

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B72 of 2016

BETWEEN:

GAX

Appellant

and

10

THE QUEEN

Respondent

**APPELLANT'S SUBMISSIONS**

20 **PART I INTERNET PUBLICATION**

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

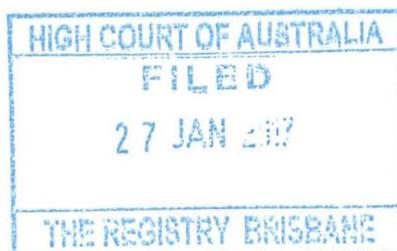
**PART II ISSUES ON APPEAL**

2. Whether the majority of the Court of Appeal made an independent assessment of the sufficiency and quality of the evidence in determining the reasonableness of the verdict of guilty.
- 30 3. Whether the majority of the Court of Appeal erred in failing to conclude that the verdict of guilty was unreasonable.

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Submissions Filed on 27 January 2017 on behalf of the Appellant

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**PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)**

4. The appellant considers that notice is not required to be given pursuant to s78B of the *Judiciary Act 1903 (Cth)*.

**PART IV CITATION OF JUDGMENT APPEALED FROM**

5. The judgment of the Court of Appeal has not been reported. The judgment has the internet citation of *R v GAX* [2016] QCA 189.

**PART V RELEVANT FACTS**

6. The appellant was tried before a judge and jury in the District Court at Mackay on three  
10 counts of aggravated indecent treatment of a child contrary to s210 of the *Criminal Code (Qld)*. The jury acquitted him on counts 1 and 2 and found him guilty on count 3. That count pleaded that on a date unknown between the eleventh day of July 2003 and the fourteenth day of July 2003 the appellant unlawfully and indecently dealt with a child who was, to his knowledge, his lineal descendant. The child (the complainant) was the appellant's natural daughter. This count had been particularised as the appellant having touched the complainant on the vagina<sup>1</sup> but after all the prosecution evidence had been received the particulars were amended to allege that the appellant touched the complainant on or near the vagina.<sup>2</sup>
7. The complainant was born on 20 August 1990.<sup>3</sup> She was aged 12 years and almost 11  
20 months old at the time that the offence was alleged to have occurred. The complainant

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<sup>1</sup> Transcript p236

<sup>2</sup> Transcript p2 – 72 line 37 – p2 – 73 line 1

<sup>3</sup> Transcript p 2 – 32 line 1

never discussed the incident the subject of the offence with anyone<sup>4</sup> until on or about 2 November 2013 when she attended a police station to make a complaint.<sup>5</sup>

8. The complainant testified that the incident the subject of count 3 occurred in the bedroom that she shared with her sister. The complainant accepted that there was only one occasion that she could recall when she was inappropriately touched by the appellant in that bedroom.<sup>6</sup> She said that this was *“a time where he was caught ... That would have to be the last time it happened”*.<sup>7</sup>

9. There was no door to the bedroom, it had previously been broken off.<sup>8</sup> The complainant said that on the night concerned she and her sister were in the bedroom and that her sister was asleep in her own bed. The light had been turned on and her mother entered the room and pulled the blanket up after she saw the appellant hopping out of the bed. The complainant said that when her mother pulled the sheets her underwear were down at her ankles.<sup>9</sup> When asked how her underwear had got down to her ankles the complainant said *“Time, I didn’t know. All I knew was my Dad had just hopped off the bed.”*<sup>10</sup> When asked what the appellant had done while he was on the bed she replied *“Well, I was asleep before and ended up finding out what happened but -”*.<sup>11</sup> The prosecutor interrupted her and said that she was not to tell the court what she ended up finding out. He asked what she remembered. The complainant said that when she was lying there she could *“feel hands down near where my underwear were – were supposed to be”*.<sup>12</sup> When asked what happened with the hands she said *“I can’t say.*

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<sup>4</sup> Transcript p1 – 24 line 8 and p2 – 8 lines 37 - 39

