SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brock* [2018] QCA 185
PARTIES:	**R** **v** **BROCK, Robert John** (appellant/applicant)
FILE NO/S:	CA No 245 of 2017 DC No 334 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 10 October 2017 (Porter QC DCJ)
DELIVERED ON:	7 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2018
JUDGES:	Sofronoff P and Morrison JA and Brown J
ORDERS:	**1. The appeal against conviction is allowed.** **2. The convictions are set aside.** **3. The sentences imposed on 19 October 2017 are set aside.** **4. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant/applicant was convicted after a trial of three counts of indecent treatment of a child under the age of 14 years – where the alleged incidents occurred between 1982 and 1985 in the context of a "Big Brother" program run by the Catholic Church – where it was submitted on behalf of the appellant/applicant that both the complainant and his mother were unreliable witnesses – where the preliminary complaint evidence was ambiguous due to conflicting accounts – where the passage of time was significant – where the complainant had suffered from alcohol and medical issues, including periods of blacking out – where the Crown submitted that any inadequacies or discrepancies did not taint the probative force of the evidence – whether the verdict was unreasonable or insupportable having regard to the evidence EVIDENCE – ADMISSIBILITY – ADMISSIONS – WHAT CONSTITUTES – STATEMENT – where evidence was

given that after the complainant had told his mother of the alleged incidents, she wrote a letter of complaint to the organisation – three or four weeks after that letter was sent, the mother gave evidence that the appellant/applicant arrived at her front door and said, "I thought you would have wanted me to do that" – where the mother assumed he was talking about the sexual assaults – where during the trial the statement was continually referred to as an "admission" and a "confession" – where on appeal, the question arose as to whether what was said by the appellant could have amounted to an admission of guilt at all – whether the evidence as to the alleged confession was admissible

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Caulfield [2012] QCA 204, cited
R v Mazza [2017] QCA 136, cited
R v Murray [2016] QCA 342, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: A J Kimmins for the appellant/applicant
D C Boyle for the respondent

SOLICITORS: Bosscher Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and the orders his Honour proposes.

[2] **MORRISON JA:** The appellant was convicted after a trial of three counts of indecent treatment of a child under the age of 14 years. The alleged incidents occurred between August 1982 and April 1985 in the context of a program in which the appellant and the complainant participated, known as the "Big Brother – Little Brother Project". That program, run by the Catholic Welfare Bureau, was designed to give young boys a one-to-one friendship with a mature adult man, so that each boy would effectively have a father figure in his life.

[3] The complainant was about 11 or 12 when he was partnered with the appellant under that program. The program entailed meetings between them over a period of time, and joint participation in various activities.

[4] The three counts of indecent treatment occurred during the joint sessions under the program and consisted of touching or fondling of the complainant's penis through his shorts and on one occasion masturbation of the complainant.

[5] The appellant was sentenced to concurrent periods of imprisonment,[1] to be suspended after serving three months, for an operational period of 18 months.

[6] The grounds of appeal are that:

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[1] Count 1, six months; count 2, 12 months; and count 3, 15 months.

(a) the verdict was unreasonable or cannot be supported having regard to the whole of the evidence;

(b) the learned trial judge erred, with respect to the use that could be made of an alleged confession, in failing to adequately warn and direct the jury:

(i) that the confession could only be relied upon if the jury was satisfied beyond reasonable doubt that it was made and was true;

(ii) whether the alleged confession applied to the individual counts on the indictment as opposed to generalised sexual abuse; and

(iii) in accordance with a Longman style direction; and

(c) the jury had access to extraneous material during the course of their deliberations.

[7] Leave to appeal is also sought in respect of the sentence imposed, on the grounds that it is manifestly excessive to require the appellant to serve any period of custody.

[8] For reasons which follow the appeal must be allowed, the convictions set aside and a re-trial ordered.

