SUPREME COURT OF QUEENSLAND

CITATION:	*R v TAV* [2022] QCA 271
PARTIES:	**R** **v** **TAV** (appellant)
FILE NO/S:	CA No 311 of 2021 DC No 2445 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 29 November 2021 (McDonnell DCJ)
DELIVERED ON:	23 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2022
JUDGES:	Mullins P and McMurdo and Bond JJA
ORDERS:	**1. The application to amend the indictment be granted, and counts 2, 3, 5 and 8 on the indictment be amended by inserting the words "on a date unknown" before the word "between".** **2. The appeal against the conviction on count 6 on the indictment be allowed, and that conviction be set aside with a verdict of acquittal being substituted for it.** **3. The appeal against conviction be otherwise dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – GENERALLY – where the appellant was convicted of seven sexual offences against a 10 year old complainant – where the offences were aggravated by the circumstances that the complainant had an impairment of the mind and was under the appellant's care at the relevant time – where the jury returned a verdict of acquittal on one offence but convicted on the others – where the appellant challenged all the convictions on the basis that they were factually inconsistent with the acquittal – whether the jury's acquittal can be reconciled with an acceptance of the complainant's testimony in proof of the other accounts – whether the different verdicts constitute an affront to logic and common sense which is unacceptable – whether the verdict was unreasonable or insupportable having regard to the

evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – GENERALLY – where the appellant was convicted of seven sexual offences against a 10 year old complainant – where the offences were aggravated by the circumstances that the complainant had an impairment of the mind and was under the appellant's care at the relevant time – where the jury returned a verdict of acquittal on one offence but convicted on the others – where the appellant challenged all the convictions on the basis that there were inconsistencies within the complainant's evidence which together required the jury to acquit on every count – whether, in combination, the inconsistencies within the complainant's evidence required the jury to be left in doubt about her credibility or reliability – whether it was open to the jury to be satisfied of the appellant's guilt on each of the counts in question, beyond reasonable doubt – whether the verdict were unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of seven sexual offences against a 10 year old complainant – where the offences were aggravated by the circumstances that the complainant had an impairment of the mind and was under the appellant's care at the relevant time – where an expert witness gave evidence at trial about the clues which might indicate that the complainant was repeating something which had been suggested to her, rather than relating something she had experienced – where the appellant submitted that this evidence was inadmissible because assessment of credibility is within the competence of jurors – whether the evidence fell within the field of expertise of the witness – whether the evidence was admissible – whether there was a miscarriage of justice

Criminal Code (Qld), s 93A

Farrell v The Queen (1998) 194 CLR 286; [1998] HCA 50, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v CAU [2010] QCA 46, cited
R v Fahey, Solomon & AD [2002] 1 Qd R 391; [2001] QCA 82, cited
R v MCO [2018] QCA 140, cited

R v Miller (2021) 8 QR 221; [2021] QCA 126, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: S C Holt KC, with Z G Brereton, for the appellant
C W Wallis for the respondent

SOLICITORS: TWC Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** I agree with McMurdo JA.

[2] **McMURDO JA:** After a six day trial by a jury, the appellant was convicted of seven sexual offences against a 10 year old girl. He was convicted of one count of maintaining an unlawful sexual relationship with the child, four counts of rape and two counts of the indecent treatment of her. The indecent treatment offences were aggravated by the circumstances that the complainant had an impairment of the mind and was under the appellant's care at the relevant time.

[3] He appeals against his conviction upon two grounds namely:

1. The verdicts are unreasonable and cannot be supported having regard to the evidence as a whole.

2. There was a miscarriage of justice by the judge failing to adequately direct the jury about the use to be made of evidence given by a psychologist.

The evidence at the trial

[4] Each of the alleged offences was said to have occurred in a 12 month period which commenced on the complainant's 10th birthday in late 2018. The appellant was a previous partner of the complainant's mother. After the appellant and the mother separated, the appellant continued to have contact with the complainant and she continued to call him "Dad".

