SUPREME COURT OF QUEENSLAND

CITATION:	*R v HCM* [2023] QCA 86
PARTIES:	**R** **v** **HCM** (appellant)
FILE NO/S:	CA No 204 of 2022 DC No 1074 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 21 September 2022 (Clare SC DCJ)
DELIVERED ON:	2 May 2023
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2023
JUDGES:	Bond JA and Boddice AJA and Bradley J
ORDERS:	**1. The appeal be allowed.** **2. The convictions on each of counts 1 and 2 be set aside.** **3. There be a retrial on counts 1 and 2.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was convicted by jury of one count of maintaining a sexual relationship with a child and one count of indecent treatment of a child under 16, under 12, under care – where the appellant sought to adduce evidence at trial of his reaction when the allegations were put to him for the first time – where it was accepted his words of denial were self-serving and inadmissible – where it was submitted his reaction of 'surprise, disbelief, shock and fear' was consistent with innocence and exculpatory evidence – where the appellant now submits an exculpatory response demonstrative of "surprise, disbelief, shock or even horror", is admissible as direct evidence of that reaction – where the appellant accepts there is binding authority contrary to that position – whether those decisions should be reconsidered in light of a divergent approach in other jurisdictions CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the sole

evidence supporting the appellant's guilt was given by the complainant – where the jury could only have been satisfied of the appellant's guilt of each count, beyond reasonable doubt, if the jury was satisfied beyond reasonable doubt of the credibility and reliability of the complainant's evidence – where the appellant submitted there were striking inconsistencies in that evidence – where those inconsistencies must be viewed in the context of the complainant's age and other circumstances – where the appellant submits, in the alternative, that the complainant's evidence did not give rise to sufficient continuity or habituality that the alleged offender 'maintained' the sexual relationship to establish the maintaining count – whether the verdicts of guilty are unreasonable or cannot be supported by evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where the sole evidence supporting the appellant's guilt was given by the complainant – where the jury could only have been satisfied of the appellant's guilt of each count, beyond reasonable doubt, if the jury was satisfied beyond reasonable doubt of the credibility and reliability of the complainant's evidence – where there was an obligation on the trial judge to direct the jury to that effect – where the jury were directed, amongst other things, that the complainant was the most important witness in the prosecution case – whether the trial judge erred in the directions given

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where the jury were directed that if they were not satisfied of the appellant's guilt, beyond reasonable doubt, they would have reasonable doubt in respect of count 1 – where the jury were further directed that if they did find the appellant guilty of count 2, they were not to automatically convict of count 1 – where the jury were not explicitly directed to consider each count separately – whether the absence of that specific direction resulted in a miscarriage of justice

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, applied
Lynch v Commissioner of Police [2022] QCA 166, cited
Nguyen v The Queen (2020) 269 CLR 299; [2020] HCA 23, explained
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, cited
R v Callaghan [1994] 2 Qd R 300; [1993] QCA 419, approved
R v Coss [2016] QCA 44, cited
R v HBN [2016] QCA 341, cited
R v Kemp (No 2) [1998] 2 Qd R 510; [1996] QCA 514, cited
R v MBV (2013) 227 A Crim R 49; [2013] QCA 17, considered

R v MCI [2016] QCA 312, cited
R v Muniz [2016] QCA 210, cited
R v Pollard [2020] QCA 188, cited
R v SCD [2013] QCA 352, approved
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, applied
R v VM [2022] QCA 88, cited

COUNSEL: P Morreau for the appellant
E L Kelso for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **BODDICE AJA:** On 21 September 2022, a jury found the appellant guilty of one count of maintaining a sexual relationship with a child (count 1) and one count of indecent treatment of a child under 16, under 12, under care (count 2). Both were domestic violence offences.

[3] On the same date, the appellant was sentenced to three years' imprisonment on count 1 and a concurrent term of two years' imprisonment on count 2. It was ordered those terms of imprisonment be suspended, after he had served a period of 18 months imprisonment, for an operational period of four years.

[4] The appellant appeals those convictions. He relies on five grounds of appeal. First, the trial judge erred in not permitting cross-examination of the complainant's mother as to the appellant's reaction in a pretext telephone call. Second, the convictions on both counts are unsafe and unsatisfactory. Third, alternatively, the conviction on count 1 is unsafe and unsatisfactory. Fourth, a failure to direct on the degree of reliability required of the complainant's evidence. Fifth, a failure to direct on separate consideration of each count.

Counts

[5] Both counts related to the same complainant child. She was aged six to eight years at the time of the commission of the offences, 10 years at the time of her first interview with police, and 12 years when she gave pre-recorded evidence.

[6] The appellant was aged between 35 and 38 years at the time of the commission of the offences. At that time, he was living with the complainant's mother, in a de facto relationship. All of the offending took place in the family home.

[7] Count 1 was particularised as maintaining an unlawful sexual relationship with the complainant by introducing her to a sexual act, involving the appellant touching her vaginal area with an object, and then continuing to engage in that conduct, on five to 10 occasions, whilst the complainant was a child under 16 years of age.

[8] Count 2 was particularised as the first occasion on which the appellant touched the complainant's vaginal area with an object. It was alleged the touching was indecent and that at the time the complainant was a child under 12 years of age and under the appellant's care.

Evidence

[9] The complainant first spoke to police on 19 February 2020. This was a little over two years after the conclusion of the maintaining period, which was charged as having taken place between 31 July 2015 and 2 January 2018.

[10] The complainant told police she was speaking to them because:

> "…a couple of years ago when I lived with Mum and my brother and Mum's partner, [the appellant]. He occasionally when Mum was out, in secret. He would use a vibrator on me and he made, he made me, like, promise not to tell Mum."[1]

[11] The complainant described a vibrator as a thing "you use on your private parts" and that "it's supposed to make you feel good".[2] The complainant said it was used between husbands and wives and boyfriends and girlfriends.

