IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B31/2013

BETWEEN:

PEB
(Appellant)

10

And

THE QUEEN
(Respondent)

RESPONDENT'S SUBMISSION

Part I. Publication Certificate

20 1. We certify these submissions are in a form suitable for publication on the internet.

Part II. The Issue

2. The appellant was convicted of two counts of unlawfully and indecently dealing with a child who was under the age of 12 years and in his care pursuant to s. 210 (1)(a), (3) and (4) of the *Criminal Code (Qld)* (the Code).

3. The appellant appealed his conviction pursuant to s. 668 D (1) of the Code on
30 the ground, inter alia, that the verdict of the jury was "unsafe and unsatisfactory" (AB 236). The Court of Appeal (Chief Justice de Jersey, Muir and White JJA) unanimously dismissed the appeal.

4. The issue is whether the Court of Appeal properly performed the function required of it when determining whether a verdict is unreasonable or cannot be supported having regard to the evidence pursuant to s. 668 E (1) of the Code. The appellant contends the Court of Appeal:

Respondent's submission
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a. failed "to adequately assess the evidence and give sufficient reasons for the conclusion" (ground 2); and

b. was wrong to find the verdict was reasonable and supported by the evidence (ground 3).

Part III. Section 78B of the Judiciary Act 1903 certificate.

5. We certify this matter does not arise under or involve the interpretation of the Constitution.

Part IV. Facts

6. The appellant was charged on indictment with three counts of unlawfully and indecently dealing with a child who was under the age of 12 years and in his care pursuant to s. 210 (1)(a), (3) and (4) the Code.

7. The acts were alleged to have occurred on a date unknown in the period between 30 September 2008 and 1 December 2008 (AB 2, 30.30).

8. On 19 July 2012 the appellant was convicted after a three day trial before Judge Long SC and a jury in the District Court at Maroochydore of counts one and two. The jury failed to reach a verdict on count three.

9. The Crown's case relied primarily on the evidence of the complainant who was only six years old when the alleged offences occurred. The complainant was nine years old when she complained to her mother and 10 at the time of trial. The Crown also called Detective Senior Constable Brian Enright (Enright) who investigated the matter and the complainant's mother (M), who gave evidence of the child's age, the complaint to her and the occasions the complainant was at the appellant's home during the period relied on.

10. The appellant is the step-father of the complainant's father. The complainant viewed the appellant and his wife as her grandparents. The appellant gave

evidence denying the acts occurred at all and that they did not occur on 14 November 2008, when he admitted the complainant spent the night at his house within the alleged period. He also called evidence from his wife.

11. M gave evidence that the complainant, who was born on 6 December 2001 (AB 53.30), regularly visited the appellant's home at Bollier near Imbil. In 2008 the complainant stayed overnight at the appellant's house "once a fortnight; sometimes once a week" (AB 54.25, 59.50, 61.20-.60). The complainant often stayed there at the same time as her siblings, cousins or other children fostered by the appellant and his wife (AB 54.40, 60.50- 61.60). M specifically remembered there were many times in October and November 2008 when the complainant stayed overnight at the house when the foster child Emily, who was a similar age to the complainant, was there (AB 60.55-61.60, 100.25). M organised a surprise birthday party for the appellant at his house in early November 2008, which was attended by a number of people including the complainant (AB 54.45- 55.20, 60.5-.20). The birthday party was held on 6 November 2008.

12. M said that, one evening around March 2011 (AB 55.50, 57.25), when the complainant was going to bed she said to M, "Mummy, can I talk to you about something in private?" The complainant then told her mother that at a time near the appellant's surprise birthday party (AB 57.5) when she was staying overnight at the appellant's house, she had a bad dream and went in to sleep in the appellant's room. When she woke up the appellant was tickling between her legs beneath her underpants. The complainant told M it happened again the next day when her grandmother went out. She told the appellant she had to go to the toilet to end the contact (AB 56.1- 57.15).

13. M spoke to Enright by telephone on 25 April 2011 and took the complainant to the Maroochydore Police Station on 26 April 2011. Enright recorded his interview with the complainant at the police station (AB 73.25-.50, 73.55).