The alleged confession

[9] Evidence was given by the complainant's mother that in late 2004 the complainant told her that he did not wish to continue in the program with the appellant, saying that the appellant had been "playing with my penis".[2]

[10] The mother said that she did not make contact with the appellant as a result of what she had been told. Instead, she rang the church and the Catholic Welfare Bureau, but "didn't get anywhere".[3] She said she had got into an angry state and "sat down and wrote a very long letter" in which she "described … that I was very, very disappointed and … I felt let down and that … we did not want his visits anymore and … they were to be cancelled".[4]

[11] As to what she wrote in the letter the mother's evidence was in two parts. The first was this passage in evidence in chief:

> "And can you say whether or not you put in the letter those words that [the complainant] had told you had happened to him, that [the appellant] had been playing with his penis? --- I can't remember. I can't remember whether I said he'd been fiddling or whether I did actually say that. I really can't remember because I was rather stressed and angry and … I was really, really shocked. I was in shock."[5]

[12] The second was in cross-examination where she said she wrote a letter of complaint notifying withdrawal from the program:

> "Only … not in those words but 'I am very disappointed with this movement and this church and this is what has happened so we do not want – we don't want to be part of this' but I cannot tell you the exact words that I used."[6]

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2 Appeal Book (**AB**) 142 lines 40-46.
3 AB 143 line 38.
4 AB 143 lines 40-47.
5 AB 144 lines 1-5.
6 AB 156 lines 7-12.

[13] The mother had not retained a copy of the letter she sent and no copy existed in the Catholic Welfare Bureau records. Nor could any witness from the program recall any allegations of sexual abuse.

[14] The mother said that about three or four weeks after the letter was sent the appellant arrived at her front door. Her evidence was:

> "… when I opened the door he was standing there and, in shock, I said, 'What are you doing – what are you doing here?' And … he sort of stood side on and said, 'I thought you would have wanted me to do that.' And I … banged the door like I've never banged a door before and walked inside."[7]

[15] Her evidence was that that was the totality of the exchange. She said she assumed that he was talking about the sexual assaults, but did not raise the words "sexual assaults" with him.[8]

Ground 1 – unreasonable verdict

[16] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[9] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact. *SKA* adopted a passage from *M v The Queen*,[10] which said:[11]

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

[17] In *M v The Queen* the High Court said:[12]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has

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7 AB 144 lines 10-13.
8 AB 157 lines 6-9.
9 (2011) 243 CLR 400, [2011] HCA 13 at [20]-[22] per French CJ, Gummow and Kiefel JJ.
10 (1994) 181 CLR 487; [1994] HCA 63.
11 *SKA* at 406; *M v The Queen* at 492-493.
12 *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[18] More recently the High Court has restated the pre-eminence of the jury and the role of a criminal appellate court, in *R v Baden-Clay*:[13]

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact.' Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
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> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[19] As was said recently in *R v Mazza*:[14]

> "The starting point is that the jury is the body entrusted with primary responsibility for determining guilt or innocence, they having had the benefit of having seen and heard the witnesses. However, when an appellate court experiences doubt, it will, in most cases, be a doubt that the jury ought also to have experienced. It is only where a jury's advantage in seeing or hearing the evidence is capable of resolving a doubt experienced by the appellate court that the latter may conclude that no miscarriage of justice has occurred."

Submissions

[20] It was submitted that each of the complainant and his mother were unreliable witnesses due to:[15]

(a) in the complainant's case: the passage of time since the offences; alcohol and medical issues, including periods of blacking out; financial motivation in respect of a civil damages claim that had been commenced; and

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13 (2016) 258 CLR 308; [2016] HCA 35 at 329-330. Internal citations omitted.
14 *R v Mazza* [2017] QCA 136 at [50], referring to *SKA* and *M v The Queen*.
15 Appellant's outline paragraph 27.

(b) in his mother's case: the passage of time and the implausibility of her account.

[21] Further it was said that the preliminary complaint evidence was ambiguous and the other evidence about events concerning the program was inconsistent and un-particularised.