[5] The complainant had a cognitive impairment which was the subject of evidence given in the prosecution case by a clinical psychologist, Mr Trudinger. On his assessment, she had an overall IQ of 67, placing her at the first percentile for her age. Her verbal IQ was 73, which was at the fourth percentile and her visual IQ was 64, which was at the first percentile. She was described by him as having a significant cognitive impairment. His evidence was that her memory was not necessarily affected by her low IQ. However the process of her recollection was different and he explained that her memory for traumatic events would be briefer and described more simply.[1] He described how persons with such an impairment will describe events in a "fairly brief" and not "terribly in depth" way.[2] At the time of his assessment of her she was aged 12 years and three months, but upon his analysis, her mental age was seven years, four months.

[6] In cross-examination, Mr Trudinger agreed that, as a general proposition, a child with a very low IQ, particularly with a very low verbal score, can be "more

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1 ARB 235.
2 Ibid.

susceptible to influences of suggestibility".[3] In re-examination, that question of suggestibility was taken up by the prosecutor. What followed was the evidence which is the subject of the second ground of appeal. It will be necessary to return to this evidence when discussing that ground but it is convenient to set it out at this point:

> "Now, you were – you were asked some questions about allegations and fabrications and when children were suggestible, in – now, you have said you have dealt with that situation before. In relation to someone like [the complainant] with her intellectual capacities, what – would there be – what would be the clues that you would be looking for to determine whether she was telling you something that she experienced or something that had been suggested to her?---In the sense which one might be more – which one would be real or more valid as opposed to something she might have just made up, is that what you're asking?
>
> Or something that someone told her to say?---Well, in those situations, those are – sometimes that can be quite difficult because – so you really have to kind of tease out or – or cognitively interview, you know, and you just have to probe a little more – more deeply, not unlike sort of asking me, you know, "What do you understand this to mean?", but in – in – in language for a seven year old and say – and – and just ask a little bit more about that. When – when you – when it's something they've experienced, because they – they really do know it because it actually has happened, so she'll – for example, in the lies comment, she would just go – I, you know, she understands what a lie is, but she can't describe what a lie is, but she'll say, "I know it when I hear it. That's a lie." But if – so if some – if some – she's gone along with something or something has been suggested to her, it's going to be difficult after a while for her to maintain because she didn't actually experience it, whereas if something – a dog bit her and somebody said, "No, no, it was a cat", and she goes along, she goes, "I was bitten. I was bitten", I go, "Was it a dog or a cat?", she'd go, "It was a dog." So she'll understand something that really happened to her and she's more likely to hold onto that memory and that discussion and – and – and she'll probably come across as being a bit more adamant, whereas something that was suggested to her is likely to fade."

[7] The complainant's evidence was given in an interview by police, the record of which was tendered under s 93A of the *Evidence Act 1977* (Qld), and in pre-recorded oral evidence in which she was cross-examined.

[8] The offence of maintaining an unlawful sexual relationship, which was charged by count 1, was based upon the other counts, as well as uncharged sexual acts which the complainant described as "sexing". In her evidence this was ultimately clarified to mean penile/vaginal intercourse. She gave evidence that the appellant also asked her to "suck his dick" a "few times" and said that he penetrated her vagina with his penis "a lot of times".[4]

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3 ARB 238.
4 ARB 147.

[9] Her evidence of the acts which became the subject of counts 2 and 3 was that they occurred on the same occasion, when the appellant took the complainant to his bathroom. On that occasion, she said, he made her "[suck] his dick" and put it in her "arse", after which the appellant washed his penis in the sink after "milk" had come out.[5] Counts 2 and 3 each charged an offence of rape, and the appellant was convicted on each count.

[10] Count 4 was a further charge of rape but in a different incident. She said that while at the appellant's house, the complainant and her brother were lying on the appellant's bed talking to each other. The appellant came into the room and the brother left. The appellant asked the complainant to close the door and he took her into the bathroom, put her on a table in there and, she said, "touch, no kissed [her]" on the lip.[6] She was asked what happened after the kissing had finished and she answered that he was "washing his hand". A few questions later, she was asked whether, in addition to the kissing, anything else had happened, and she answered "no then he was washing his dick I think". Again she was asked whether anything else happened, and she answered "then we, I was wearing my … pants on back on then walked out the bathroom." She was asked whether she and the appellant had used the toilet or whether they had done "something else in the toilet", she answered "ah we was, … then we went in the toilet … sexing I think".[7] She said that after then "sexing" her and washing himself, he put his hand on her "boob". When asked to explain what "sexing" meant in this incident, she said that it was putting his "dick in… her arse". The jury acquitted the appellant on that count.

