levelled at it in this course of submissions is revealed by the following:

(a) it was complained that Joe was "not a clear narrator"; that is not surprising given Joe was only seven at the time of his interview;

(b) he was criticised for having trouble with estimating times and days of the week;

(c) at one point Joe said that some events happened at "the other house", and when asked to identify which house said it was a different house, and then said "so Asia or Africa he went to. I think he went to different … different place, Asia and Africa he went, now he's in Townsville …";[93] it is simply unrealistic to treat a statement like that by a seven year old as being some sort of precise or accurate account;

(d) in the same vein were the comments by Joe in his interview about having talked to a ghost which (he said) told him that his mother wanted to kill him;[94] the jury could rightly consider that account to be the product of imagination or nightmare, without damaging Joe's credit otherwise;

(e) equally unrealistic is the submission that Joe "refused to respond to questions about why he didn't tell his mother about digital anal penetration";[95] reference to the passage referred to shows that Joe did explain why he did not tell his mother; it was that she was in the shower when the appellant finished the offending conduct, and the children were leaving for school; by the time their mother was out of the shower, they were at school;[96] and

(f) the appellant's submissions tried to make much of the fact that Joe added some detail to his account when trying to estimate how long it was that the appellant put his penis into Joe's bottom; defence counsel used the example of how long it took a kettle to boil, asking whether it took that length of time;[97] in response Joe effectively said that the appellant would sometimes engage in that sexual conduct at about the time as he was making coffee on the stove, and in that context referred to the appellant dealing with the kettle;[98] Joe said it did not happen all the time but occasionally; in that context his response, prompted by the way in which defence counsel framed the question, would not automatically lead a jury to consider that the evidence was made up, or otherwise given in such a way that it was destructive of credit.

[49] I have not dealt with every separate suggested discrepancy or inconsistency. Many were set out in the written outline. But I have considered them all and the vast bulk fall into the unrealistic forms of criticism referred to above. The jury would have

---

92 AB 163.
93 AB 213-214.
94 AB 229-230; AB 188-189.
95 Appellant's outline para 23(l)(iii).
96 AB 186 line 37 to AB 187 line 1.
97 AB 180 line 46 – AB 181 line 2.
98 AB 181.

been acutely aware of the young age of the boys when interviewed and when they gave oral evidence and were cross-examined.

[50] What the jury had was a remarkable degree of consistency between the evidence of Tim and Joe. Each gave evidence about the appellant's conduct in specific ways, including urinating in the mouth of one or other of them, putting his penis in their mouths, and making them suck his penis and each other's penises. The jury may well have considered that their evidence exhibited cogency in their attempts to describe various features of the conduct, such as: (i) the taste and colour of the appellant's urine;[99] (ii) how the appellant pushed his penis into their mouths so far they could not breathe;[100] (iii) that the appellant pushed their heads to make them suck his penis;[101] (iv) the appearance or colour of the appellant's penis;[102] (v) the particular phrase used by the appellant, "suck my willy".[103] Then, the jury heard them each say (in a variety of ways and more than once) that the appellant made them suck the other's penis, quite apart from being made to suck the appellant's penis. That sort of personally embarrassing admission may well have been seen by the jury as unlikely to be the product of fantasy or exaggeration, but more likely suggestive of truthful recollection.

[51] Their evidence received support from the preliminary complaint witnesses whose evidence was that they complained that the appellant had made them suck his penis, had made them do that to each other, and had peed in their mouths. If that evidence was accepted then the jury had a source of support for the credibility of the two complainants.

[52] Further, the evidence of the complainant's mother was that on occasions the appellant showered with the two boys and that on one occasion Tim came out saying he had been peed upon by the appellant.

[53] The jury in this case was in the position so many juries are in sexual offence cases where the complainants are young and therefore cannot bring a disciplined adult mind to their account of what happened. That is why the jury's advantage of seeing and hearing the complainant's evidence puts it in a superior position to that of this Court. That advantage is one well recognised by authority.