14. In that interview, which became the complainant's evidence in chief on counts one and two on the indictment, the complainant said on an occasion near the

appellant's birthday (AB 194.1), when she and her brother (B) were sleeping overnight at the appellant's house, that she went to bed wearing a long sleeve T-shirt, skirt and yellow underpants (AB 191). She woke up during the night after having a dream and went into the room where the appellant and his wife were sleeping. The complainant said her grandmother wore ear plugs to sleep. The complainant woke the appellant up (AB 193) and she slept in the bed next to him. The appellant said she woke up in the morning and the appellant was tickling her vagina 'slowly' and 'gently' (AB 197) underneath her underpants with three fingers of his left hand (count one). The complainant felt "scared and lonely" and got out of the bed and went outside to try and forget about it. The complainant said about half an hour later her grandmother and brother went out in the car. Then about an hour later (AB 201) the appellant came into the toy room where the complainant was playing and took her back into the bedroom. The complainant said she was standing near the wall separating it from the toilet when the appellant pulled down and removed her underpants and again tickled her a little harder this time with his left hand on the vagina (count two). The complainant told the appellant she had to go to the toilet, and despite him asking her to stay she went to a toilet in a different part of the house, where she saw a spider that scared her (AB 204). The complainant then watched a movie until her grandmother returned, about half way through the movie. The complainant was uncertain whether the acts occurred before or after the appellant's birthday party (AB 194.5, cf 194.45).

15. On 27 April 2011 the appellant was charged with two counts of indecent dealing and they became counts one and two on the indictment (AB 74.33).

16. In March 2012, M was advised that a date had been set to pre-record the complainant's evidence. When M was speaking to the complainant about giving evidence the complainant made a further disclosure. The complainant told M that the next day when her grandmother had left the house the appellant had "touched her under her underpants" and placed her hand "on his private area" while he was not wearing underpants, before taking her to the bedroom where he lay on the bed and bounced her on top of him when she had no underpants on under her skirt and he had no pants on under his shirt. The

complainant told her mother that she felt bad about laughing and giggling at the time of the incident and that was the reason she did not tell M about it earlier. The complainant also said that she was scared and the appellant had told her not to tell anybody (AB 58.30-.60).

17. The complainant was taken to the Maroochydore Police Station on 15 March 2012 and Enright recorded another interview with the complainant which was her evidence in chief for count three (74.45).

10 18. In that interview the complainant said that after the act relied on as count two above the appellant took her over to the bed where he lay down, took his pants off, placed her hand on his penis, his hand on her vagina, took off her underpants, and then with the complainant facing him bounced her up and down on top of him (AB 224, 229). The complainant said she pretended to laugh. The appellant's penis and the complainant's vagina touched (AB 227, 228). The complainant's grandmother returned and the appellant pulled up her underpants and told the complainant not to tell anybody. She said the appellant's birthday was "near that as well" (AB 224). When asked why she had not told Enright of this act last time she said she had forgotten about it
20 (AB 224).

19. On 29 March 2012, the complainant's evidence for the trial was recorded. In cross-examination the complainant said that she had not told Enright about the incident constituting count three on 26 April 2011 because she had forgotten about it at the time (AB 21.1). Further, she explained that she had not told her mother earlier because she was scared she would appear 'silly' for not mentioning it (AB 20.5, 21.20-.45). The complainant said the appellant touched her near the date of his birthday (AB 24.17). When asked if it was before or after the birthday she said it was after (AB 24.25). Later she said she
30 thought there was a week between the incident and the birthday (AB 32.55). The complainant said her grandmother did wake up when she went into the room, but did not say anything and went back to sleep (AB 26.15). The complainant agreed that the appellant had three foster children in the house during the period but she could only remember her brother being there on this

occasion and she didn't know whether the foster children were there before or after the incident (AB 30.50- 31.30).

20. The complainant was cross-examined again on 11 July 2012. The complainant agreed with the proposition that she had previously said the acts occurred prior to the party (AB 42.5, 42.47). The question ignored the evidence at AB 194.40 and 24.20. Later, when it was suggested that the only time she stayed at the appellant's house was a 'couple of weeks' after the birthday the complainant said she could not remember (AB 43.5). The complainant also said that she was not sure whether the foster children were living at the house or present at the time of the acts (AB 42.20). However she did remember that at the time she "stayed over at Poppy's house near his birthday" that the appellant and his wife were supervising her and the foster children (AB 43.40). She also agreed that around the time of the birthday there were 'sleepovers' with the foster children (43.30).