<sup>5</sup> Transcript p32 lines 36 - 39

<sup>6</sup> Transcript p29 lines 40 - 43

<sup>7</sup> Transcript p25 lines 17 - 19

<sup>8</sup> Transcript p27 line 26 and transcript p2 – 33 lines 31 - 32

<sup>9</sup> Transcript p25 lines 20 - 25

<sup>10</sup> Transcript p25 lines 27 – 28

<sup>11</sup> Transcript p25 lines 30 - 31

<sup>12</sup> Transcript p25 lines 35 - 36

Sorry, I can't say. I don't remember".<sup>13</sup> She was asked if she could say where the hands were and she said his "*fingers were near my vagina*", she did not recall what was happening just that his fingers were down there until "*we*" realised someone was coming down the hallway.<sup>14</sup> She could not recall how long his fingers had been there but the appellant had been in her bed for probably five minutes before the light came on and her mother saw that her underwear was around her ankles.<sup>15</sup> When her mother pulled the covers off the appellant was next to the bed. He had just hopped off it and made it appear as if he had been picking something up or had been checking on them.<sup>16</sup>

10. The complainant's mother said that at about 7.30 – 8.00pm<sup>17</sup> she returned home in their car with the complainant's brother, L. She said that the complainant's sister had either stayed home or had gone with her to get takeaway.<sup>18</sup> The mother put the food on a table and called out that dinner was ready. There was no reply from anyone so she went along to her daughters' bedroom, accompanied by the complainant's sister. When she turned the light on she saw the appellant "*cuddling up*" with the complainant, the sheets were pulled "*right up*" and the complainant was "*snuggled up*" to the appellant. The complainant's eyes were "*scrunched up*" and the appellant looked to be asleep.<sup>19</sup>
11. The mother announced that dinner was there and pulled back the covers. She noticed that the complainant's pink knickers were "*folded down*" about an inch or so. The complainant's pink singlet was positioned normally.<sup>20</sup>

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<sup>13</sup> Transcript p25 lines 38 - 39  
<sup>14</sup> Transcript p25 lines 41 - 45  
<sup>15</sup> Transcript p25 line 47 – p26 line 7  
<sup>16</sup> Transcript p26 lines 17 - 19  
<sup>17</sup> Transcript p2 – 41 line 7  
<sup>18</sup> Transcript p2 – 37 line 37 – p2 – 38 line 2  
<sup>19</sup> Transcript p2 – 38 line 23 – p2 – 39 line 28  
<sup>20</sup> Transcript p2 – 39 line 30 – p2 – 40 line 7

12. The mother did not know what to say. She tried to wake the complainant up. She yelled at the appellant and pulled him out of the bed. The appellant was appropriately dressed and he left the room. The complainant just lay there with her eyes “*scrunched up*” and did not leave the room.<sup>21</sup>
13. The next day, Saturday 12 July 2003, the mother put an asterisk in the calendar column relevant to the complainant to record it as the day after she had “*caught*” the appellant in the bed with the complainant.<sup>22</sup>
14. The complainant’s sister was born on 21 July 1992<sup>23</sup> and was aged almost 11 years old on 11 July 2013. The sister said that she recalled arriving home in the car with her mother and two younger brothers. She and her mother went to the bedroom that the sister shared with the complainant. Her mother was looking for the complainant.
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15. The sister said that when her mother turned the light on the complainant’s bed was up against a bedroom wall. The complainant was lying face up on the right side of the bed. The appellant was facing the wall away from the complainant.<sup>24</sup> She said that the appellant did not answer when her mother repeatedly asked what he was doing. The sister saw the complainant get up from the bed. The complainant’s underwear were “*right down*” and the complainant’s nightie or shirt was “*above her boobs*”. The complainant ran from the room crying. The sister said that the appellant never got out from under the blanket in the time that the sister was in the bedroom.<sup>25</sup>

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<sup>21</sup> Transcript p2 – 40 lines 10 - 47