[12] The complainant said the vibrator was her mother's and that it was purple and "like a handle and two little like balls or parts that go out to the side".[3] The complainant said she did not think her mother knew the appellant used it. When asked if she could draw a picture of it, the complainant said "I don't really remember what it looks like".[4] She said she last saw it a couple of years ago, when her mother was out.

[13] The complainant said the appellant was her mother's partner. Her mother first met him when the complainant was six years of age, and in grade 1. They lived with him until she was in grade 3 or 4. Her mother had since broken up with the appellant, and the complainant did not see him anymore. The complainant described the appellant as nice, but said he sometimes got too carried away. He liked to wrestle.

[14] The complainant said the first occasion the appellant used it he was lying next to her on the bed. The appellant said he "didn't want to just show [her] something".[5] He obtained the vibrator, asked the complainant to take her pants and undies off, and showed her how to use the vibrator. The vibrator was placed on the sides of her vagina, for five to 10 minutes.

[15] The complainant said when the appellant first used the vibrator on her, he asked her if it felt good, and that before he used it, he asked the complainant to promise to never tell her mother. She did not realise what he was doing was bad. The complainant said she trusted him and thought of him as a second father.

[16] The complainant said when the appellant used the vibrator on her she "liked it and it felt joyful".[6] After the first occasion, the complainant said she would ask the appellant to use it when he came in to say goodnight to her. The complainant said she would ask the appellant to get the vibrator. Sometimes he did, and she would take off her undies and shorts. The complainant said he put it on her vagina and moved it up and down a bit. The complainant said the vibrator was always used in her bedroom, when her mother was out of the house.

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1 AB405/45-48.
2 AB405/59.
3 AB406/73-74.
4 AB406/84.
5 AB408/181.
6 AB408/170.

[17] The complainant said the very first time was "probably about in the middle" of the period between when they first lived together and when the complainant, her mother and brother moved out. She described a "big fight" between the appellant and her mother and said it had occurred during the period when the appellant was using the vibrator on her vagina. She estimated the appellant had used the vibrator on her, between five and 10 times, with five of them before and five of them after that fight. The appellant would not use it all the time the complainant asked, using it rarely when her mother was away from the house.

[18] The complainant said the appellant only ever used the vibrator on her vagina. He did not ever use his fingers or hands. She did not recall the appellant ever using it on special occasions. He did not ever put the vibrator inside her vagina and did not ever ask the complainant to touch him in any way. He did not ever touch himself on these occasions.

[19] The complainant said the vibrator had a switch. The appellant would put it on her vagina, push a button and it would start vibrating. In describing the size of the vibrator, she said if you were holding it in your hand it would stick out both ends of your hand, but if you were holding it in two hands it would not stick out both ends. She described it as circular with a handle and little balls on the side like marbles, but bigger.

[20] The complainant said she told her mother about the vibrator two nights before coming to speak to the police. Her mother was talking to her about learning from her mistakes. The complainant said the conversation made her feel really safe and she felt "really bad about keeping it from her". She told her mother the appellant used this thing and described where he used it. Her mother asked her if it was "hers" (her mother's) and said "hers" was purple.[7] The complainant told her mother that it was and her mother kept telling her she had not done anything wrong.

[21] The complainant said during this conversation she asked her mother what the object was and her mother told her it was a vibrator. Her mother also told her who uses it and why they use it. Her mother said couples used it and that it was supposed to make you feel good. Her mother did not show her the vibrator.

[22] In her pre-recorded evidence, the complainant confirmed that the first person she told about the vibrator was her mother. She agreed she did not know her mother would involve the police. She also agreed her mother and the appellant had broken up at the beginning of 2018, and that her mother really disliked him.

[23] The complainant said she could not remember what grade she was in when the appellant first used the vibrator on her vagina. She did not know whether it was summer or winter. She could not recall whether the first time occurred on a weeknight or a weekend, but agreed that every time it happened it was in the night-time when her mother was out and her brother was asleep.

[24] The complainant agreed that when she told her mother about the object, it was her mother who had asked if it was purple. Her mother told her that she had one, but did not show her that purple vibrator.

[25] The complainant described the device as purple and white in colour and estimated its length at about 20 centimetres. She said she had recently seen pictures of it.[8] She

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7 AB416/489.

8 At trial, a picture of the mother's vibrator was Exhibit 13.

described the balls at the end of the handle, on either side. The balls were bigger than the end joint of a thumb, probably three times the diameter. Those balls touched the sides of her vagina. The complainant said her memory now was a little less hazy, as she had been thinking more about where she was touched by the vibrator. Her recollection was that the appellant touched her with the vibrating device right on the front of her vagina, rubbing it up and down.

[26] The complainant agreed she never told her psychologist or other medical specialists, until after she had told her mother. She never told her teachers, her friends, her father, grandmother or aunty. She agreed that when she told her mother, she "didn't really know what a big deal it was" and did not know her mother would go to police.[9] She said she did not tell anyone when her mother broke up with the appellant, because she did not believe the appellant would do anything that was seriously wrong, and would harm or hurt her. The complainant said she had not told anyone about it before her mother, because it had never been a big deal in her mind.

[27] At trial, two formal admissions were made. First, that on the day before the complainant was cross-examined during the pre-recording of her evidence, the prosecutor had shown the complainant photographs of her mother's white and purple vibrator, and asked if that was the vibrator the appellant had used to touch her, to which the complainant had said she was not 100 per cent sure. Second, that during her cross-examination, the complainant was asked to describe the shape of the vibrator and replied "I've seen pictures of it recently". The pictures being referred to were the photographs shown to her by the prosecutor the previous day.

[28] The complainant's mother gave evidence that she was in a relationship with the appellant for about five-and-a-half years. It started through messaging, via a dating app, in January 2014. There were breaks in that period. The complainant's mother said she and her children moved out of the family home for a period in mid-2016, before returning on 10 August 2016. She resumed her relationship with the appellant thereafter.

