SUPREME COURT OF QUEENSLAND

CITATION:	*R v PBB* [2018] QCA 214
PARTIES:	**R** **v** **PBB** (appellant)
FILE NO/S:	CA No 190 of 2017 DC No 193 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 26 July 2017; Date of Sentence: 26 July 2017 (Long SC DCJ)
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2018
JUDGES:	Sofronoff P and Fraser and Gotterson JJA
ORDER:	**Dismiss the appeal.**
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 a jury of one count of maintaining a sexual relationship with a child and seven sexual offences against that same child – where the complainant and other witnesses gave evidence of harassment of the complainant by the appellant – where this harassment evidence was admitted at a pre-trial hearing for demonstrating ongoing sexual interest in the complainant – whether it was an error for this post-offence conduct to be admitted as evidence in the trial *BBH v The Queen* (2012) 245 CLR 499; [2012] HCA 9, considered *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, applied *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16, considered *Knight v The Queen* (1992) 175 CLR 495; [1992] HCA 56, cited *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7, considered *R v Douglas* [2018] QCA 69, applied
COUNSEL:	B J Power for the appellant

C W Wallis for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **FRASER JA:** After a seven day re-trial in the District Court, a jury found the appellant guilty of one count of maintaining a sexual relationship with a child during a period of eight years between 1 January 2004 and 1 January 2012 and seven specific sexual offences against the same child on various dates between 1 January 2009 and 31 December 2011. The complainant was aged between five and 13 during the period of the maintaining offence. Before the commencement of that period and during part of it the appellant was in a de facto marriage with the complainant's mother. There was a son of that relationship. The complainant had an older brother and a younger sister. When the de facto marriage ended in 2009 the appellant continued to have a role in the care of the children including the complainant, the complainant's mother and the appellant having agreed that there should be "open-door policy" for the children between the separate households.

[3] The complainant gave evidence of the alleged offences. Amongst other matters, the complainant gave evidence to the effect that towards the end of grade 8 (2011) she began to rebuff the appellant's sexual advances, and the sexual acts stopped by the end of that year. The Crown case also relied upon evidence given by the complainant's mother and some other witnesses that between October 2012 and January 2014 the appellant engaged in conduct ("the harassment") which the prosecution asserted was evidence of the appellant having an ongoing sexual interest in the complainant. The appellant gave evidence in which he denied all of the alleged offences and any inappropriate contact with the complainant. The appellant agreed that he had engaged in much of the alleged harassment. He denied that he had done so because of any sexual interest in the complainant. He said that he had done so because of his concern that the complainant was not concentrating on her schooling and appropriate friendships.

[4] The appellant filed a notice of appeal against his conviction and sentence, the grounds of which were that the verdict was unreasonable or could not be supported having regard to the evidence and that the sentence was manifestly excessive. At the hearing of the appeal the appellant was given leave to file an amended notice of appeal. The appellant abandoned his application for leave to appeal against sentence. The appellant also abandoned the original ground of his appeal against conviction. He now relies only upon grounds of appeal which concern the admissibility of and directions about the harassment evidence.

Ground 1: It was an error for evidence of certain post-offence conduct by the appellant, namely the conduct constituting his stalking of the complainant, to be admitted as evidence in the trial

[5] In an earlier trial, a jury convicted the appellant of one count of stalking between 1 October 2012 and 14 January 2004. The stalking conviction was based upon evidence of what I have called the harassment. The jury acquitted the appellant of a different

offence, one count of indecent treatment described as "the hot-tub incident". The jury was unable to reach verdicts on the remaining counts, which were the subject of the re-trial.

[6] Before the earlier trial, the appellant applied for an order quashing the indictment because of the allegedly improper joinder of the count of unlawful stalking, or that there be a separate trial of that count. The application was refused by the judge who subsequently presided over the re-trial.[1] The trial judge refused the application for the reason that the evidence in relation to all of the charged offences was cross-admissible, the charges were properly joined under s 567(2) of the *Criminal Code*, at least on the basis of being founded on the same facts, and there was no relevant prejudice or embarrassment to the defence such as to warrant severance pursuant to s 597A of the *Criminal Code*. As the trial judge observed, the admissibility of the evidence of the sexual offences in proof of the stalking charge was evident. Accordingly the trial judge's reasons focused upon the question whether the evidence admissible in proof of the stalking charge (the harassment evidence) was also admissible in proof of the sexual offences. The trial judge held that it was.