[22] For the Crown it was submitted that the whole of the evidence supported the verdict, once allowance was made for the fact that the jury saw and heard the witnesses. The preliminary complaint evidence was clear, and any inadequacies or discrepancies in other evidence did not taint the probative force of the evidence. Further, the directions included a suitable Longman direction.

The evidence

[23] The appellant's approach on appeal was to focus upon the evidence of the complainant and his mother. There were other witnesses who I will refer to where necessary, but given the way the appeal was conducted I intend to focus on those witnesses at the heart of the case.

Evidence of the complainant

[24] The complainant gave evidence that he was 43 at the trial and between 11 and 12 when he participated in the Big Brother Program. He described being partnered with the appellant and the sort of activities in which they would engage during their monthly meetings. He also recalled that he went to the appellant's home on a number of occasions, and met his wife and children.

[25] He also gave evidence as to a time when he was allowed to sit on the appellant's lap in his car, and steer for a while, during which the appellant was holding his legs.

[26] The complainant described count 1 as involving a time when they were in the woodworking room, working on a bow and arrow, and planing a piece of wood to make the bow. The appellant was showing him how to use the manual plane, and he "touched me through my shorts on my penis and fondled me".[16] He said the fondling was over the top of the clothing and lasted for 20 or 30 seconds.[17]

[27] The complainant described where the woodworking room was in relation to other parts of the house, namely off to the side of the garage or carport. He referred to a map which he had made of the layout of the appellant's home, with various rooms and details indicated.

[28] As for count 2, the complainant said it was not on his next visit, but on the one after that. He described being in a walk-in robe with the appellant when the appellant grabbed him, gave him a bear hug, and "fondled me over my shorts".[18] The complainant said he obtained an erection and then the fondling stopped. He could not remember why he had been in the walk-in robe nor whether anyone else was around at the time. He described trying to squirm away but being unable to do so.[19] He

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16 AB 69 line 36.
17 AB 70 lines 6-10.
18 AB 71 lines 36-43.
19 AB 72 lines 15-18.

also described the appellant as saying something "soothing, sort of" as in "this is normal".

[29] As for count 3 the complainant described being in the sitting room on the ground floor of the house, lying on a towel while the appellant gave him a massage. He said the appellant pulled his shorts down and "started fondling my penis again". He said that the appellant masturbated him with massage oil during which time he had an erection. That went on for a couple of minutes and then stopped.[20]

[30] The complainant described why it was that he chose not to see the appellant again after count 3. He said he had "alarm bells going off" because the contact was "skin-on-skin".[21] As a consequence the complainant avoided contact with him and when his mother pressed him to go on other visits he eventually told her what had been happening. He estimated that occurred between three to six months after count 3.[22]

[31] He said that he told his mother that the appellant was "fiddling with me"[23] and "touching me". He had not told anybody else, and sometime later when two police came to see his mother, he told her that he did not wish to speak to them and "didn't want anything to do with it".[24]

[32] In cross-examination he was confronted with the 30 year time period which had elapsed between when the events occurred and the trial. He said that his memories of the events had never gone away but became stronger in his mid to late-30s.[25] He agreed that when he was questioned at the preliminary hearing before the trial he had grave difficulties remembering any surrounding circumstances apart from the alleged offending itself.[26]

[33] He described trying to get on with his life but agreed that in his mid-30s he started having some problems as a consequence of which he had psychological counselling. Some of those problems stemmed from difficulties between himself and his mother.[27] He had become a fairly heavy drinker of alcohol, with alcoholic tendencies where on occasions he drank until he blacked out.[28] He agreed that part of the problems he had stemmed from the failure of his business, which resulted in the loss of his house, bankruptcy and entry into depression for four years.[29] The consequence of the business failure was that he effectively lost everything he owned.[30] Following this, he saw a psychologist and obtained a mental health plan involving the use of anti-depressants. His treatment involved seeing several therapists over time.