[11] Count 5 charged a further offence of rape. The complainant's description of that event began with her statement that "he put it in a shower when I have my period",[8] and she then said that the appellant had had sex with her when she had her period. When she was asked by police "has he put his dick in you when you're on your period", her response was "yes some, when I was going to buy somebody a present for secret Santa". In evidence, she was asked where he put his penis and she said that it "went into the small flaps."[9] The appellant was convicted on that count.

[12] Count 6 was a charge of indecent dealing which was particularised as:

> "Shower event: Skin contact between the complainant's vagina and the defendant's penis".

The complainant's evidence was a recollection that when she and the appellant were in the shower together, the appellant picked her up and placed her around his legs. She said that she was touching the appellant's knee with her hand. She disavowed any other bodily contact with him in this incident. Her evidence did not support a conviction for the offence as particularised and it is now conceded that a verdict of acquittal should be entered on this count.

[13] Counts 7 and 8 were said to have been committed in the same incident, at the complainant's mother's home when the appellant was there erecting some blinds. At a time when the complainant's mother was out of the house, the appellant waved

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5 ARB 409.
6 ARB 405-406.
7 ARB 406.
8 ARB 410.
9 ARB 145.

the complainant into the mother's bedroom before closing and locking the door. When the appellant was naked he told the complainant to "suck his dick" which she did, before he pulled her onto the bed and put "his dick in me".[10] When asked where the appellant had "put his dick" the complainant said "Into my ass I think".[11] She was asked "you know what your ass is compared to… your vagina", to which the complainant answered "Yeah". She was then asked "so he put it in your bottom", to which she answered "Yeah". However later in the police interview she said that when she had been talking about her "ass", she was talking about her vagina.[12]

[14] She went on to tell police on this occasion, there was a phone call when "he was putting his dick in my ass" and "then we stopped it".[13] The appellant then looked out the window and saw that the complainant's mother's car had arrived back at the house. The complainant said "That's why we have stop it". She was asked "And, when you say he was putting his dick in my ass did his dick go in your ass before the phone call happened", to which she answered "No … he was nearly putting his dick in my ass then we heard a phone call." She was asked "was his dick touching your ass or was it … Pushing on your ass", to which she answered "… pushing on my ass". She was then asked "But did it go in your ass", to which she answered "No".

[15] In cross-examination, the complainant was asked: "the day of the blinds … , you say that you sucked your dad's dick … [and] he put his dick in your arse … . Did that happen?" She answered: "It didn't happen, apart from his dick in me". Defence counsel suggested: "That's a lie that he put his dick in you", to which the complainant said "Yeah".[14]

[16] In re-examination, the complainant gave this evidence as to the events the subject of counts 7 and 8:

> "You said that it was a lie when you said he put his dick in you? --- Yes.
>
> Okay. When you spoke to [police] you said two things. You said he 'put his dick in' you, and he nearly 'put his dick in your ass'? --- Yes.
>
> Okay. Can you explain which parts are a lie? --- He almost put his dick – because my mum drove up and came home with [indistinct].
>
> Okay. So is it a lie that he nearly put his dick in you? --- Yes.
>
> Okay. Is it a lie – sorry – is it – let me start again. … can you just explain to me on the blinds incident where his dick was, and where you were, or your ass, or your bottom, or your vagina was? --- I was in - his dick was on my big flaps ... that time.
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> Okay. Is that part true, or is that part a lie? --- That part was true.

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10 ARB 398, 401-402.
11 ARB 402.
12 ARB 410-411.
13 ARB 403.
14 ARB 162.

> Okay. Now the part where you told [police] that it went in your ass – or into you, I think you've said, rather than ass – when you said it went into you, is that part a lie or a truth? --- That was the truth.
>
> Okay. Which part is a lie? --- He – the one he put his dick in me.
>
> Okay. … , are you understanding the questions I'm asking you? Do you know what - - -? --- Yes."

[17] Count 7 was particularised as "penile penetration of the complainant's mouth." Count 8 was particularised as "penile contact in the area of the complainant's 'ass' – vaginal area."