[29] The complainant's mother said that on 1 January 2018, she left the family home with her children. She never lived with the appellant again, although they did see each other "a bit on again/off again". The relationship permanently ended in or about July 2019.

[30] The complainant's mother said that on the evening of 17 February 2020, she had a conversation with the complainant, after they had had a shower together. The complainant's mother said she had been giving the complainant a well-meaning parenting lecture, when the complainant thanked her and said she had a secret she wanted to share with her mother. The complainant said that when they lived in the house together, she had a secret with the appellant. They used to play a special game that the appellant called their secret game. The complainant said the first time they played the game, the appellant asked if she wanted to play a special game. The game was that the appellant would use "a buzzy thing" on her. The complainant's mother said the complainant gestured to her lower tummy and groin. The complainant said it felt nice.

[31] The complainant's mother said she asked the complainant whether the buzzy thing was purple. The complainant said it was. When the complainant asked what the

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9 AB446/15.

buzzy thing could be, she replied that, from the description the complainant gave, it sounded like a vibrator. The complainant asked if she had done the wrong thing playing that game with the appellant. The complainant's mother replied the complainant had not, but said it was not an okay thing for the appellant to have done. She told the complainant those buzzy things were supposed to feel nice, but that it was not okay for an adult to use it on a child.

[32] The complainant's mother said the complainant then asked her if it was still okay "if I said that he could, like, I said that I wanted to play the game". The complainant's mother replied it was still not okay for an adult to do that with a child. She said the complainant was really upset and kept saying she did not want her mother to be mad at her for not telling the secret sooner.

[33] The complainant's mother asked the complainant where the mother had been when she played this game with the appellant. The complainant replied it would happen when the mother was not home. The complainant said it had happened at least eight times. The complainant's mother said the complainant did not want the appellant to be in trouble, but she arranged for the matter to be reported to police.

[34] The complainant's mother said she did own a vibrator. She identified it as the vibrator shown in the photograph.[10] Half of that vibrator was purple and the other half was white. It was in the family home between August 2015 and January 2018. The complainant's mother said she had never shown that vibrator to the complainant.

[35] The complainant's mother said whilst she lived with the appellant, she mainly looked after her children, but she and the appellant helped each other out. Once every month or every second month he would watch the children, whilst she went out for the evening. There were other occasions when she would go to the supermarket and he would stay with the children, or she would go for a run. Once or twice, the appellant had them for full overnights, whilst she was away. More often it would be that she would go out for dinner or to see a show with friends "from five in the afternoon until 10 at night".[11]

[36] In cross-examination, the complainant's mother said the complainant's bedtime, in 2015, was around 7 pm. She accepted that her review of her diary entries had identified ten occasions, between August 2015 and January 2018, when she had been out and the appellant had looked after the children. She could not recall whether the children were in bed when she returned home, although on some of those occasions she did not get home until around midnight, so she expects they would have been in bed. The complainant's mother said there were other occasions when she might have gone for a run or to see her mother. She would go and see her mother after the children were in bed, as she lived a five-minute drive away.

[37] The complainant's mother accepted that in her statement to police and her evidence at the committal hearing, she did not mention the complainant getting upset during the conversation in the shower. The complainant's mother also accepted that sometimes she discussed with the complainant why she did not like the appellant. She agreed she told the complainant she really disliked the appellant.

[38] The complainant's mother said the complainant was talking about some peer pressure at school. The complainant's mother raised that she had been talking to her "talkie

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10 Exhibit 13.
11 T1-21/15.

person" – the term she and the complainant used for her psychologist – that day about the relationship with the appellant. The complainant's mother said she had stayed in the relationship longer than she should have, because she was worried what people would think. The complainant's mother accepted there was nothing secret about that conversation, and that it was a misuse of the word for the complainant to say it was secret. The complainant's mother said she corrected it straight away and said, "No, it's not a secret, it's just a bit personal."[12] She agreed she went on to state that the family had a "big saying we don't have any secrets in our family".[13] It was in that context that the complainant told her about the secret with the appellant.

[39] The complainant's mother accepted that the complainant did not say that the appellant had put the "buzzy thing" on her vagina or near her vagina. She accepted she was shocked at what she heard and that she thought, from what it sounded, that the appellant had used a vibrator. The complainant's mother agreed that prior to that discussion in the shower, the complainant had never mentioned to her that she had a secret with the appellant.

[40] The complainant's mother agreed that on 24 February 2020 she had attended the police station, where she was asked by police to contact the appellant on his mobile phone. She was unsuccessful. She sent the appellant a text message. She agreed she did not tell the appellant she was at the police station wanting to talk to him about the complainant's allegations. Later that night, she spoke to him. She recorded the call and gave the police the recording.

[41] The complainant's mother also agreed that when the complainant indicated the area where the appellant had placed the vibrator, she gestured in a circular motion to the area between her navel and her groin.

[42] The appellant gave evidence that he had been in a relationship with the complainant's mother, between February 2014 and January 2018. During that period, he was working five days a week in Brisbane as a consultant, although in 2016 he worked in Canberra from Tuesday to Thursday each week. The complainant's mother was working three days a week.

[43] The appellant said the complainant's mother would go for runs when they were living together. He could not remember an occasion when she did so after dark or at or around the children's bedtime. He said the complainant's mother frequently visited her mother. He could not recall an occasion where she visited her mother after the children were in bed.

[44] The appellant accepted that, on rare occasions, he would have put the complainant to bed. He estimated it would have been five or six occasions. He denied ever owning another vibrator whilst living with the complainant's mother and denied ever using a vibrator on the complainant.

[45] The appellant said he first found out about such a suggestion in February 2020, when he received a late night telephone call from the complainant's mother. It was after midnight. He was not aware that call was recorded by the complainant's mother.