[34] The complainant accepted that he was at his worst in the period from 2012 to 2014.[31] In 2012 he joined the organisation Bravehearts through which he was

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20 AB 73 lines 22-28.
21 AB 74 line 25.
22 AB 74 line 30.
23 AB 74 line 35.
24 AB 75 lines 3-12.
25 AB 75 line 46.
26 AB 95 lines 15-32, AB 96.
27 AB 76.
28 AB 77 lines 1-16.
29 AB 107 lines 1-12.
30 AB 77 line 44.
31 AB 81 lines 1-3.

encouraged to go to the police with a formal complaint.[32] He told Bravehearts that he was not interested in going to the police, but rather pursuing civil action for monetary compensation.[33]

[35] Eventually, through Bravehearts, he provided a statement to the Royal Commission into Child Sexual Abuse, which was the first time that he had actually identified what had occurred between himself and the appellant.[34] In addition he had an appearance before the Royal Commission. Following that he was contacted again by a detective who took a statement from him.

[36] The complainant said that he had not filed an application for compensation with the Royal Commission and was still awaiting an acknowledgement from them in that respect.[35] He said it was his intention to commence a civil action though that was not on foot at the time of the trial.[36] However, his intention was not to sue the appellant, but rather the Catholic Church.

[37] When cross-examined about the individual counts the complainant maintained his description of what occurred, though there were variations in relation to the duration of the events. For example, in respect of count 1 the complainant said it lasted a few seconds or "fairly quickly" at the trial, whereas at the committal hearing he had given his best guess at "minutes".[37] Another variation was in respect of count 2 where he had told police in 2015 that he had been pulled into the wardrobe, but now had no memory of that.[38]

[38] As to what he told his mother, the complainant said in cross-examination that the appellant was "fiddling with me" or "touching me".[39] He said that at the time he did not want to go into any further details. It was put to him that all he had told his mother was that the appellant was "a poofter". The complainant said he could not remember that but it "could have been" said.[40]

[39] In cross-examination he accepted that when his mother proposed the possibility of seeing the police he resisted, and threatened to run away if she called them.[41] He agreed that he did not want to tell police what had occurred.

[40] It was also put to him that he had told a Family Services officer in 1990 that he had been sexually abused by the appellant two years before. The complainant's response was that he could not recall but agreed that he had not provided details of the abuse.[42]

[41] In cross-examination he was asked about his reasons for going to the Royal Commission, as reflected in his statement from Bravehearts. They included that he wanted to tell his story so that the appellant and the Catholic Church could be held accountable, and

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32 AB 81-82.
33 AB 82 lines 24-36.
34 AB 84.
35 AB 87.
36 AB 93.
37 AB 110.
38 AB 114 line 36.
39 AB 120-121.
40 AB 121 lines 10-16.
41 AB 121.
42 AB 125.

that he wanted the police to investigate his complaint.[43] He said that up until that point he had not told anyone the details, but did so then because he "felt ready to".[44]

[42] He denied the proposition, put to him in cross-examination, that the appellant had not touched him in any way, at any time, in an indecent way.[45]

[43] In re-examination the complainant explained why he had not told his mother straight away. It was that he was in shock and confused, and not sure whether it was the normal thing.[46] After the second incident he was still confused and hoping it would go away, but "gave it another chance and hoped that it would stop". However he said that "once it got to my pants being down, that was it for me".[47]

Evidence of the complainant's mother

[44] The complainant's mother gave evidence of her relationship with the complainant and an account of the various houses in which they lived from time to time. She also described the arrangements for the complainant to participate in the Big Brother Program. She said he was nine going on 10 when he first met the appellant. The arrangements included set meeting times, with provision for contacting her if the meeting could not be made.

[45] She described when the complainant told her about what had occurred. He said he did not want to go out with the appellant on his own, and asked if he could take a friend with him. When asked why he wanted to take a friend she said he replied "because he's been playing with my penis".[48] She said she did not get any further details about what had happened.