[54] Furthermore, it is apparent from the addresses to the jury that the evidence they had regard to contained various aspects of the demeanour of Tim, in particular, which this Court cannot access. Thus, there is a description of the way in which Tim paused to consider questions, concentrating to formulate a response and giving excited explanations.[104] Further, it seems that Joe made a number of motions which were graphic illustrations of what he was attempting to say.[105] Those sorts of matters put the jury in a much better position than this Court for the purposes of assessing the credibility and reliability of the evidence.

---

99 Tim: "don't know what the colour is" and tasted "gross", like "off lemon" AB 137 line 57, AB 138 lines 1-28; Joe: colour "yellow" AB 204 line 55 to AB 205 line 3, and taste "gross" AB 205 line 21.

100 Tim: AB 139 lines 31-40; Joe: AB 223 lines 23-35.

101 Tim: AB 139 line 38, AB 147 line 46, AB 161 line 17, AB 165 line 14; Joe: AB 222 lines 21 and 48, AB 224 line 14.

102 Joe: "dark skin" AB 208 line 58.

103 Tim: AB 146-147; Joe: AB 208, 219, 220; 222.

104 AB 16 lines 34-43.

105 AB 17 lines 14-19.

[55] Having reviewed the whole of the evidence, and weighing the various criticisms made of it, I am unable to conclude that it was not open to the jury to accept the evidence of Tim and Joe, and reach a state of satisfaction of the appellant's guilt beyond reasonable doubt.

[56] Ground 1 therefore fails.

Ground 2 – failure to direct about use of evidence

[57] The appellant contended that the learned trial judge erred in failing to direct the jury about the use that could be made of evidence of offences and other misconduct against each complainant, in proof of the counts concerning the other complainant. The consequence was, it was said, a miscarriage of justice. In that respect reliance was based upon statements by Henry J in *R v CBM*.[106]

[58] The contention was that the issue of cross-admissibility of evidence of sexual contact with each boy, in proof of the charges relating to the other, was given no consideration. And, no direction was given as to what use could be made of that evidence. Further, it was said the trial judge appeared to have positively told the jury that they could use all the uncharged sexual interest evidence in respect of the counts concerning each boy.

[59] For the Crown it was contended that the directions on this topic were adequate. The key components of the directions were:

(a) all conduct not the subject of the counts on the indictment could be used only if the occurrence of that conduct were proved beyond reasonable doubt;

(b) the issue to be decided in relation to any of that conduct which was so proved, was whether it proved the appellant had a sexual interest in the "complainants" upon which he was willing to act; that also must be proved beyond reasonable doubt;

(c) only if those two things were proved could the jury then consider whether it made any of the conduct giving rise to any specific count more likely, but the jury still had to be satisfied of the proof of the elements of the offence they were considering, beyond reasonable doubt;

(d) if they were not satisfied that any or all of the acts occurred, that might affect their assessment of the complainants, and they must not engage in propensity reasoning.

[60] Taken in the context of the remainder of the summing up, the respondent contended that those directions were adequate and appropriate. Further, the directions were ventilated prior to the summing up and there was no dissent from them by defence counsel, nor were redirections sought. It was contended that *R v CBM* was distinguishable because there propensity evidence had been ruled cross-admissible in a pre-trial hearing, but the trial judge ruled the evidence was not cross-admissible and gave no directions whatever about the propensity evidence, at the same time not discharging the jury.

Consideration – ground 2

---

106 [2015] 1 Qd R 165, at [37]-[52].