[46] In cross-examination, the appellant accepted that for most of the time between mid-2015 and early 2018, he was living with the complainant's mother and her

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12 T1-32/30.
13 T1-32/40.

children. It was their family home. His own children lived there intermittently. He accepted the complainant would have been six years of age when they first moved into that house. The appellant said he very rarely watched the children when the complainant's mother was out, but accepted during those times he was responsible for the children's care. Some of those times were when the complainant's mother was out seeing friends or socialising, and there was one occasion when the complainant's mother went to Melbourne on a work trip overnight.

[47] The appellant accepted that during the period he was living with the complainant's mother, he developed a relationship with her children. There were times when he would speak to the complainant in her bedroom, if it involved putting the children to bed. He denied having a sexual attraction to the complainant. He denied using a vibrator to touch her on five to 10 occasions.

Consideration

Ground 1

[48] The appellant sought to adduce evidence, through cross-examination of the complainant's mother, as to his reaction when the allegations were put to him for the first time. It was accepted that his words of denial were self-serving and inadmissible, but it was submitted his reaction of "surprise, disbelief, shock and fear" was consistent with innocence and, therefore, exculpatory evidence.

[49] The trial judge ruled that even if it be accepted that those adjectives properly described the appellant's reaction on the pretext call, the evidence of his reaction was not probative of anything and was inadmissible.

[50] The appellant submits that the trial judge erred in ruling that cross-examination of the complainant's mother, as to the appellant's reaction in the late night pretext call, was inadmissible. The appellant submits that although the content of the call was entirely exculpatory, an exculpatory response demonstrative of "surprise, disbelief, shock or even horror", is admissible as direct evidence of that reaction. The appellant submits that that conclusion is consistent with the observations of McMurdo P in *R v MBV*.[14]

[51] The appellant accepts there is binding authority contrary to that proposition.[15] The appellant submits those decisions should be reconsidered, in light of a divergent approach elsewhere to the admissibility of a wholly exculpatory and spontaneous reaction to an allegation put to the accused for the first time.[16]

[52] In support of this submission, the appellant relies particularly on a passage endorsed by the plurality of the High Court in *Nguyen v The Queen*,[17] that otherwise:

> "…the jury would be left to speculate as to whether the accused had given any account of their actions when first challenged by the police."

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14 (2013) 227 A Crim R 49; [2013] QCA 17 at [18], [20].

15 *R v Callaghan* [1994] 2 Qd R 300; [1993] QCA 419; *R v SCD* [2013] QCA 352; *R v MCI* [2016] QCA 312.

16 *R v Storey* (1968) 52 Cr App R 334; *R v Donaldson* (1977) 64 Cr App R 59; *R v Pearce* (1979) 69 Cr App R 365; *R v McCarthy* (1980) 71 Cr App R 142; *R v Tooke* (1990) Cr App R 417; *R v Astill* (1992) 63 A Crim R 148; *R v Reeves* (1992) 29 NSWLR 109; *R v Familic* (1994) 75 A Crim R 229; *R v Rymer* (2005) 156 A Crim R 84; *R v Su & Ors* [1997] 1 VR 1; *R v Pidoto* [2002] VSCA 60; *R v Rudd* [2009] 23 VR 444; [2009] VSCA 213.

17 (2020) 269 CLR 299; [2020] HCA 23 at [31].

[53] The observations in *Nguyen* must be viewed in their context. That context was a consideration of the prosecutorial obligation to present all available, cogent and admissible evidence, where there was admissible evidence available to the prosecution of out-of-court statements of an accused that contained both inculpating and exculpating material.

[54] Contrary to that circumstance, evidence of an accused's reaction to being confronted with allegations for the first time, absent that reaction containing statements that are both inculpating and exculpating, is wholly self-serving material. Such material is wholly exculpatory, is probative of nothing in issue, and is properly not admissible.

[55] In both *Callaghan* and *SCD*, this Court consistently held that wholly exculpatory evidence of the nature under consideration is not admissible. Nothing in the authorities referred to in the other jurisdictions causes me to doubt the correctness of those reasoned decisions.

[56] The observations by McMurdo P in *R v MBV* were made in relation to statements made by the accused which the Crown had suggested should be regarded as demonstrating a consciousness of guilt. When her Honour remarked that a reaction which had conveyed "surprise, disbelief, shock or even horror" could have been admissible exculpatory evidence, she should be understood to have conveyed nothing more than it would have been admissible as tending to negate the Crown's suggestion that the statements demonstrated a consciousness of guilt.

[57] Nothing in those observations compels a conclusion that the decisions in *Callaghan* and *SCD* were decided wrongly. No basis has been advanced which would enable this Court to regard itself as free to depart from those decisions.[18]

[58] There was no error in the trial judge's ruling that evidence of the appellant's reaction, when first confronted with the allegation, was inadmissible.

Ground 2

[59] The appellant submits that the verdicts of guilty of both counts 1 and 2 are unreasonable or cannot be supported by the evidence, because it was not open to the jury to be satisfied, on the basis of the complainant's evidence, of the appellant's guilt, beyond reasonable doubt.

[60] In determining whether a verdict is unreasonable, this Court must undertake its own independent assessment of the evidence as a whole. If, having done so, this Court is satisfied that by reason of inconsistencies, discrepancies, other inadequacies, or in light of other evidence, the jury, acting rationally, ought to have entertained a reasonable doubt as to the appellant's guilt, the verdict is to be set aside as unreasonable.[19]

[61] In the present case, the jury could only have been satisfied of the appellant's guilt of each count, beyond reasonable doubt, if the jury was satisfied beyond reasonable doubt that the complainant's evidence, that the appellant had used the vibrator on her vagina between five and 10 times, was both credible and reliable.

[62] The appellant submits there were striking inconsistencies in that evidence, rendering the complainant's evidence lacking in the requisite credibility and reliability. Those

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18 *Lynch v Commissioner of Police* [2022] QCA 166 at [60], [62].
19 *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12 at [39].

inconsistences included as to the placement and description of the vibrator, as to who initiated each occasion and as to the number of times it had taken place. It is submitted these inconsistencies grew more stark, having regard to the extremely vague nature of the complainant's evidence as to each occasion.