[7] The trial judge summarised the harassment evidence in reasons given for the interlocutory ruling before the first trial:-

> "[1] Around 26 or 27 October 2012 and in connection with the complainant attending a friend's birthday party in Burnside, the defendant pulled over when he was driving past with his son (the complainant's brother) and when the complainant was walking on a street with others, including a male friend. The defendant questioned her about who the others in the group were and whether they were trying to "hook" her up with "that guy", before speeding off. Subsequently that night, the defendant repeatedly drove past the house at which the party took place, with the headlights of his car turned off and yelling out "you're sluts". The complainant's mother was contacted and she went to the defendant's house and found their son alone there and she confronted the defendant when he arrived home.
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> [2] In March 2013 and a few days after he had been seen walking in the yard and past the bedroom window of the father of a friend of the complainant and at whose house she was at, the defendant sent Facebook messages to the complainant's friend which included assertions "that [the complainant] did not love him anymore, that she did not have time for her father, thanking [her friend] for helping [the complainant] get him out of her life and accusing them of being lesbians. He also wrote "P.S. I bet your father had a good perve on [the complainant] over the weekend as I no [know] she likes to flash herself around and get people to look at her and show as much as possible".

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1 *R v PBB*, DC No 243 of 2015, pre-trial application pursuant to s 590AA, District Court at Maroochydore, 11 December 2015 (Long SC DCJ).

[3] On 26 April 2013, the complainant's mother was repeatedly telephoned by the defendant seeking information about the complainant. Her mother received a series of text messages from the defendant, in which he accused the complainant of having a boy with her, of not being at home and asking "where did the slut go?" He came to the house and banged on the doors yelling "where is the fucken' slut? Bring the fucken slut out here, prove to me she's at home. She's got a fucken boy in there doesn't she and you're letting her have sex with him". Later the complainant's mother received a further text stating: "I didn't want things to turn nasty but now there is no other way".

[4] On 6 May 2013, the defendant called out to the complainant as he went past in a friend's car and she was walking with two male friends. Subsequently and after she had parted with her friends and was continuing alone, the defendant approached her, in his own car and "asked her invasive questions about what she had been doing with her two male friends". After the defendant stopped his car and approached her on foot, the complainant ran home and together with her younger sister, locked the doors and hid in the house. She attempted to contact her mother and her mother was later "bombarded with calls from the defendant swearing and screaming that the complainant was a slut".

[5] On Saturday 5 October 2013, sometime after 2.00 am, the complainant found the defendant at the window to her bedroom, at her house in Nambour. He told her that "he wanted to talk to her about whether she would admit to having boys over". When the complainant's mother was alerted and she found the defendant stumbling around the back of the house and asked him what he was doing he responded that he wanted to talk to the complainant in private, "as he does not get the chance". The defendant left but later called the complainant's mother "saying that the complainant's screen was 'already half off the window' and that she must be 'waiting for a boy to come over and have sex'."

[6] On 7 October 2013 and after the defendant had collected his son at the complainant's house, he stopped his car outside a neighbour's house and began screaming out the window, using profane language and suggesting that he would bash "a paedophile" who was "perving on 15 year old girls". Later that night the defendant telephoned and sent texts to the complainant's mother accusing her neighbour of standing on his veranda and watching the complainant through her window and saying "she must dance around naked in front of her window for him and she probably likes it". When the complainant's mother reacted angrily, the defendant began to question why she was defending this person and said things including: "I bet he is paying you to let him have sex with her too and I bet she loves it, fucking whore". Then and when the

complainant's mother told the defendant that the complainant closed her curtains when getting dressed, the defendant responded: "no she doesn't, I saw her through the window the other night a few weeks ago". When the complainant's mother asked whether he watched the complainant getting dressed, he responded "well I couldn't help it, she came in and stripped off her towel". He added that he had turned his head but that the neighbour could have watched her. Over subsequent days the defendant continued to contact the complainant's mother and made further accusations of her allowing the neighbour to watch the complainant naked and getting paid to allow him to have sex with the complainant. On 10 October 2013 he sent a text message to the complainant's mother which included a threat to "sort him out with a baseball bat" before coming over to her house to "sort things out once and for all".