[61] Resolution of this ground of appeal turns on the directions given by the trial judge which were in these terms:[107]

> "The defendant is charged with the five offences set out in the indictment. The prosecution has led evidence of the conduct with which the defendant is charged; however, in addition, the prosecution has led evidence of other incidents in which the complainants have said that they had sexual contact or conduct toward them by the defendant. There are many examples, and you will recall that they included, for example, the defendant making the boys suck each other's penises and putting their penises in each other's bottoms.
>
> Also, there was evidence that the boys were urinating on one of their sisters, and there were other suggestions of sexual conduct that do not constitute actual offences. The prosecution relies on this other evidence to prove that the defendant had a sexual interest in the boys and was prepared to act upon it. The prosecution argues that this evidence makes it more likely that the defendant committed the offences with which he is charged; however, you can only use this other evidence if you are satisfied beyond reasonable doubt that the defendant did act as that evidence suggests and that the conduct demonstrates that he had a sexual interest in the complainants which he was willing to pursue. If you are not satisfied of those things beyond reasonable doubt, then that may affect your assessment of the complainant's evidence about the acts which are the subject of the offences with which the defendant is charged.
>
> If you do not accept that this evidence proves to your satisfaction that the defendant had a sexual interest in the complainant boys, you must not use the evidence in some other way then (sic) to find that the defendant is guilty of the offences with which he is charged, and if you are satisfied that one or more of these other acts did occur, and that this conduct does demonstrate a sexual interest of the defendant in the boys, it does not follow that the defendant is guilty of the offences that are charged. You cannot infer only from the fact that this other conduct occurred that the defendant did the things with which he is charged. You must still decide whether, having regard to the whole of the evidence, the offences charged have been proved to your satisfaction beyond reasonable doubt."

[62] The jury were told that they had to consider each charge separately, evaluating the evidence relating to that particular charge in order to decide whether they were satisfied beyond reasonable doubt that the elements had been proved.[108] That was followed by a direction that:

> "Your general assessment of the boys as witnesses will be relevant to all counts, but you will have to consider their evidence in respect of each count when you consider that count."[109]

---

107 AB 41.
108 AB 40 lines 29-34.
109 AB 40 line 38.

[63] The jury were also directed that the evidence of the uncharged sexual acts was relied upon only to prove that the appellant had a sexual interest in the two boys, and was prepared to act upon it. Then the jury were told that they could only use that evidence if they were satisfied beyond reasonable doubt of two things, namely that the appellant did act as the evidence suggested, and that that particular conduct demonstrated that he had a sexual interest in the boys which he was willing to pursue. The jury were then directed that if they did not accept that the evidence proved that the appellant had a sexual interest in the boys, they "must not use the evidence in some other way to find that the [appellant] was guilty of offences with which he was charged". Specifically, they were told that they could not infer "only from the fact that this other conduct occurred that the [appellant] did the things with which he is charged."[110]

[64] I pause to note that no direction of the kind now suggested was sought by defence counsel, nor were any redirections sought.

[65] The appellant was charged on six counts, two of which related to acts against Tim and the remaining four relating to acts against Joe. The particulars of the offences did not specify that those against Tim occurred in the presence of Joe, or vice versa.[111]

[66] The state of the evidence during the trial did not make it particularly clear which offences occurred in the presence of the other complainant. Thus:

(a) on count 1, Tim gave evidence that it occurred when both he and Joe were in the shower together with the appellant; however, Joe's account was that whilst the appellant peed in Tim's mouth, that was not in the shower and he did not see anything happen in the shower;

(b) on count 2, Tim did not suggest that occurred in Joe's presence; Joe suggested that count 2 and count 4 occurred at the same time and place;

(c) on count 3, Tim gave no evidence as to this offence; Joe gave evidence that the boys were together when counts 1 and 3 occurred;

(d) on count 4, Tim gave no real evidence in support of that count whilst Joe suggested there was an occasion when that occurred at the same time as count 2; and

(e) on count 6, Tim did not refer to those offences whereas Joe gave evidence which suggested they were together when it occurred.

[67] During the trial no application was made to exclude the evidence of one complainant on the basis that it was not cross-admissible as against the other complainant. Similarly, in the course of address and summing-up cross-admissibility was not in dispute.