<sup>22</sup> Transcript p2 – 36 line 30 – p2 – 37 line 35 and Exhibit 2 at p222

<sup>23</sup> Transcript p2 – 32 line 2

<sup>24</sup> Transcript p2 – 25 line 37

<sup>25</sup> Transcript p2 – 27 lines 1 - 29

16. The appellant gave evidence that he did not touch the complainant on or near her vagina when she was in her bed.<sup>26</sup> He denied that there was an occasion when he was in the complainant's bed when his wife entered the room and turned the light on.<sup>27</sup>

## PART VI ARGUMENT

### Ground 1

17. Two grounds of appeal were agitated in the Court of Appeal – first that the verdict of guilty was unreasonable and second that it was inconsistent with the verdicts of acquittal returned on counts 1 and 2. The appeal to this Court is only concerned with how the majority below (Morrison JA and Atkinson J) dealt with the ground that the  
10 verdict was unreasonable.
18. The majority was not satisfied either ground was established.<sup>28</sup> McMurdo P would have allowed the appeal on the ground that the verdict was unreasonable.<sup>29</sup>
19. Section 668E(1) of the *Criminal Code* relevantly states that the Court of Appeal “*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 cannot be supported having regard to the evidence.*”
20. A complaint that a verdict is unreasonable is to be determined according to principles which are regarded as well established.<sup>30</sup> Those principles include that an appellate court must make an assessment about whether it was open to the jury on the whole of the evidence to be satisfied of guilt beyond reasonable doubt.<sup>31</sup> An appellate court must

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<sup>26</sup> Transcript p2 – 77 line 16

<sup>27</sup> Transcript p2 – 84 lines 21 - 25

<sup>28</sup> Reasons at [21] and [51]

<sup>29</sup> Reasons at [2]

<sup>30</sup> *BCM v R* (2013) 303 ALR 387 at [31]

<sup>31</sup> *MFA v The Queen* (2002) 213 CLR 606 at [55]; *SKA v The Queen* (2011) 243 CLR 400 at [11]

assess the sufficiency and the quality of the evidence.<sup>32</sup> Its reasons must “*disclose its assessment of the capacity of the evidence to support the verdict*”.<sup>33</sup>

21. The reasons at [25] contained a correct statement of the test to be applied. At [41] the arguments advanced about why the verdict was unreasonable were summarised. However, the reasons did not disclose an assessment or a weighing<sup>34</sup> of the evidence of the complainant and her relatives in order to gauge whether the evidence as a whole was sufficient to support a verdict of guilty beyond reasonable doubt. Any assessment of the evidence was confined to an observation at [35] that the complainant’s evidence about counts 1 and 2 was vague and uncertain and at [43] that the complainant’s evidence about count 3 was supported in important ways by the evidence of her mother and sister. Any support that the complainant’s evidence enjoyed from that of her mother or sister did not go to whether the appellant had actually touched the complainant on or near her vagina.

22. Paragraphs [44] – [48] were only directed to the other ground of appeal concerning the inconsistency of the verdicts. This can be seen in phrases such as:

- “*The conviction on count three can be accounted for by ...*”[44];
- “*The difference in the strength of evidence on count three readily accounts for ...*” and “*There was a rational distinction between the strength of the evidence on each of the three counts ...*”[46];
- “*The evidence ... was much more detailed with regard to count three*” [47]; and
- “*The cases in which inconsistency of verdicts undermine the legitimacy of a guilty verdict ...*”[48].

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<sup>32</sup> SKA at [14]

<sup>33</sup> BCM at [31]

<sup>34</sup> SKA at [22]

23. Consideration of the reasonableness of the guilty verdict was confined to the third sentence in [49] and the one sentence in [50].
24. There was no assessment of the matters which were canvassed by McMurdo P at [17]. There McMurdo P weighed up those features of the complainant's testimony which, when combined, caused McMurdo P to have "*real uncertainty as to what, if anything, happened with the appellant's fingers*" [17]. Aspects of the evidence are discussed in detail under ground 2 below but those features of the complainant's evidence which concerned McMurdo P included the substantial delay in complaining, the complainant's memory difficulties and the complainant's difficulty in recalling what if anything the appellant's fingers touched. An additional feature of the complainant's evidence that McMurdo P referred to was that her testimony that she ended up finding out what happened raised a real possibility that the complainant had engaged in a reconstruction of events.
25. The inconsistencies between the complainant and her mother and sister were regarded by McMurdo P at [18] as "*more than minor*". To the extent that the majority considered the inconsistencies at [44] the consideration was only in the context of assessing whether the verdicts were inconsistent.