[7] In November 2013, the complainant's mother became aware that the defendant was seeking information from others about a male friend of the complainant and with whom she had been texting. On 11 November 2013 the defendant sent a text message to the complainant's mother about this boy and when she called the defendant to ask him to stop, he said "she ruined my life when she decided to not have anything to do with me, I'm going to make sure I ruin her life".

[8] On 15 November 2013, the defendant called the complainant's mother and their conversation disintegrated, again, into assertions that the defendant made about the complainant. "The defendant threatened to kill himself but that first he was going to buy a gun and 'hunt Mitch down' as he 'wasn't going alone'." In another argument by telephone with the complainant's mother on 16 November 2014 the defendant said that when the complainant moved away he would "track her down and get his revenge".

[9] In a further conversation with the complainant's mother on 22 November 2013, the defendant made further threats, including that if the complainant's mother wouldn't let him be in the complainant's life, he would make sure she could not have the complainant either.

[10] On 19 December 2013, the complainant slept over at a friend's house and she and her friend went for a walk. When the defendant drove past, he turned the car around, drove back towards them and yelled obscenities, including "you're all fucking sluts".

[11] On 5 January 2014, the defendant telephoned the complainant's mother and yelled obscenities about the complainant's boyfriend, "saying he was having sex with [the complainant]". He made threats to "hunt" and "bash him". Later that day and when the defendant came to the complainant's house to drop off his son, he yelled out "[the complainant] is a fucking slut" and "[the complainant] is a

> fucking slut whore" before driving off. He later called the complainant's mother, asking if he had caused enough of a scene for the neighbours to hear.[2]

[8] The trial judge referred to the contention then made for the appellant that there might be a reasonable view of the harassment evidence that was consistent with the appellant's innocence. The contention relied upon evidence in the interlocutory application of a pretext telephone call in which the appellant denied implications in the complainant's assertions that he had committed sexual offences, proffered an apology for "stalking" the complainant, asserted that he loved her and wanted to be back in her life and to be a "proper dad to her", and sought to explain his conduct by his concern for her and that she was not throwing away her life as, he asserted, was the case with other girls (understood to be his daughters) who "haven't got ahead through wrong boyfriends and decisions" and "got pregnant".

[9] The trial judge noted that the prosecutor's intention was not to adduce evidence of the pretext telephone call in the Crown case. In the trial judge's view, the contentions for the appellant did not present a reasonable explanation of the harassment evidence; that evidence demonstrated such a pre-occupation with the appellant's estrangement from, or separation from contact with, the complainant and the potentiality of her sexual activities with others or sexual interest in her by others, as to be redolent of the prosecution assertion that the harassment manifested an ongoing sexual interest in her. The trial judge concluded that there was no reasonable view of that evidence other than as supporting an inference that the earlier charged manifestation of that sexual interest had also occurred.

[10] At the commencement of the subject re-trial, the trial judge enquired whether there were any issues arising out of what had occurred at the earlier trial. The prosecutor explained that the Crown would not lead evidence that the appellant was convicted of the stalking charge but submitted that the evidence of the harassment was cross-admissible and it was expected that the trial judge would give a direction about that conduct in relation to the sexual acts. Defence counsel agreed.[3] Defence counsel did not submit, as is contended in appeal ground 1, that the evidence of the harassment should not be admitted in the re-trial.

[11] The appellant submitted that the absence of any such submission by defence counsel was explicable by reference to s 590AA(3) of the *Criminal Code*, which provides that a pre-trial direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling. The appellant argued that, as s 590AA provides, the ruling could not be subject to an interlocutory appeal but might be raised in a ground of appeal against conviction. The respondent replied that the trial judge's interlocutory decision was not binding at the re-trial for two reasons. First, the ruling was upon an application to quash the indictment or order a separate trial, rather than an order that the post-offence conduct should not be admitted as evidence in the trial. Secondly, the appellant could have applied for leave to re-open the ruling. As to the latter submission, the respondent argued that the "special reason" that allowed the trial judge to give leave to re-open the ruling was that, whereas at the earlier trial the appellant's explanation for the harassment was in evidence in the Crown case only as the content of a pre-

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2 Numbering added.