[68] The case having been conducted on the basis that the evidence as to the offending against Tim was cross-admissible in respect of the offending against Joe, and vice versa, that could only have been on the basis that it was similar fact evidence in the sense explained in *Pfennig v The Queen*.[112] There the High Court explained that similar fact evidence was a variety of propensity evidence, that is, a particular class

---

110 AB 41 line 38.
111 AB 117.
112 (1995) 182 CLR 461, 464, 481-484.

of circumstantial evidence which necessitates a high degree of cogency to justify its admission. Had there been an application to separate the trials in respect of Tim and Joe, the assessment of the quality of the evidence would have focussed on whether it had a high degree of probative force in aiding to prove charges relating to the other complainant. As was said in *R v CBM*,[113] when explaining the assessment of the probative force of such evidence:

> "[42] In *Phillips v The Queen* the High Court emphasised that in order to assess the probative force of the evidence it is essential at the outset to identify the issues on the trial for which the evidence is to be tendered. Put another way, it is essential to identify the circumstantial reasoning by which the evidence of offending against one complainant is said to have probative force in aiding to prove offending against the other complainant.
>
> [43] Where that reasoning is merely that the accused has a propensity or disposition to commit a sex offence the evidence will not be admissible for want of cogency. However reasoning which points to a 'particular distinctive propensity' in connexion with or in relation to the issues in the case will give the evidence greater cogency.
>
> [44] Such reasoning relies upon the evidence of other offending as circumstantial evidence of the alleged offending under consideration. The degree of similarity or connexion of features is said by inference to so heighten the objective improbability of the alleged offending occurring other than as alleged that there is no reasonable view of the evidence consistent with the innocence of the accused. If the judge considers there is a reasonable view of that evidence, consistent with the innocence of the accused in respect of the charges under consideration, then it will not have the high degree of probative force required to be cross-admissible in proof of those charges and separate trials should be ordered."

[69] Here there was no contest about the cross-admissibility of the evidence. It is therefore appropriate to proceed on the basis that, rightly or wrongly, the evidence was perceived to have the relevant high degree of probative force in accordance with *Pfennig v The Queen*.

[70] That must be the case in respect of the evidence given by Tim and Joe in respect of the charged offences. That evidence is distinct from the evidence of uncharged acts which was only relevant (if accepted to the requisite standard) to demonstrate that the appellant had a sexual interest in the boys.

[71] The summing-up makes it clear that whilst a direction against propensity reasoning was given in respect of the evidence concerning uncharged acts, nothing of that kind was said in respect of the evidence on the charged acts. True it is that the jury were told that there were separate charges and each charge must be considered separately, evaluating the evidence relating to that particular charge to decide whether guilt was

---

113 [2015] 1 Qd R 165 at 175; internal citations omitted.

established beyond reasonable doubt.[114] However, in my respectful view the summing-up was deficient in that the jury were given no instructions on the use which could or could not be made of one complainant's evidence in the case involving the other complainant. The issue was explained in *R v HAB*.[115] There, having dealt with the question of admissibility of similar fact evidence according to the test in *Pfennig v The Queen*, as confirmed in *Phillips v The Queen*,[116] this Court said:[117]

> "[12] What were the necessary directions depended upon that admissibility question, which this Court was not asked to decide. But a decision either way on that question would have required some instruction to the jury on the use which could or could not be made of one complainant's evidence in the case involving the other complainant. Unfortunately the jury was not given any instruction on the matter. An explanation may be in the exchange between the learned trial judge and counsel for the appellant at trial (who did not appear on the appeal), who seemed to concede the question of admissibility in saying to his Honour that the jury should be told that they could use the evidence in relation to counts 1 and 2 'in support of count 3' and they could use 'count 3 in support of counts 1 and 2'. Yet no direction was given in those terms, or otherwise. Nor was any redirection sought. Still the learned trial judge was obliged to give the jury the instructions to which they were entitled, including instructions as to how they were not to reason: *RPS v The Queen*.
>
> [13] Had the trial judge held the evidence of one complainant to be inadmissible on the count or counts involving the other complainant, a necessary direction would have been that the jury could not use, in any way, the evidence of one complainant to convict the appellant on a count involving the other. And a propensity warning would also be required. …
>
> [14] Alternatively, if the evidence was admissible as similar fact evidence, as the prosecution would argue and the appellant's trial counsel seemed to accept, still the jury had to be warned. In particular they had to be told that probability reasoning carried a danger that '(c)ommon assumptions about improbability of sequences are often wrong'. With that warning, it may have been unnecessary to give a distinct instruction against propensity reasoning: see for example the respective views of McHugh J and Hayne J in *KRM*. My own view is that it would be preferable for the jury in that event to receive also a propensity warning but whether it would be necessary is a question which need not be decided now."