[46] As a consequence she tried to ring the Church and the Catholic Welfare Bureau, but got nowhere. She then became angry and wrote a long letter to the Catholic Welfare Bureau.[49]

[47] In cross-examination she was taken to a statement given in 2015 to a police officer. In it she attributed the date of September 1984 to the time when the complainant told her what had happened and refused to go back with the appellant. She said that everything stopped from that date.[50]

[48] She gave evidence in cross-examination of a conversation with the complainant, not reflected in her police statement, namely that the complainant revealed a neighbour had told him to go to the police but he resisted that and did not want his mother to involve anybody else either because it would be "far too embarrassing".[51] Shortly thereafter she said that the conversation occurred because a neighbour had been speaking to her and suggested that she should go to the police.[52]

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43 AB 128.
44 AB 128 line 35.
45 AB 130.
46 AB 131.
47 AB 131 lines 35-39.
48 AB 142 line 46.
49 AB 143 lines 36-42.
50 AB 148 line 27 to AB 149 line 5, AB 162 lines 27-34.
51 AB 149 lines 26-32.
52 AB 151 lines 36-38.

[49] The mother confirmed that after contact was first made with the police the complainant did not want to take matters further. In her statement she had ascribed that to a time period "probably about May 1984".[53]

[50] As for the terms of the words used by the complainant when he revealed what had been happening, the mother said that she was certain that he used the word "penis".[54]

[51] It was put to her that she had told officers of the Children's Services Department, in 1990, that the complainant had told her that the appellant was "a poofter". She denied that suggestion.[55]

[52] The mother also gave evidence of a conversation between herself and the appellant, approximately one month after the complainant had told her what had happened. For reasons given below in respect of Ground 2, that conversation should be ignored for present purposes.

Other witnesses

[53] A witness who had been an officer with the Department of Child Safety in 1990 gave evidence that he conducted a visit with the complainant during which time the complainant said there had been "two occasions of a sexual nature involving [the appellant] but he refused to give details".[56] His evidence was given by reference to case notes made at the time.

Discussion

[54] There can be little doubt that the lapse of such a long time period between the events and the need to recall them means that it is quite likely that memory will have suffered, with the consequence that various details might be inconsistent, vague or even contradictory. The submissions in respect of the complainant's evidence were that the passage of time affected his memory especially in relation to the dates and circumstances surrounding the alleged conduct. That is true, but it is also true that his description of the events was consistent both as to where and how they occurred, and in what sequence. That evidence given by reference to locations in the house, identified on a map the accuracy of which was not the subject of any challenge.

[55] The attack based upon the complainant's use of alcohol and the medication he used for his depression cannot, in my respectful view, be seen as something that would have seriously troubled the jury as to his overall credibility or reliability, particularly in the absence of evidence that such alcohol use, even to the point of blackouts on occasions, or the use of the medications, was such that it would have a permanent and long-term effect on memory. The reasons given by the complainant for those matters were largely concerned with the fact that his business failed, ruining him financially and sending him into a depressive state. No evidence was adduced to show why that would affect memories formed at a much earlier time.

[56] The contention that there was financial motivation which somehow made the complainant an unreliable witness should be rejected. The evidence established that he told his mother and an officer from the Children's Safety Department. If the jury

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53 AB 153-154.
54 AB 155 lines 12-34.
55 AB 165-166.
56 AB 173 lines 27-29.

accepted that evidence then there was reason to conclude that it supported the complainant's credibility and reliability, particularly as those previous complaints about the misconduct had been made when there was no suggestion of financial compensation. In any event, the motivations of seeking compensation was only one factor of several given by the complainant for having eventually pursued his complaints.