3 Transcript 17 July 2017, T1-2.

text telephone call, at the re-trial the appellant gave evidence and was cross-examined.[4] Upon that premise the respondent argued that the appellant's failure to object to the admissibility of the harassment evidence was a forensic decision which accepted the relevance of the evidence both for and against the appellant. The respondent submitted that defence counsel took advantage of the evidence of the harassment in arguing for a "*Longman* direction"[5] and in submitting to the jury that the harassment by the appellant supplied a motive to the complainant to make a false complaint about the alleged sexual offending, the suggested motive being to bring the stalking to an end.

[12] The appellant's argument upon that issue should be accepted. It is evident that the prosecutor and defence counsel treated the interlocutory ruling before the first trial as binding in the second trial. The circumstance that the appellant gave evidence in the second trial (which, although more detailed than his statements in the pretext telephone call, was substantially to the same effect) was immaterial to the admissibility in the Crown case of the harassment evidence. Whether or not the appellant was strictly bound by the trial judge's decision that the harassment evidence was admissible, a decision made in the course of the pre-trial ruling concerned with the question whether there should be a separate trial of the count of unlawful stalking, the conduct of both parties in treating that decision as binding in the re-trial was understandable and reasonable. The circumstance that defence counsel sought to take what advantage could be taken of this manifestly prejudicial evidence does not in these circumstances justify a conclusion that defence counsel's failure to object to its admissibility was a forensic decision which accepted that the evidence was admissible against the appellant. The only real question raised by ground 1 is whether or not the harassment evidence was admissible for the purpose for which it was admitted at the re-trial.

[13] There were some minor differences between the evidence of harassment at the pre-trial hearing and the evidence upon that topic at the re-trial but neither party submitted that the differences were material. Both parties' arguments about the grounds of appeal were made with reference to the trial judge's summary of the harassment evidence in the reasons for the interlocutory ruling. With reference to the paragraph numbers I have added to those reasons quoted earlier, the effect of the harassment evidence adduced at the re-trial may be summarised as follows:

> [1] Provoked only by seeing the complainant walking with others including a male friend, the appellant accused the complainant of trying to "hook up" with the male friend and subsequently described the guests at the complainant's friend's birthday party as "sluts".
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> [2] When the complainant was at a friend's house, the appellant walked in the yard of the house, accused the complainant and her friend of being lesbians, and speculated that the complainant's friend's father "had a good perve on" the complainant.
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> [3] The appellant told the complainant's mother that the complainant was a "slut", speculated that the complainant was

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4 The respondent referred to *R v Dunning; Ex parte Attorney General (Qld)* [2007] QCA 176.

5 *Longman v The Queen* (1989) 168 CLR 79.

having sex with an unidentified "fucken boy", and threatened that things would turn nasty.

[4] Provoked only by seeing the complainant walking with two male friends, the appellant interrogated her about what she had been doing with them and subsequently swore and screamed at the complainant's mother that the complainant was a "slut".

[5] The appellant was at the window of the complainant's bedroom, sought to extract an admission that she was having boys over, and later speculated to the complainant's mother that the complainant was waiting for a boy to arrive to have sex.

[6] The appellant admitted to watching the complainant undress through the complainant's window, screamed at a house neighbouring the complainant's house that the neighbour was a paedophile "perving on 15 year old girls", accused the complainant of dancing around naked in front of her window for the neighbour and probably liking it, accused the complainant's mother of taking payment to let the complainant have sex with the neighbour, and accused the complainant of being a prostitute.

[7] The appellant made enquiries of the complainant's mother and others about a male friend of the complainant and, when the complainant's mother asked him to stop, the appellant accused the complainant of ruining his life by deciding not to have anything to do with him, and he threatened that he would ruin her life.

[8] The appellant threatened to hunt down and kill a man, kill himself, and track the complainant down and get his revenge.

[9] The appellant told the complainant's mother that if she would not let him be in the complainant's life, he would make sure that she could not have the complainant either.

[10] Upon seeing the complainant with a friend, the appellant accused both of them of being "fucking sluts".