21. The appellant gave evidence denying the acts took place (AB 86.38). The appellant said that the three foster children came to live with him and his wife on 15 October 2008 (AB 86.45), the children were never allowed to sleep in his bed (AB 87.28) and the only occasion the complainant stayed over at his house during the period 'between October and November 2008' was on 14 November 2008 (AB 87.40). The appellant denied indecently dealing with the complainant on that occasion (AB 88.15) and said his wife did not leave the house the following day and he was never alone with the complainant (AB 94.50). He confirmed his wife did work on the weekends before and after his birthday party on 6 November (AB 90.15). The appellant said the complainant's last visit to his house before 14 November was 'a month or so before' a trip to SeaWorld on 11 October (AB 93.50-94.1).

22. The appellant's wife gave evidence that the three foster children arrived on 15 October 2008 (AB 100.25), the children were not allowed to sleep in the bed she shared with the appellant (AB 101.1, 101.40), and the only occasion the complainant stayed over at the house in October or November 2008 was on 14 November (AB 101.20) when the foster children were present (AB 101.30).

She said the complainant did not come into her room and was not left alone with the appellant on that occasion. She confirmed on that occasion the complainant and one of the female foster children around her age were getting used to playing together (AB 102.1, 102.30-.45). She said that she did not leave the house and there was no occasion the appellant was alone with the complainant. She said that in 2007 and 2008 the complainant did not stay overnight at her house regularly (AB 104.1). She explained she kept a diary specifically to record details about the foster children (AB 105.40) and the last time the complainant stayed over was before 27 September 2008 (AB 107.45). She conceded the diary was not a complete record (AB 111.1, 113.1) and that it was possible the complainant did stay over on other occasions not recorded in the diary (AB 113.48, cf 114.30-115.20). She also confirmed that she did wear ear plugs to sleep (AB 108.1).

Part V. Statutory Material

23. In addition to s. 668 E (1) of the Code referred to by the appellant s. 210 of the Code relevantly provides:

> (1) Any person who—
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> (a) unlawfully and indecently deals with a child under the age of 16 years;
>
> is guilty of an indictable offence.
>
> (2)...
>
> (3) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 20 years.
>
> (4) If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 20 years.

(5)...

(6) In this section— ***deals with*** includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

24. Section 668 D (1) of the Code relevantly provides:

(1) A person convicted on indictment, or a person convicted of a summary offence by a court under section 651, may appeal to the Court—

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(a) against the person's conviction on any ground which involves a question of law alone; and

(b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal.

20 (2)...

25. For completeness section 668 E (1) relevantly provides:

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and

30 in any other case shall dismiss the appeal.

(1A)...

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3)...

Part VI. Argument

26. The appellant appealed his conviction on three grounds. Two grounds, added by leave at the hearing of the appeal, concerned whether the judge's direction about the date of the alleged offending was adequate. This was the focus of the appellant's written and oral submissions below. There is no complaint about the Court's finding dismissing those two grounds of appeal at [18].

27. The original ground of appeal, which is the subject of this grant of leave to appeal, is "the verdicts reached by the jury were unsafe and unsatisfactory." (AB 236 and [14]).

28. To determine whether, as the appellant alleges, the Court of Appeal failed to properly perform its function or give adequate reasons, their decision must be looked at in the context of the evidence and why it was said the verdict was unreasonable.

29. The Chief Justice correctly summarised the appellant's primary submission on this ground at [19]. The appellant's entire written submission below to support this ground was:

"The circumstances in which the complainant made her complaint of the third incident of indecent treatment were unusual and were the likely reason for the jury's inability to reach a verdict on count 3. The jury were given a Markuleski direction (at R 134-135). The circumstances in which the complaint of count 3 was made, namely, about a year after her first complaint to her mother and her interviews with police, and while the complainant's mother was preparing her for her pre-recorded evidence, gave rise to doubts

about her credibility and reliability overall. The verdicts of guilty and the jury's inability to agree on count 3 were inconsistent and irreconcilable."

30. At the commencement of the hearing of the appeal below the appellant's counsel said the submissions would 'focus' on the grounds concerning the adequacy of the directions and in relation to this ground (T 27.11.2013 p.1-2. 27):

"There's probably not much more I can say about the reasonableness or otherwise of the verdicts than what I've already said in my outline."