[63] A consideration of the complainant's evidence, in the context of the record as a whole, supports a conclusion that it was open to the jury to be satisfied beyond reasonable doubt that the complainant's evidence, that the appellant had used a vibrator on her vagina on five to 10 occasions, was both credible and reliable.

[64] The so-called inconsistencies as to the placement and description of the device are properly to be viewed in the context of the complainant's age and the fact that exhibit 13 did not necessarily represent an image of the vibrator that had been used by the appellant. Any inconsistencies were explicable by reason of the complainant's youth and the effluxion of time since the last occasion that the vibrator had been used on her vagina, rather than suggestive of a lack of credibility and reliability in her evidence of the use of the vibrator on her vagina on five to 10 occasions.

[65] Further, it was open to the jury to find that the credibility and reliability of the complainant's evidence was enhanced by her admission that subsequent to the first occasion, she had asked the appellant to use the vibrator on her vagina, because it "felt nice". There was a consistency in that admission by the complainant and in her discussions with her mother, in particular, her question to her mother as to whether it was wrong when she had asked the appellant to use the vibrator. That consistency was also enhanced in her estimate to her mother that the appellant had used the vibrator on her vagina on approximately eight occasions.

Ground 3

[66] The appellant submits, in the alternative, that the appellant's guilt of count 1 was unsupported by the evidence, as an element of a maintaining count requires proof beyond reasonable doubt as to sufficient continuity or habituality to justify an inference that the appellant "maintained" the sexual relationship with the child.[20] It is submitted that proof of that element requires more than random or opportunistic acts of offending. The element is premised upon a course of conduct characteristic of such a relationship.[21]

[67] Whilst the complainant gave evidence that the vibrator was used only "for a shortish period" and "kind of rarely when mum was out", the complainant gave consistent evidence that the vibrator was used by the appellant, on her vagina, between five and 10 times over a period of at least some months. Further, it was the appellant who introduced the complainant to the specific sexual conduct, and did so asking whether it felt good and having required the complainant to promise not to tell her mother.

[68] The use of a vibrator on the complainant's vagina, on five to 10 occasions, over a relatively short period of time, when there were limited opportunities to do so, having regard to the limited occasions on which the complainant was alone in the appellant's care, was evidence of sufficient habituality as to render it open to the jury to be satisfied beyond reasonable doubt of the offence of maintaining.

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20 *R v Kemp (No 2)* [1998] 2 Qd R 510; *R v DAT* [2009] QCA 181; *R v CAZ* [2012] 1 Qd R 440, 457; *R v SCE* [2014] QCA 48 at [5], [20]-[21].

21 *R v Kemp (No 2)* [1998] 2 Qd R 510, 511, 518-9.

Ground 4

[69] The appellant submits that where the sole evidence on which the appellant's conviction rests is a single complainant's account, the jury, in order to convict the appellant of each count, had to be satisfied of the truth and accuracy of that account beyond reasonable doubt. There was an obligation on the trial judge to direct the jury to that effect. No such direction was given and the jury would not necessarily have inferred the application of that burden of proof to the complainant's account from the directions that were given to them. Accordingly, the appellant was denied a fair chance of acquittal.

[70] In the present case, the only evidence capable of supporting the appellant's guilt, beyond reasonable doubt, of either count was the complainant's evidence. Accordingly, in order to convict the appellant of either count, the jury had to accept, beyond reasonable doubt, the reliability and credibility of the complainant's account, that the appellant had, on five to 10 occasions, used a vibrator on her vagina.

[71] Whilst the jury was directed that the complainant was the most important witness in the prosecution case, and that the case "rests on her and her account of what happened"[22] and, was later directed that they may only convict the appellant if "[the complainant] is telling the truth about these things, about what he did to her,"[23] the jury was not directed that they must be satisfied of the truth and accuracy of that account beyond reasonable doubt.

[72] In a prosecution case where the complainant was vague in her description of individual occasions, and there were potential inconsistencies in the description of the device and the circumstances in which it had been used, it was the obligation of the trial judge to give a specific direction to the jury of the need for satisfaction of the truth and accuracy of the complainant's account, beyond reasonable doubt.

[73] The failure to do so, in the present case, assumes a particular significance, as in the course of the summing up the jury was directed that they need not be satisfied of the accuracy of every allegation made by a witness;[24] that it was a matter for them whether and what parts of the evidence they might accept or reject;[25] and there was but a general discussion about the assessment of witnesses in the case, albeit, in the context of an acknowledgement that the complainant was the most important witness.[26]

[74] The failure to give the requisite direction, in those circumstances, did deprive the appellant of a fair chance of acquittal. There was a miscarriage of justice.

Ground 5

[75] The appellant submits that although the trial judge correctly directed the jury that the case on count 1 was premised on proof, beyond reasonable doubt, of count 2, as well as an acceptance of the complainant's evidence that that conduct was repeated with sufficient habituality to reflect a relationship, the jury was not directed to consider each count separately. It is submitted that the failure to do so deprived the appellant

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22 AB56/17.
23 AB57/25.
24 AB50/6.
25 AB54/33-36; AB55/14-26.
26 AB56/8-18.

of a fair chance of acquittal, as the same verdict was not inevitable even if the jury was satisfied of the appellant's guilt of count 2, beyond reasonable doubt.

[76] Whilst the trial judge did not direct the jury that it must consider each count separately, the trial judge specifically directed the jury that if they were not satisfied of the appellant's guilt on count 2, beyond reasonable doubt, they would have a reasonable doubt in respect of count 1. Further, the jury was specifically directed that if they did find the appellant guilty of count 2, they were not to automatically convict of count 1, it being necessary to "consider whether there were other times and whether those times had the flavour of a continuing relationship."[27]

[77] Those specific directions, in the context of the summing up as a whole, support a conclusion that there was no real risk that the jury misunderstood its obligation to consider each count separately.