[18] Count 7 charged an offence of rape; count 8 charged an offence of indecent dealing. He was convicted on each count.

[19] In her s 93A interview, the complainant told police that she had disclosed the offending to her mother.[15] In cross-examination she was asked whether she told anybody about "these things that happened between your dad and you", to which she answered "my little brother" (whom I will call J). She was asked if she could remember what had she told her brother and she said "about him and me … sexing".[16]

[20] J told police, in an interview tendered under s 93A, that the complainant and the appellant did "weird stuff".[17] He said that he had seen the appellant under the bedcovers with the complainant with his hand in the vicinity of her "private parts".[18] He recalled another incident in which the appellant, while naked, called the complainant into her mother's bedroom,[19] and a third incident at a place in Sydney in late 2019 when the appellant and the complainant were "humping".

[21] J recalled being told by the complainant of an occasion where the appellant took the complainant into the toilet, and another occasion when she was lying in bed with her pants off. His evidence seemed to be that he was told by the complainant that on these occasions, the appellant touched her bottom and breasts.[20]

[22] The complainant's older sister gave evidence that she had seen the appellant in bed with the complainant. Her recollection was that this was on the day when the appellant had erected the blinds at her mother's house, although she had witnessed that event later in the evening, after dinner.[21]

[23] The complainant's mother recalled an occasion when the complainant, having been with the appellant, returned and complained of pain in her vagina. On her inspection, the mother saw a tear or cut to the vagina.[22] She recalled a trip with the family to Sydney, and there going out leaving the complainant and J in the

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15 ARB 419.
16 ARB 149.
17 ARB 428.
18 ARB 429.
19 ARB 437.
20 ARB 433-434.
21 ARB 230, which would have been after the appellant desisted on the mother's return with the food for that meal.
22 ARB 265.

appellant's care for a night. She recalled hearing from J what he had then seen. But she said that she had received no complaint from her daughter.

[24] The appellant testified and denied any offending. He denied what J said he had seen in Sydney. His evidence was that the complainant's mother had persistently asked him for money because she had a problem with gambling. That evidence was the basis for an argument in his counsel's closing to the effect that the complainant's mother was angry with him for not giving her money, so she had manipulated the complainant to give untrue claims against him.

The first ground of appeal

[25] As noted earlier, the respondent concedes that the evidence did not support the prosecution case on count 6, as that case was particularised. The concession is rightly made.

[26] The appellant makes a particular challenge to the conviction on count 8 as an unreasonable verdict. It is submitted that there were inconsistencies within the complainant's testimony about that count which required the jury to remain in doubt. As should appear, there were inconsistencies, particularly within the evidence given in re-examination. Evidently the complainant was confused in distinguishing between whether the appellant's penis went in her, or it nearly happened (before he was interrupted by the mother's return). However count 8 was not a charge of rape. It was a charge of indecent dealing, for which it was sufficient for the prosecution to prove a case which was particularised as penile contact in the area of the complainant's vagina. In my opinion it was open to the jury to be satisfied beyond reasonable doubt that this occurred. It was not as if the complainant recanted her account of this incident: she continued to maintain that, beyond the conduct which involved count 7, the appellant was proceeding towards penile/vaginal intercourse with her until this was interrupted by the mother's return. The jury may have thought she had simply misunderstood one or more of the questions.

[27] There are two limbs to the arguments which challenge all of the convictions as unreasonable. The first is that the convictions are factually inconsistent with the verdict of acquittal on count 4. The second is that there are inconsistencies within the complainant's evidence, and as between her evidence and that of other prosecution witnesses, which together required the jury to acquit on every count.

[28] I have set out earlier the line of questioning in the police interview which led up to her evidence that there had been "sexing" on the occasion the subject of count 4. The jury may have considered that this evidence was relatively unpersuasive, in that she described several events which followed the kissing, before ultimately saying, with some apparent hesitation, that there had been "sexing *I think*".

[29] In *MacKenzie v The Queen*,[23] Gaudron, Gummow and Kirby JJ said that where there is a suggestion of a factual inconsistency between jury verdicts upon different counts, the test is one of logic and reasonableness. They quoted this statement from the judgment of Devlin J in *R v Stone*:[24]

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23 (1996) 190 CLR 348 at 366.