[57] The complainant's evidence also had this feature about it. There was no evident suggestion of elaboration or embroidering on the original story. For example, the complainant never varied from the fact that on the first two occasions the touching was on the outside of the clothing. Nor was there any variation in the number of events that occurred. The discrepancies about the duration of each event could easily have been seen by the jury to simply be the product of a memory affected by the lapse of time. Further, the jury could well have concluded that the complainant was moderate in his evidence, acknowledging that he went back to visit the appellant even after the first events because he enjoyed spending time with the appellant and was hoping it would simply stop.[57]

[58] On the face of his evidence it is by no means obvious that the jury were compelled to conclude that he was unreliable. The jury were directed about the time delay in accordance with *Longman*. Further, there was no suggestion that he might have made a complaint to someone else who could not be called as a witness because of the lapse of time. In that sense the time delay affected the Crown as well as the defence.

[59] As for the complainant's mother, there was nothing inherently implausible about her account. She said that the complainant had mentioned what had happened, without details, and that as a consequence she wrote a letter to the Catholic Welfare Bureau, withdrawing from the Program. That fact was not challenged, even though the letter could not be produced. Further, when she urged the complainant to go to the police, she did not try to override his resistance. As for her memory, it is true that there were some discrepancies between a statement that she had given in 2015 and her evidence at the trial, but that was a matter for the jury to weigh. There is nothing in those inconsistencies which necessarily points to her unreliability. Her evidence would have been assessed in light of the *Longman* direction.

[60] The suggestion that the preliminary complaint was ambiguous should be rejected. The submission turns on the suggestion that the complaint was that the appellant "was a poofter". However, the use of that phrase was rejected by the complainant who was only prepared to concede that it might have been said, not that it was the only thing said. It was rejected by the complainant's mother. The evidence of the preliminary complaint was that he said either that the appellant was "fiddling with me"[58] or that he had been "playing with my penis".[59] Even though the complainant said he did not use the word "penis" when his mother was certain he did, that inconsistency was a matter for the jury to weigh. It did not necessarily destroy the reliability of either.

[61] The fact that the evidence concerning the incidents and subsequent events, including dates in relation to the program, displayed some inconsistencies or lack of particularity,

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57 AB 131 lines 30-31.
58 AB 74 line 35.
59 AB 142 line 46.

does not compel the view that the evidence should have been rejected by the jury. The passage of time explains them, and the *Longman* direction dealt with it.

[62] In my view, it cannot be said that a review of the whole of the evidence leads to the conclusion that it was not open to the jury to be satisfied of the appellant's guilt. The jury had the unquestioned benefit of seeing and hearing the witnesses, and in particular the complainant and his mother. This Court does not enjoy that benefit. I am unable to conclude that the evidence lacks credibility for reasons which are not explained by the manner in which it was given, or that the jury should have had such a doubt about it that they could not be satisfied to the requisite standard of the appellant's guilt.

[63] This ground of appeal fails.

Ground 2 – the alleged confession

[64] In the course of oral argument concerning the grounds of appeal raised in respect of the alleged confession, the question arose as to whether what was said by the appellant could have amounted to an admission of guilt at all, and therefore, was it admissible on any basis. Ultimately both counsel addressed that question.

[65] In the absence of the actual letter said to have been written by the mother, the highest the evidence got as to its contents was that the mother could not remember whether she said the appellant had been fiddling with her son, but her general recall was that she had recorded her disappointment and "this is what has happened so we do not want … to be part of this".

[66] That letter was not sent to the appellant, nor was there any suggestion that the mother had communicated the contents of it to the appellant. Instead, the letter was written to the Catholic Welfare Bureau.

[67] In those circumstances, it is, in my respectful view, not possible to draw out of the exchange at the front door any admission as to the alleged sexual misconduct. The mother asked "What are you doing here?" and the response was "I thought you would have wanted me to do that". On its face the response was to the question of what he was doing at the mother's house. The response, that "I thought you would have wanted me to do that", is fairly plainly a statement of why he was at the house, and nothing more.

[68] One might infer that the event which prompted the appellant's arrival was the complaint letter and the withdrawal from the program, but the mother's question and his response did not go as to the nature of the complaint. In my respectful view, it could not be construed as an admission in relation to any alleged sexual misconduct.