[11] The appellant accused the complainant's boyfriend of having sex with the complainant, threated to assault him, and on the same day accused the complainant of being a "fucking slut" and "whore".

[14] In summing up, the trial judge referred the jury to the harassment evidence and observed that on the complainant's evidence the harassment commenced when she began to resist and rebuff the appellant's advances to her, and particularly as his access to her became progressively more limited. The trial judge directed the jury that this evidence was "particularly placed before you on the basis that the prosecution contend that you would draw from that evidence an inference or that this evidence demonstrates that the defendant had a sexual interest in the complainant, and that if persuaded of that, you may think that it is more likely that the defendant did what is alleged in the charges under consideration".

[15] As I have indicated, when the appellant gave evidence he agreed he had harassed the complainant. His explanation for doing so was that after grade eight the complainant was going off the rails and getting involved with the wrong people. He was trying to keep in touch with what was happening.[6] The appellant said he had concerns because his daughters had done the same thing. One of them had run away from her mother's home and stayed a night with a boyfriend who was on drugs. The other daughter was also mischievous and used to get up to a lot of things with different boys.[7] The first daughter left school in grade nine. Even before then she was wagging school a lot. Her life in adulthood was not very good. The second daughter was pregnant at 17 and had another child to a different father two years later. The appellant said that he saw the complainant going off the path and the complainant's mother would not tell him anything.[8]

[16] In *Pfennig v The Queen*[9] similar fact evidence (that after the alleged offence the accused had molested a child) was adduced to identify the accused as the offender. The similar fact evidence demonstrated a propensity to commit offences of the kind charged. The evidence was held to be admissible. The plurality observed that because propensity evidence has a prejudicial capacity of a high order, it should not be admitted if there is a "rational view of the evidence that is consistent with the innocence of the accused", "rational" in this context meaning "reasonable";[10] although evidence of "mere propensity" lacks cogency and is prejudicial, "evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case"; and such evidence is admissible if, viewed in the context of ("as a step in the proof of") the prosecution case, "there is no reasonable view of the evidence consistent with the innocence of the accused."[11] In *HML*, Hayne J (Gummow and Kirby JJ agreeing) held that the *Pfennig* test applies to evidence of conduct that does not constitute a charged sexual offence that is adduced to prove that the accused had a sexual interest in the complainant in a charge of a sexual offence.[12]

[17] In *R v Douglas*,[13] McMurdo JA pointed out that, although in *HML*[14] Hayne J considered that for evidence to be admissible for the purpose of proving a sexual interest it had to satisfy the *Pfennig* test, that was not the unanimous view in *HML*,[15] and in *BBH v The Queen*,[16] Crennan and Kiefel JJ observed that the test in *Pfennig* had not been universally accepted and (except where abolished by statute) the test continues to apply only "in its proper sphere of operation". Relevantly to the present appeal though,

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6 Transcript 20 July 2017, T4-104.
7 Transcript 20 July 2017, T4-104.
8 Transcript 20 July 2017, T4-105.
9 (1995) 182 CLR 461.
10 (1995) 182 CLR 461 at 483. That rationality is equated to reasonableness in this context is also reflected in Hayne J's reasons in *HML v The Queen* (2008) 235 CLR 334 at (at [107], [118] and [170]) and in the reasons of each of the majority justices in *BBH v The Queen* (2012) 245 CLR 499 at [108] (Heydon J), at [169] (Crennan and Kiefel JJ), and at [197] (Bell J).
11 (1995) 182 CLR 461 at 483-484. See also at 485: "the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence".
12 (2008) 235 CLR 334 at 384 [111]-[112] and 399-400 [171]-[176].
13 [2018] QCA 69 at [39] (McMurdo JA, Sofronoff P and Brown J agreeing).
14 (2008) 235 CLR 334 at 383 [108].
15 [2018] QCA 69 at [46], referring, as an example, to the reasons of Kiefel J at 502 [512].
16 (2012) 245 CLR 499 at 542 [134].

Crennan and Kiefel JJ concluded that the *Pfennig* test applied to evidence demonstrating a sexual interest held by an accused father towards his daughter, on the footing that such evidence was of the accused's motive or propensity to engage in sexual acts with the daughter and might be employed by the jury in propensity reasoning towards guilt.[17] The appellant and the respondent framed their arguments upon that basis.