---

114 AB 40 lines 29-34.
115 [2006] QCA 80 at [12]-[14].
116 (2006) 225 CLR 303; [2006] HCA 4.
117 [2006] QCA 80 at [12]-[14].

[72] Those passages in *HAB* were adopted in *R v CBM*. That, too, was a case involving similar fact evidence. The fact that the evidence in that case related to different complainants and offences in different locations, albeit of striking similarity, does not distinguish *CBM* from the current case. Here the evidence of offending against Tim was only cross-admissible in the case of offending against Joe if it met the test in *Pfennig v The Queen* and *Phillips v The Queen*. As was the case in *HAB* and *CBM*, the jury here were given no assistance at all about the proper use of the evidence in each case, nor warned against the risks involved in propensity reasoning in relation to the evidence in respect of the charged acts. As was said in *CBM*:[118]

> "[49] A jury will naturally understand that it can have regard to evidence led before it when considering whether the charges have been proved beyond a reasonable doubt. Deciding to not direct a jury against using evidence for a certain purpose will not guard against the jury thinking it can use the evidence for that purpose. That is particularly so where the potential purpose seems obvious. In a case like the present the prospect of the jury using the evidence to engage in propensity reasoning was readily apparent. It would only have been natural for the lay minds of the jury to think that if the appellant sexually offended against one of his female child cousins while staying at her home then that made it more likely he was the sort of person who would have done likewise to another of his female child cousins while staying at her home.
>
> [50] There is no room for a neutral or silent position to be taken in directions about the cross-admissibility of the evidence of multiple complainants in sex cases. Because of the potential for misuse of such evidence, directions should ordinarily be given to guard against its misuse, whether it is left to the jury as cross-admissible or not. Even if the learned trial judge had allowed the evidence of the complainants to go to the jury as cross-admissible it would still have been necessary to direct the jury about its proper potential use, including an explanation of the need to consider and exclude competing circumstantial inferences such as collusion.
>
> [51] The learned trial judge's decision not to tell the jury it could use the evidence of offending against one complainant in support of proof of offending against the other complainant did nothing to prevent the jury putting it to that use. If the jury were not to be permitted to use it for that purpose, as the learned trial judge determined, then it was essential the jury be specifically directed that they could not use it for that purpose. Such a direction needed to be sufficiently clear and forceful as to deter the jury's natural inclination to so use the evidence. To guard against the prejudice occasioned by the joinder such a direction should in this case have incorporated a warning not to engage in impermissible propensity reasoning."

---

118 [2015] 1 Qd R 165, at [49]-[51]; internal citations omitted.

[73] The consequence is that ground 2 is established and a retrial must be ordered.

[74] In light of the conclusion that I have reached above in respect of ground 2, it is unnecessary to deal with the other grounds which submitted that proposed errors of one sort or another leading to a miscarriage of justice. Each of those grounds, if successful, would lead to a retrial, which is the result of the appellant's success on ground 2. Further, if there is to be a new trial, the matters the subject of agitation in proposed grounds 3 and 4 will not necessarily arise again.

Conclusion and disposition of the appeal

[75] Given that ground 1 has failed, the appropriate order is that there be a retrial.

[76] I propose the following orders:

1. Allow the appeal.
2. Set aside the convictions and order a retrial.

[77] **PHILIPPIDES JA:** I agree with the orders proposed by Morrison JA for the reasons given by his Honour.

[78] **WILSON J:** I agree with the reasons of Morrison JA.