[69] Therefore the exchange between the mother and the appellant was inadmissible to prove anything relevant, let alone an admission or confession to specific allegations. It should not have been admitted at the trial. That no objection was taken to its admission does not alter its status as inadmissible evidence.[60]

[70] The evidence was referred to in the opening by the Crown as to being a comment by the appellant "referring to his misconduct with the son and admitting it, implicitly,

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60 *R v Murray* [2016] QCA 342 at [36].

through that response."[61] That was said in the context that the jury would hear her evidence that she "wrote a letter 'about what happened to her son'".[62]

[71] Discussion between counsel and the learned trial judge, in the absence of the jury, referred to the issue being as to whether "the confession" was made, and whether it was true.[63] It was also referred to in addresses as "an alleged confession" by defence counsel,[64] and by the Crown who contended that it was an admission of guilt.[65]

[72] More importantly the learned trial judge referred to it in his summing-up. The jury were told that was evidence "which the Crown submits is confessional in nature",[66] and as "a confessional statement".[67] The jury were reminded that the evidence was characterised by the Crown as "confessional" and that the jury had to consider not only whether the statement was made but also whether it was a "true and an accurate confession".[68]

[73] The learned trial judge read out that part of the Crown's address in which it was said to be an admission as to the allegation, and supportive of guilt.[69] In the course of dealing with the addresses by counsel, it was again referred to as "the alleged confession"[70] and the jury were again told that if they were satisfied the statement was made, the jury "must consider whether the parts of the statement the prosecution relied upon as indicating guilt are true and accurate", and then whether those things "would tend to indicate he's guilty of the offences".[71] The learned trial judge ended by telling the jury that if they were not satisfied that those things were true and indicative of guilt then they "cannot rely on them as tending to support the complainant's evidence".[72]

[74] If words spoken by an accused are reasonably capable of being construed as an admission by the accused, they are admissible.[73] In that situation it is for the jury to determine whether or not the words amount to an admission and what weight, if any, the admission should be given. However, here the words were not reasonably capable of being construed as an admission.

[75] Therefore, in my respectful view, the evidence of the appellant's response was not capable of constituting an admission of guilt, and was inadmissible. In the circumstances it was wrongly admitted, and, as the Crown concedes, one cannot conclude that it had no influence on the jury's consideration of guilt. The final result was that the jury were left to grapple with that piece of evidence when they should not have been doing so, because it was inadmissible. Notwithstanding its reception into evidence, had the learned trial judge concluded that it was inadmissible then that could have

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61 T1-40 lines 8-10; AB 51.
62 T1-40 line 1-2; AB 51.
63 AB 34 line 2, AB 37 line 46, AB 38, AB 188 and AB 198.
64 AB 228 line 18, AB 230 line 33 and 46, AB 233 lines 7, 22, AB 237 line 17 and AB 241.
65 AB 219 lines 19-22.
66 AB 273 line 46.
67 AB 274 line 4.
68 AB 279 lines 19-37.
69 AB 280.
70 AB 296 line 6.
71 AB 296 lines 32-36.
72 AB 296 line 36.
73 *R v Caulfield* [2012] QCA 204 at [18].

led to his Honour's directing the jury that they must ignore that evidence completely. That was not done with the consequence referred to above.

[76] The potential prejudice created by leaving that inadmissible evidence to the jury is obvious. It is difficult to conclude that it did not influence the jury's consideration in any way. Indeed, Mr Boyle, appearing for the Crown on the appeal, accepted that if the statement was inadmissible then he could not rely upon the proviso to save the convictions.[74]

[77] In the circumstances it is not necessary that the other ground of appeal be dealt with. Nor is it necessary to deal with the application for leave to appeal against sentence.

[78] I would propose the following orders:

1. The appeal against conviction is allowed.
2. The convictions are set aside.
3. The sentences imposed on 19 October 2017 are set aside.
4. A retrial is ordered.

[79] **BROWN J:** I agree with the reasons given by Morrison JA, and the orders proposed by his Honour.

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74 Appeal transcript 31 lines 15-36.