24 [1955] Crim LR 120, per Devlin J.

> "He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand."

Their Honours continued:[25]

> "Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. … In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt."

[30] In *MFA v The Queen*,[26] Gleeson CJ, Hayne and Callinan JJ referred to a number of features of a criminal trial by jury, as relevant to this question. Amongst them, were the following:[27]

> "The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others."

[31] Consequently, the jury's acquittal on count 4 need not have involved a conclusion that the offence charged by count 4 did not occur, let alone a conclusion that the complainant was lying in her testimony on that count. That verdict can be reconciled with an acceptance of the complainant's testimony in the proof of other counts, upon the basis that the jury may have seen the testimony on count 4 as hesitant and relatively unpersuasive. The different verdicts do not constitute an affront to logic and common sense which is unacceptable, to adopt the words of Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*.[28]

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25 (1996) 190 CLR 348 at 367.
26 (2002) 213 CLR 606.
27 Ibid at 617.
28 (1996) 190 CLR 348 at 368.

[32] In oral submissions, support for an argument of inconsistent verdicts was apparently sought from the verdict of acquittal which will be substituted by this Court on count 6. However that verdict results not from a finding that the jury could not accept the complainant's testimony, but rather from the fact that her testimony did not prove that charge as it was particularised. The jury acted unreasonably in convicting upon count 6, but that does not suggest an unreasonableness of the other verdicts.

[33] A number of inconsistencies within the complainant's testimony are relied upon, namely:

(a) The complainant agreed in cross-examination that her mother had told her that she wanted the appellant to get into trouble, yet in re-examination, she said that her mother did not say that to her.[29] (However she also said in re-examination that she knew that her mother wanted the appellant to be in trouble because of what she could see on her face.[30])

(b) The complainant told police that she had told her mother about the offending but had told no one else, whereas in her evidence in Court she said that she had never spoken to her mother about it, only her brother.

(c) The complainant was asked by the prosecution "do you remember what you told [J]" to which she responded "yes", yet when asked what that was, she said that she did not remember.

(d) When defence counsel first asked "has someone told you to say something happened in the toilet with your dad", the complainant responded "yes", but when asked "who", she responded "no, I meant no".

(e) In her police interview, the complainant at first said that the appellant put his dick into her "ass", that she knew the difference between her "ass compared to her vagina" and that his dick went into her "bottom". Later in the interview she said that she was referring to her vagina, not her bottom, whenever she was saying where his penis was inserted into her.

(f) The first time, in her police interview, when she was asked how many times the appellant put his dick in her vagina or mouth during second term at school, she said three times and at the appellant's place. Ask to clarify, she said that it was "sometimes at my mum's". Asked again about the place, she told police "I don't know". Asked again about how many times it happened in term two, she said "I think two times".

[34] Each of these points warranted the jury's consideration. However, in combination, they did not require the jury to be left in doubt as to her credibility or reliability. It was unremarkable that she would have an imperfect recollection of what she had discussed with her mother or her brother about the offending. Her correction that it was her vagina and not her bottom was made in the same interview, and that corrected version was not weakened by her later oral evidence. Her uncertainty in the police interview as to the number of times the offending had happened at various places was, the jury could have considered, unremarkable and inconsequential.

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29 ARB 156, 165.
30 ARB 166.

[35] It is submitted that there are blatant inconsistencies between the complainant's evidence and that of other prosecution witnesses, namely the complainant's mother, sister and brother. It is sufficient to say that none of the inconsistencies of this kind, nor all of them in combination, required the jury to reject the complainant's evidence of the acts which constituted the alleged offences. The complainant may have been correct in her recollection and not her sibling or her mother. Alternatively, the complainant may have been mistaken but not lying about those points. And in most of the inconsistencies advanced in this argument, the complainant's version was of less assistance to the prosecution case than that of her sister, brother or mother.

[36] On my examination of the whole of the evidence, I have concluded that it was open to the jury to be satisfied of the appellant's guilt on each of the counts in question, beyond reasonable doubt. It is insufficient for an appellant merely to show discrepancies or inadequacies in the evidence.[31] What must be demonstrated is that there are such features which appear in the evidence as to lead to a conclusion that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted.[32]

[37] The first ground of appeal fails, save for the challenge to the conviction on count 6 which is conceded.