31. The appellant did say in oral argument at appeal that the verdict was unreasonable because the evidence of the emergence of the complaint of count three combined with the defence evidence relating to the issue of when the offence was alleged to have occurred should have caused the jury to have a reasonable doubt on counts one and two (T 27.11. 2013 p.1-2.15; 1-5.30-.45). This submission is reflected in paragraph [21] of the reasons.

32. It is not submitted by the appellant that the Court of Appeal applied the wrong test or incorrectly concerned itself with whether, as a question of law, there was evidence to support the verdicts. The Court of Appeal was required to make "an independent assessment of the evidence, both as to its sufficiency and its quality": see *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Gaudron and Toohey JJ; *MFA v The Queen* (2002) 213 CLR 606 per McHugh, Gummow and Kirby JJ, at 623-624 [58]. In *SKA v The Queen* (2011) 243 CLR 400 the majority of French CJ, Gummow and Kiefel JJ at 405 [11] and [13] confirmed the function to be performed by the Court was stated in *M v The Queen* (1994) 181 CLR 487 by Mason CJ, Deane, Dawson and Toohey JJ at 493 and recognised that the jury is the body entrusted with primary responsibility for determining guilt. At page 408 [20] the majority identified the central question as "whether on the evidence the Court was satisfied the applicant was guilty of the offence". The majority went on to say at 409 [22] that:

"On appeal, the task of the Court of Criminal Appeal was to make an independent assessment of the whole of the evidence, to determine whether the verdicts of guilty could be supported."

33. After referring to the majority in *SKA v The Queen* (2011) 243 CLR 400 at 409, the Chief Justice said at [24]:

"Having reviewed the evidence as required, I am satisfied these convictions are not unsafe."

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34. The evidence he referred to was short and uncomplicated. The fact in issue at the trial was whether the acts occurred at all within the period of 30 September 2008 and 1 December 2008. The complainant said they occurred near the date of the appellant's birthday party on 6 November 2008. The Chief Justice summarised the evidence in paragraphs [1] to [13] and identified the matters that went to the sufficiency and quality of the complainant's evidence. The Chief Justice took into account that the complainant was six years old at the time of the offences (at [2]) and that the complainant gave a similar account to her mother and the police (at [6]). The complainant informed her mother of the
20 first two incidents two years and four months after they occurred and she raised the third incident 12 months after that and after her evidence regarding counts one and two had been recorded (at [7] and [8]). The complainant did not tell her mother about the third incident when she first spoke to her because she was scared and she forgot about it when she was first talking to the police (at [9]). When first cross-examined the complainant said the foster children were not present but on the second occasion said she was not sure whether they were living there at the time (at [10]).

35. The Chief Justice took into account that the appellant gave evidence denying
30 the offences and his evidence, based on his wife's diary, that the foster children arrived in his house on 15 October 2008 and that the offences did not occur on 14 November 2008 when the complainant stayed overnight at his house (at [12]). The Chief Justice recognised the significance of that evidence in relation to the complainant's evidence that the foster children were not

present when the offences occurred (at [13]) and her uncertainty as to when the acts occurred, apart from her evidence they occurred close to the date of the birthday party on 6 November 2008 (at [17]).

36. The trial judge directed the jury that they could accept all, part or none of a witness's evidence (AB 131), to consider each charge separately and of the need to be satisfied beyond reasonable doubt in relation to each count (AB 134). The appellant complains at paragraphs 60 and 61 of his submissions that the Chief Justice did not properly identify the inconsistencies in the complainant's evidence. The Chief Justice did identify the material inconsistencies in the reasons. Further, the matter relied on in paragraph 61 (iv) is not, in the context of the question, an inconsistency. The complaint in paragraph 62 that the Chief Justice made factual errors is of little weight because the first two matters, as the appellant concedes, were minor and the third matter was not an error. M did give evidence that the first she knew about the offences was sometime in or around March 2011 (AB 55.50).