[78] The failure to explicitly direct the jury to consider each count separately did not deprive the appellant of a fair chance of acquittal.

Conclusions

[79] The appellant has established that the failure to direct the jury as to the need to be satisfied of the reliability and credibility of the complainant's account, beyond reasonable doubt, deprived him of the fair chance of an acquittal.

[80] The convictions must be set aside.

Orders

[81] I would order:

1. The appeal be allowed.
2. The convictions on each of counts 1 and 2 be set aside.
3. There be a retrial on counts 1 and 2.

[82] **BRADLEY J:** I have had the benefit of reading the reasons for judgment of Boddice AJA. They set out fulsomely and accurately the background to this appeal, the counts on the indictment, and the evidence at the trial.

[83] I agree with his Honour's conclusions concerning grounds of appeal 1, 2, 3, and 5. I respectfully disagree with his Honour's conclusion concerning ground 4. These reasons address only ground 4.

Ground 4

[84] As is clear from the reasons of Boddice AJA, the sole evidence on which the appellant's convictions rest is the complainant's account. To convict the appellant of count 2, the jury had to be satisfied beyond reasonable doubt of the truth and accuracy of the complainant's account of the appellant touching her on the alleged first occasion. To convict him of count 1, the jury had to be so satisfied of the complainant's account that he repeated that conduct on five to ten occasions. The trial judge was obliged to direct the jury to that effect.

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27 AB52/17.

[85] The appellant submits that no such direction was given. The appellant says the "closest" was the direction given about a motive to lie suggested by the appellant's defence.

[86] The appellant also submits that "the jury would not necessarily have inferred the application of the burden of proof" beyond reasonable doubt to "the task of assessing the complainant's evidence." The appellant says this submission is "fortified" by two directions given by the trial judge to assist the jury in their assessment of the evidence. The two directions are said to be: that the jury need not be satisfied of the accuracy of every allegation made by a witness; and that it is for the members of the jury to decide whether and what parts of the evidence they might accept or reject.

[87] The appellant also says this submission is strengthened because, he says, her Honour dealt with the assessment of the complainant's evidence "in general terms applicable to *all* witnesses in the case"

[88] The appellant also submits that the trial judge did not refer to "the degree of reliability, or level of satisfaction, demanded by the burden of proof" in respect of the complainant's evidence. In support of this contention, the appellant cites the following passage from this Court's decision in *R v Pollard*:

> "The long experience of judges and lawyers who practise criminal law, an experience that jurors cannot be expected to possess, teaches that there are recurring factors in the cases that can render testimony suspect. When factors exist in a case that affect the reliability of evidence, whether for reasons to do with the possible dishonesty of a witness or for reasons to do with sheer reliability, it is the duty of the judge to give the jury the benefit of judicial experience by instructing a jury about the known risks."[28]

[89] Despite this citation, the appellant does not pursue this ground of appeal on the basis that there were factors in the case or inherent dangers in the complainant's evidence that the jury might not appreciate, without some warning.[29] This ground 4 is confined to a complaint that her Honour failed to direct the jury that they had to be satisfied beyond reasonable doubt of the truth and accuracy of the complainant's account of the appellant touching her as alleged on the alleged first occasion, to convict him on count 2, and that he repeated that conduct on five to ten occasions, to convict him on count 1.

The summing up by the trial judge

[90] The complainant and the appellant were the only witnesses to give evidence about whether the alleged offences were committed. The complainant gave the evidence on which the prosecution case was made. The appellant denied that he had ever touched the complainant in the way she described.

[91] The complainant's mother was the only other witness. She gave evidence about what the complainant said to her about the alleged offending conduct. The trial judge directed the jury that this was "not evidence of what [the appellant] did to [the complainant]" and that "the only relevance of what [the complainant] told her

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28 [2020] QCA 188, [28] (Sofronoff P).

29 *R v VM* [2022] QCA 88, [36] (Sofronoff P).

mother" was to "your assessment of [the complainant's] credibility."[30] No point is taken about these directions in this appeal.

[92] Early in the summing up, the trial judge directed the jury about the burden of proof, including in these words:

> "To prove guilt the Prosecution must prove it beyond reasonable doubt. That means to convict you must be satisfied beyond reasonable doubt of every legal ingredient that constitutes the offence. And beyond reasonable doubt is … the highest standard known to the law… [I]n a criminal trial, in this trial, it is satisfaction beyond reasonable doubt that is required.
>
> … If you are left with a reasonable doubt about any one of the elements for a charge, then your duty is to acquit [the appellant]. … And when I say to you that you must be satisfied of the elements or that … they must be proved, you can take it that what I mean is satisfaction or proof beyond reasonable doubt because that is the standard on the Prosecution. Proof of the elements beyond reasonable doubt. <u>You do not need to solve every mystery in the trial, you do not need to be satisfied of the accuracy of every allegation made by the witnesses.</u> It is the elements of the offence that must be proved beyond reasonable doubt for a conviction."[31]

[93] The appellant relies on the underlined sentence in the extract above as the first of two directions that fortify his submission that the jury would not necessarily have inferred they needed to be satisfied beyond reasonable doubt of the complainant's evidence.

[94] The trial judge then identified the five elements of count 2 (indecent dealing with a child under 12 under care). Her Honour told the jury that four elements were not in issue at the trial.[32] No issue is raised on appeal in this respect. Her Honour then said:

> "So just to recap, you must be satisfied beyond reasonable doubt of all five elements. But the central issue in this trial is whether [the appellant] touched [the complainant's] vaginal area with an object. And you might think that if you are satisfied beyond reasonable doubt of that, the other elements fall into place. But that is the critical question before you, you might think, did the accused do this."[33]

[95] Next, the trial judge identified the elements of count 1 (maintaining a sexual relationship with a child). Two of these were plainly not contentious: that the appellant was an adult; and that the complainant was a child. The matter in issue was whether the appellant maintained an unlawful sexual relationship with the complainant. Her Honour explained to the jury the meaning of "unlawful sexual relationship" and the meaning of "maintained". Her Honour then said:

> "All of you must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with [the

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30 AB57/29-35.