The second ground of appeal

[38] The relevant evidence for this ground, which was that of Mr Trudinger, is set out earlier. It is common ground that his evidence in chief and cross-examination was admissible evidence. The problem, it is argued, arose from the evidence given in re-examination, when the prosecutor asked him what would be the clues of whether someone like the complainant was relating something which she had experienced, or was instead repeating something which had been suggested to her.

[39] The critical evidence is contained within the long answer given to that question. The effect of the answer was that if such a witness is repeating something which has been suggested to them, it will be difficult for them to maintain that version because they did not actually experience it, whereas they will "probably come across as being a bit more adamant" and persistent if they are speaking from an actual memory of events.

[40] For the appellant it is submitted that this evidence was inadmissible, because an assessment of credibility is a matter within the competence of jurors, and this evidence did not reveal anything beyond the experience and knowledge of the ordinary juror.[33] That appears to be accepted in the respondent's argument. However, in my view there was within this evidence an opinion within the field of expertise of the witness. The prosecutor's question did not ask the witness to tell the jurors what they would know from their ordinary experience and understanding of human behaviour. The question asked what clues would be given by someone with an impairment such as the complainant. It was relevant for the jury to know the answer to that question, even if it was that in this respect she was no different from a person without her impairment.

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31 *SKA v The Queen* (2011) 243 CLR 400 at 408-409 [20]-[22].

32 *R v Miller* (2021) 8 QR 221 at [16], citing *M v The Queen* (1994) 181 CLR 487 at 494.

33 Citing *Farrell v The Queen* (1998) 194 CLR 286 at [93].

[41] The ultimate argument under this ground is that the evidence required a firm warning to the jury that the psychologist could not determine matters of credibility and that the jury should not use his evidence to bolster the complainant's evidence or to negate a doubt they might have about her evidence.

[42] The appellant's argument cited *R v CAU*,[34] where evidence was given by a psychologist that the complainant was within the lowest four per cent of intelligence of members of the community, so that her credibility or reliability was affected. McMurdo P, with whom Fraser JA and Douglas J agreed, held that the psychologist's evidence was inadmissible, because it did not provide specialised information likely to be outside the experience and knowledge of a judge or jury. Her Honour's statement, about the warning which was required in that case must be seen in the context that the evidence there was inadmissible. That warning was neither required nor appropriate in this case.[35]

[43] In *Farrell v The Queen*,[36] Kirby J explained that whilst expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility is admissible, provided three conditions are satisfied. The evidence is to be given by an expert within an established field of knowledge relevant to the witness's expertise, the testimony is to go beyond the ordinary experience of the trier of fact, and the trier of fact, if a jury, is to be provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine. There should be no question that the first and second of those conditions were satisfied here. And in my opinion, so is the third condition, by the judge's instructions that the evidence of experts did not have to be accepted, the jury were the sole judges of the facts and it was for them to judge whether a witness was telling the truth and correctly recalling the facts about which they had testified.[37]

[44] No further direction or warning was required. Moreover, no such direction or warning was sought by defence counsel. There was no miscarriage of justice.

Conclusion and orders

[45] The respondent seeks leave, pursuant to s 572 of the *Criminal Code*, to amend counts 2, 3, 5 and 8 to add the words "on a date unknown" before the word "between". That amendment should be allowed.[38]

[46] I would order as follows:

1. The application to amend the indictment be granted, and counts 2, 3, 5 and 8 on the indictment be amended by inserting the words "on a date unknown" before the word "between".

2. The appeal against the conviction on count 6 on the indictment be allowed, and that conviction be set aside with a verdict of acquittal being substituted for it.

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34 [2010] QCA 46.
35 cf *R v MCO* [2018] QCA 140 at [9]-[12].
36 (1998) 194 CLR 286 at 300 [29].
37 ARB 79.
38 See *R v Fahey*, *Solomon & AD* [2001] QCA 82.

3. The appeal against conviction be otherwise dismissed.

[47] **BOND JA:** I agree with the reasons for judgment of McMurdo JA and with the orders proposed by his Honour.