[18] The appellant argued that the harassment evidence was not capable of satisfying the *Pfennig* test, essentially for three reasons: first, the harassment commenced after the cessation of the alleged sexual offending; secondly, there was no evidence of any attempted sexual conduct by the appellant during the period in which the harassment occurred notwithstanding continuing opportunities for the appellant to engage in sexual offending (there being frequent occasions when the complainant stayed at the appellant's house and a period when the appellant and the complainant's mother rekindled their relationship); and, thirdly, the conduct was explicable as the conduct of an angry and over-protective step father seeking to protect the complainant. The appellant acknowledged that the question whether the harassment evidence was admissible was to be answered in the context of the prosecution case, so that the evidence given by the appellant at the trial did not directly bear upon the admissibility of the harassment evidence; but the appellant argued that, upon the face of the harassment evidence when viewed in the context of the prosecution case, that evidence itself revealed the availability of the same explanation as was given by the appellant in evidence.

[19] The first two points made by the appellant are correct, but those points must be considered together with the complainant's evidence that the sexual offending stopped only after the complainant was able to rebuff the appellant's sexual advances. In the context of the Crown case, I am unable to discern any rational basis for thinking that there might have been any protective purpose underlying any of the items of conduct of the appellant described in the harassment evidence. Understood in the context of the Crown case, each item of the alleged conduct is explicable only as a manifestation of extreme sexual jealousy, which was redolent of the appellant having a continuing sexual interest in the complainant after she had matured sufficiently to be able to rebuff the appellant's sexual advances. The harassment evidence was therefore admissible to prove that the appellant had such an ongoing sexual interest in the complainant as to make it more likely that he committed the earlier sexual offences alleged against him.

Ground 2: The trial judge erred in directing the jury as to the use they might make of the uncharged alleged discreditable conduct[18] on behalf of the appellant

[20] As the appellant acknowledged in argument, ground 2 falls away if, as I conclude, the harassment evidence was admissible for the purpose identified to the jury by the trial judge.

Ground 3: There was a miscarriage of justice occasioned by a failure to give an appropriate direction about the use of that circumstantial evidence to

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17 (2012) 245 CLR 499 at 546 [153].

18 Counsel for the appellant explained that the term "discreditable conduct" was a reference to the harassment.

determine the appellant's mental state (a sexual interest in the complainant) in light of the appellant's sworn evidence to the contrary

[21] After giving the jury a standard direction about drawing inferences, the trial judge directed the jury that, in order to convict, the jury must be satisfied beyond reasonable doubt of every element that goes to make the offence charged, and "the prosecution must also satisfy you beyond reasonable doubt of any matter, which I indicate, you must be satisfied about in order to find the defendant guilty." After giving the jury the direction quoted in [14] of these reasons, the trial judge directed the jury:

> "You may only use the evidence in that way if you are satisfied beyond reasonable doubt that by his conduct, including what he said to the complainant and others concerning her and her associates, he has demonstrated such an obsession in respect of her sexuality and the potential sexual interest of others towards her and jealousies as to others having any sexual interest in her so as to be demonstrative of his own sexual interest in her as the only rational inference that can be drawn from this evidence and therefore to the exclusion of any other inference, such as demonstration of parental concern as to her behaviour."

[22] The trial judge directed the jury that if they were not so satisfied, the evidence could not be used by the jury as proof of any charge. Shortly afterwards, the trial judge returned to the topic:

> "Of course, you will need to consider whether and to what extent you may find any confirmatory support for the complainant's evidence in the evidence as to the defendant's conduct towards her and in relation to her in the years from 2011 to early 2014, and in respect of any demonstration of sexual interest in her by such conduct if you are satisfied beyond reasonable doubt about that."