31 AB49/35-AB50/7.

32 AB50/27-41. It was common ground that the complainant was under 12 and, if the appellant was babysitting her, she was under his care. Nor was it in issue, if the alleged touching occurred, it was indecent and that there was no lawful excuse, justification or authorisation for it.

33 AB50/41-46.

> complainant] involving sexual acts existed. It is not necessary that all of you be satisfied about the same unlawful sexual acts, but you must be satisfied that there was an unlawful sexual relationship involving multiple unlawful sexual acts, and that it was maintained, that it was carried on."[34]

[96] The trial judge then explained to the jury the possible interaction between their consideration of the evidence of counts 1 and 2. Her Honour said:

> "If you are satisfied beyond reasonable doubt of count 2, the indecent dealing charge, which is particularised as the first – which is relied on as the first time this has – this happened – if you are satisfied beyond reasonable doubt that that happened and that that offence was committed, the sexual act in count 2, that is the first time it happened, [it] will then be used in your consideration of the maintaining charge in count 1. I will just say that again. You can use count 2 in your consideration of whether or not there was an unlawful sexual relationship which was maintained.
>
> As well as relying on that specific first time … in count 2, the Prosecution also relies upon the child's evidence that the incident was repeated, that it was not isolated. …
>
> So in considering count 1, you take into account count 2. … If count 2, the first act, is proved, the question for you then is was it repeated. Do you believe … evidence that it happened on other times as well. Do you accept her general evidence about that. If you have a doubt about count 2, it is still theoretically possible to convict of the relationship charge on the basis of her more general evidence about it happening on other times, but logically if you did not believe her on count 2, you would probably have doubts about her general allegations. Or in fact I will change that. If you do not believe there was a first time, then you could not accept – you clearly would not accept that there was a relationship – any basis for a relationship at all.
>
> But if you had a reasonable doubt about count 2, it seems almost inevitable that you would have to have a reasonable doubt about count 1 …"[35]

[97] Then, in the absence of the jury, the trial judge had some exchanges with counsel about this direction which had been given to the jury. When the jury returned, her Honour continued:

> "Ladies and gentlemen, if I can pick up where I left off. If you have a reasonable doubt about count 2, theoretically it might be possible that you could convict on the basis of the general allegations. But in truth, because count 2 is particularised as the first time it happened, if you had a reasonable doubt that there was a first time, you would have to have a reasonable doubt that it happened at all. And so in those circumstances I say I you have a reasonable doubt about count 2, then that is likely that – sorry, that you could not convict of the maintaining

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34 AB51/18-23.

35 AB51/25-35; AB51/44-AB52/10.

> charge. If you had a reasonable doubt about the general allegations, then that is something that you should take into account when assessing [the complainant's] credibility generally. So ultimately – her credibility in relation to count 1. But ultimately it is up to you as to what evidence you accept, and what evidence you reject."[36]

[98] The underlined last sentence above is the second of the directions the appellant says fortify his submission that the jury would not necessarily have inferred they needed to be satisfied beyond reasonable doubt of the complainant's evidence.

[99] Her Honour then reminded the jury that the appellant gave evidence and denied that he had ever touched the complainant in the way she alleged. Her Honour then said:

> "His decision to go into the witness box did not change the burden on the Prosecution. And that is because a defendant does not have to prove his version is true. The Prosecution has to prove to you that it could not reasonably be true. …
>
> It is for the Prosecution to prove that [the appellant] committed the offence, and it is upon the whole of the evidence that you must be so satisfied beyond reasonable doubt. After considering all the evidence for a charge, that is the evidence of [the complainant], the mother, … and [the appellant], if you, having considered all of that evidence before you, if you believe [the appellant] when he swore he did not do it, then you must acquit him. If you, after considering all the evidence, do not positively accept him but think it might be true, you should acquit him. You must acquit him. If you do not believe [the appellant], put his evidence aside. Because, even if you find him unreliable or even if you find him untruthful, that is not evidence of his guilt. The question is does the evidence before you that you do accept prove guilt."[37]

[100] The trial judge then gave the jury the usual directions about assessing evidence, including the need to look at "both honesty and accuracy or reliability".[38] Her Honour drew the jury's attention to the complainant's evidence, noting that her age may be relevant as "[s]he was only 10 when she spoke to police in the first recording, and she was speaking about a time when she was younger, perhaps seven or eight" and "the second part of her evidence was some two years later when she was 12."[39]

[101] In this part of the summing up, her Honour told the jury:

> "In the Prosecution case [the complainant] is clearly the most important witness because the case rests on her and her account of what happened. So you might consider what impression did she leave on you. Did you find her to be an unreliable witness or an untruthful witness or did you think that she was recalling events from her actual memory. How did her evidence sit with other evidence that you found to be reliable. Similarly, there is a similar process in relation to all of the witnesses, so in relation to [the appellant] for example, what was your assessment of him."[40]

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36 AB54/26-36.
37 AB54/41-44; AB55/2-12.
38 AB55/16.
39 AB55/31-34.
40 AB56/11-18.

[102] The appellant relies on the underlined part of the extract above, as "fortifying" the submission that the jury would not necessarily have inferred that the prosecution had to satisfy them beyond reasonable doubt that the complainant's evidence was true about the alleged first indecent dealing and the alleged repetition of the conduct.

[103] The trial judge then turned to specific directions. The first specific direction was about the significant forensic disadvantage to the appellant caused by delay. No point is raised about it in this appeal.