37. The Chief Justice at [19] specifically addressed the appellant's written submission concerning the verdict. The Chief Justice first dealt with how the verdicts could be reconciled. The verdicts were not inconsistent because as the Court (McMurdo P, McPherson and Keane JJA (as His Honour then was)) said in *R v DAL* [2005] QCA 281 there could be no inconsistency between the guilty verdicts on counts one and two and the discharge of the jury without returning a verdict on count 3. McPherson JA said at [6]: "There cannot be a state of inconsistency between something and nothing". Keane JA, citing what Callinan J said in *Osland v The Queen* (1998) 197 CLR 316 at 406, said at [21] that "it is not correct to speak of inconsistent verdicts. In this case the jury only returned verdicts of guilty while failing to reach agreement on the other charges. The failure to reach a verdict is not to be equated with a verdict of acquittal." However, the Chief Justice was correct to find the 'rational explanation' for why the jury was unable to reach unanimity on count three was because one or more considered the delay in complaining about the acts in count three when all acts occurred around the same time rendered the complainant's evidence on count three unreliable. There was evidence the

complainant was embarrassed by her response to the third act (AB 58.30), forgot to tell the police officer when she first spoke to him (AB 21.1, 29.30, 224) and she was scared to tell her mother because she might appear 'silly' for failing to mention it originally (AB 21.20-.50). The Chief Justice was also correct to find, in response to the submission, that although one or more jurors had found the complainant's evidence on count three unreliable, that it did not cause them to doubt her credibility overall given the very young complainant had given an explanation for the delay which the jurors believed: see *MFA v The Queen* (2002) 213 606 at 617-618, 632. Further, in *MacKenzie v The Queen* (1996) 190 CLR 348 at 367, Gaudron, Gummow and Kirby JJ said:

"...the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense (33). Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted (34). If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."

38. The verdicts in this case are reconcilable and do not "represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty." See *MacKenzie* at 368.

39. The Chief Justice then considered the oral submission that the appellant's denial in combination with the evidence that he took the complainant to Sea World on 11 October 2008, the foster children arrived on 15 October 2008, and his wife's diary recording a sleepover on 14 November 2008 was so compelling it was unreasonable for the jury to convict. The Chief Justice, taking into account the whole of the evidence, referred to the fact that the diary was not a complete record and that it was open to the jury to approach the

diary with some circumspection (see [21]) and "to E's (the complainant's) understandable inability to be certain about dates, and as to the presence or absence of the foster children, whereas she plainly put the offending proximately in time to that of the surprise birthday party." (see [12] ,[13] & [22]). The Chief Justice also had regard to "the consistency of E's accounts, from when she first spoke to her mother in relation to counts one and two". The jury had the benefit of seeing and assessing the 10 year old complainant give evidence of acts said to have occurred when she was six years old. Making full allowance for the advantage enjoyed by the jury in seeing the complainant give evidence the discrepancy as to whether the acts occurred before or after but close to the birthday party and her uncertainty as to whether the foster children were present does not deplete the probative value of her evidence to the point that there is a significant possibility an innocent person has been convicted: see *M* at 494.

40. It is not a matter, as the appellant contends in paragraphs 48 to 52, of accepting or rejecting a particular witness's evidence. In *Douglass v The Queen* 290 ALR 699 this Court said at 702 [12] said "It was an error to view the appellant's trial as reducing to a case of "word against word". It is a characterisation which fails to recognise that the resolution of a criminal case does not depend on whether the evidence of one witness is preferred to that of another. The resolution of a criminal trial depends upon whether the evidence taken as a whole proves the elements of the offence beyond reasonable doubt." The issue for the jury was, as the Chief Justice observed at [24], "whether, in the context of the defence evidence, they were nevertheless satisfied beyond reasonable doubt that the respective offences occurred as related by E, including within the nominated timeframe". However, on appeal the question was the sufficiency of the complainant's evidence to support a conclusion beyond reasonable doubt that the offences charged in the indictment occurred. The Chief Justice summarised and independently assessed the whole of the evidence and gave specific reasons as to why each complaint that the verdicts were unreasonable was dismissed. It was on the whole of the evidence open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The Chief Justice was correct to find at [24]:

"Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict."

Part VII. Notice of Contention or cross-appeal

41. The respondent does not intend to file a notice of contention or a cross-appeal.

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Part VIII. Time estimate

42. The respondent estimates it will take one hour to present the oral argument.

Anthony Moynihan
Clare Kelly
Counsel
Date: 31 July 2013