[23] Shortly afterwards again, the trial judge directed the jury:

> "In relation to the prosecution contention that you would find the continued sexual interest of her in that conduct, it was pointed out that you would bear in mind that there is no suggestion of any attempt at sexual touching in that period; that – it was emphasised that you must, at the end of the day, before you can use it in the way which the Crown or the prosecution seek to use it, as I have directed you, be satisfied that – not just that the conduct occurred, and not that it was deplorable or ill advised, but that it demonstrated sexual interest in [the complainant]. He urged you to consider the break-up of the relationship, or the marriage, with the complainant's mother, and question whether it could be excluded beyond reasonable doubt that it simply represented an irrational desire to avoid [the complainant] making similar poor decisions as the defendant's daughter had, or going down the same wrong path, as he said. In fact, he says, the evidence is that that's what he said to [the complainant], at one point."

[24] Finally, and very shortly before the conclusion of the summing up, the trial judge again referred to the contention of the prosecutor that the harassing conduct evidence was "not explicable by parental concern about her behaviour" but indicated "such an obsession with her sexuality and the potential sexual interest of others in her to be, as he described it, demonstrative of the actions of someone who might be described as a jilted lover." The trial judge directed the jury that it was not necessary to find that the defendant intended to disclose such underlying sexual interests, but "rather whether that is what emerges from what's been described as his obsessive behaviours … before you can so conclude, you must be satisfied … beyond reasonable doubt that the conduct demonstrates such a sexual interest in the complainant".

[25] No redirection was sought.

[26] The appellant contended that the directions were inadequate and that the trial judge should have given the following direction:

> "I have directed you that to use the post-offence conduct by the defendant to reason towards guilt you must be satisfied beyond reasonable doubt that the defendant's conduct demonstrated a sexual interest in the complainant. Such a finding would require you to determine the appellant's state of mind solely upon circumstantial evidence. For a finding to be made beyond reasonable doubt to based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances.
>
> If there is any reasonable possibility consistent with innocence, it is your duty to set aside that evidence and not to use it in any way to find the defendant guilty. This follows from the requirement for you to use this particular evidence you must be established beyond reasonable doubt that the defendant's post-offence conduct demonstrated a sexual interest in the complainant."

[27] The appellant argued that the directions given by the trial judge were insufficiently complete, particularly because of the appellant's sworn evidence to the contrary of the Crown case upon the harassment. In support of this argument, the appellant referred to a case concerning circumstantial reasoning towards intent, *Knight v The Queen*.[19] From that decision the appellant derived the proposition that, in a case concerning intent, the jury should be directed that if there were any reasonable inference consistent with an absence of the necessary intent, the jury must not use the circumstantial evidence to reason towards guilt, even if there was also a reasonable inference consistent with the existence of the necessary intent.

[28] The substance of the directions which the appellant contends were required was clearly conveyed to the jury. The trial judge directed the jury in terms, not only of the necessity for the jury to be satisfied beyond reasonable doubt that the relevant evidence proved that the appellant had "demonstrated such an obsession in respect of [the complainant's] sexuality and the potential sexual interest of others towards her … so as to be demonstrative of his own sexual interest in her", but that so much must be "the only rational inference that can be drawn from this evidence and

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19 (1992) 175 CLR 495 at 503.

therefore to the exclusion of any other inference". Furthermore, the trial judge correctly explained to the jury that "in a criminal trial it is not a question of your making a choice between the evidence of the Prosecution's principal witness or witnesses and the evidence of the defendant. The proper approach is to understand that the Prosecution case depends upon you, the jury, accepting the evidence of [the complainant] … and accepting that her evidence was true and accurate beyond reasonable doubt despite the sworn evidence of the defendant". The trial judge went on to elaborate upon that conventional direction[20] by giving additional, conventional directions.[21]

[29] I would accept the submissions for the respondent that the jury must have understood that it was necessary for them to be satisfied beyond a reasonable doubt of the appellant's sexual interest in the complainant at the time of the alleged offences, and that the direction for which the appellant now contends would supply no more guidance to the jury than that which already was contained within the trial judge's directions. The absence of the postulated direction did not occasion a miscarriage of justice because it was not "'reasonably possible' that the failure to direct the jury [in the manner which the appellant now contends] 'may have affected the verdict'".[22]

Proposed Order

[30] I would dismiss the appeal.

[31] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

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20 *R v E* (1995) 89 A Crim R 325 at 330 (Hunt CJ).

21 The trial judge gave the directions approved in *R v Armstrong* [2006] QCA 158 and *R v McBride* [2008] QCA 412.

22 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38].