[104] The second of the specific directions was about the complainant's motive to lie:

> "Next I want to talk to you about the issue of motive; motive to make up a story against [the appellant]. That arises because in cross-examination Mr Eberhardt suggested that the complainant had made it up to get her mother's attention or to please … the mother. And [the complainant] denied that. She denied those propositions. … Obviously, if [the complainant] had a motive to make up a story, then that is something that you would take into account. But … if you reject that theory by the Defence, it is not evidence of guilt. The absence of motive apparent on the evidence is not evidence of guilt because there may well be a motive – if someone is telling a lie there may be reason that was unknown to the [appellant]. And so for that reason, the absence of evidence of motive to make up a story against the [appellant] is neutral. By that I mean it takes you nowhere. <u>You still have need to consider whether [the complainant's] evidence was truthful and you may only convict [the appellant] if you are satisfied that [the complainant] is telling the truth about these things, about what he did to her.</u>"[41]

[105] The appellant refers to the underlined part of this direction, in submitting that "the direction did not refer to the degree of reliability, or level of satisfaction, demanded by the burden of proof."

[106] The trial judge summed up from 2.38 pm to 3.01 pm, from 3.07 pm to 3.31 pm, and from 3.50 pm to 4.11 pm, a total of one hour and eight minutes. All her Honour's directions referred to above were given to the jury in either the first 23 minutes or the second 24 minutes of the summing up. The final 21-minute period was occupied by reading some parts of the evidence to the jury, summarising other parts, and summarising the addresses of counsel. At 4.11 pm, the jury retired to consider their verdicts. They were allowed to go home at 5.05 pm.

[107] The following morning, the jury asked to see the recorded evidence of the complainant again "with the sound up".[42] Before playing the pre-recorded evidence to the jury, the trial judge directed the jury that they were to decide the case on the whole of the evidence. Her Honour told the jury that while the complainant was "obviously" the most important witness as "the Crown case rests on her, in effect", they "need[ed] to not forget about the other evidence in the trial … including the evidence from the [appellant], his denials and his evidence that he had limited opportunity" to commit the alleged offences.[43]

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41 AB57/19-26.
42 AB70/8.
43 AB71/9-12.

Consideration of the appellant's submissions on ground 4

[108] In my respectful view, when the summing up is read as a whole, the trial judge did direct the jury that they must be satisfied beyond reasonable doubt of the truth and accuracy of the complainant's account that the appellant touched her in the way she described, and that the appellant repeated the same conduct over the following period. Her Honour's summing up could have left the jury in no doubt that they had to be satisfied beyond reasonable doubt of that on the complainant's evidence.

[109] This conclusion also accords with the views expressed (on summing up on the different subject matter of uncharged acts) in *HML v The Queen*[44] by Hayne J,[45] Heydon J,[46] and Crennan J.[47]

[110] The trial judge's relatively short, clear, and repeated directions could not have left the members of the jury in any doubt that in assessing the complainant's evidence it was necessary for them to be satisfied beyond reasonable doubt before they could use her evidence as proof of a central or critical element of either count with which the appellant was charged.

[111] The two directions identified by the appellant[48] do not fortify the principal ground 4 submission. Set out in paragraph [92] above, the first "direction" was immediately preceded by a statement that the jury must be satisfied there is "[p]roof of the elements beyond reasonable doubt" and followed immediately by the statement that "[i]t is the elements of the offence that must be proved beyond reasonable doubt for a conviction." The second, set out at paragraph [97] above, occurred in a passage where the trial judge reminded the jury that, if they had a reasonable doubt about the complainant's evidence on either count, it would affect the credibility of her evidence on the other count. In doing so, her Honour used the expression "reasonable doubt" five times. In their immediate context, and in the context of the summing up as a whole, neither "direction" could have interfered with the jury's understanding that they needed to be satisfied beyond reasonable doubt of the truthfulness and accuracy of the complainant's evidence that the appellant touched her vagina with an object and that such conduct was repeated over the relevant period.

[112] The trial judge identified the central and critical importance of the complainant's evidence for the jury. Her Honour dealt with the complainant's evidence first, given its importance, before telling the jury they could apply the same approach to the evidence of each of the other witnesses. Her Honour directed the jury separately about the limited effect of rejection of the appellant's evidence. Her Honour also directed about the confined use the jury could make of the complainant's mother's evidence. The jury's understanding of the burden and standard of proof to be applied to the complainant's evidence could not have been adversely affected by the trial judge's directions about the assessment of evidence.

[113] In context, her Honour's use of an appropriate direction – about an asserted motive for the complainant to lie – did not detract from the clear directions about burden of

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44 (2008) 235 CLR 334.

45 Ibid 405 [194].

46 Ibid 452-453 [339], 464 [376], 471 [395].

47 Ibid 473 [406], 490 [479], 491 [483].

48 These were that the jury need not be satisfied of the accuracy of every allegation made by a witness; and that it was for the members of the jury to decide whether and what parts of the evidence they might accept or reject.

proof and the standard of proof. Nor did it detract from the clear direction about the importance of the complainant's evidence to the proof of the disputed elements of each of the charges beyond reasonable doubt. It was not necessary for the trial judge, in giving this direction, to refer to the degree of reliability or level of satisfaction demanded by the burden of proof with respect to the complainant's evidence. This part of her Honour's direction followed the general form and the language that Muir JA described as appropriate for a trial judge to direct in *R v Van Der Zyden*.[49] Such a direction has been substantially adopted as a model direction within the Supreme and District Court Benchbook and endorsed for use in appropriate circumstances when a motive to lie is advanced by the defence and contested by the prosecution.[50]

[114] In the circumstances, the appellant was not deprived of a fair chance of acquittal in the way asserted.

[115] The appellant was ably represented at the trial. No redirection was sought to remind the jury that it was necessary for them to satisfy themselves beyond reasonable doubt of the truthfulness and accuracy of complainant's evidence. None was necessary.

Disposition of the appeal

[116] Given the view I have reached on ground 4 and adopting the reasons of Boddice AJA on the other grounds, I would dismiss the appeal.

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49 [2012] 2 Qd R 568, 578-579 [32].

50 *R v Coss* [2016] QCA 44, [13]; *R v Muniz* [2016] QCA 210, [20]; *R v HBN* [2016] QCA 341, [29].