## Ground 2

26. The majority erred in failing to conclude that the verdict was unreasonable. Like the position which obtained in *BCM*<sup>35</sup> the trial was short. The evidence was heard in two days. It is not in the interests of justice to remit the appeal to the Court of Appeal upon satisfaction that Ground 1 is established. This Court should determine whether the verdict was reasonable.

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<sup>35</sup> At [32]

27. Before the jury could find the appellant guilty on count 3 it had to be satisfied beyond reasonable doubt that he had done an act which constituted a dealing with the complainant. On the way the prosecution case was presented this required satisfaction beyond reasonable doubt that he had touched her on or near the vagina<sup>36</sup> whilst on the bed.
28. It was not open to the jury to be satisfied to the criminal standard on the whole of the evidence that the complainant was touched on or near the vagina. This was because it was not open to the jury to be satisfied that the complainant had any actual recollection of being touched there by the appellant.
- 10 29. At the time of the mother's entry to the bedroom and switching on the light the complainant did not know how her underwear came to be around her ankles.<sup>37</sup> That her underwear might be in other than the appropriate place was not remarkable in itself. She regularly wet the bed up until she was in high school and she agreed that often when that occurred she would take her underwear off and the underwear would end up in the bed or on the floor.<sup>38</sup> Accordingly, the underwear being out of proper position was explicable on a basis other than that it was the appellant who was responsible for it even though the evidence was silent on the issue of whether the bed was wet.
30. All that the complainant knew was that the appellant hopped off the bed.<sup>39</sup> When asked what he had done while on the bed she replied that she had been asleep and ended up  
20 finding out what happened.<sup>40</sup> This answer is very significant as its terms imply that the complainant did not know what had occurred at all due to being asleep but had

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<sup>36</sup> Summing up at p15 lines 26 - 30

<sup>37</sup> Transcript p25 line 27

<sup>38</sup> Transcript p2 - 10 lines 25 - 37

<sup>39</sup> Transcript p25 line 28

<sup>40</sup> Transcript p25 lines 30 - 31

subsequently come to an understanding about what must have taken place. The mother's evidence was that she yelled at the appellant<sup>41</sup>, made a notation relevant to her observation in the calendar<sup>42</sup> and later in 2003 told a person about what she saw<sup>43</sup>, despite knowing nobody would believe what she said.<sup>44</sup> These reactions suggest that what the mother believed she had discovered was regarded as noteworthy and so likely to have been the subject of discussion between her and the complainant. It seems as though it was a topic the mother raised with the other children according to the sister.<sup>45</sup>

10 31. When told to confine her evidence to what she recalled, the complainant's testimony demonstrated a vagueness about details suggestive of no actual recollection. She could not say what the appellant's hands did, she did not remember. His hands were "near" where her underwear was meant to be.<sup>46</sup> She did not say that there was any touching. Although she said that fingers were "near" her vagina<sup>47</sup> she did not say that anything was touched. It is impossible to be satisfied on this evidence that there was touching as particularised.

32. That the complainant believed that she had been touched due to something said afterwards or due to her mother's reaction could not be excluded. She was easily led in high school and said she believed what her parents told her.<sup>48</sup> Her mother said that she was easily led.<sup>49</sup> She agreed that she had previously stated that the complainant would believe what anyone told her.<sup>50</sup>

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41 Transcript p2 – 40 line 17

42 Transcript p2 – 37 lines 27 - 29

43 Transcript p2 – 53 lines 17 - 29

44 Transcript p2 – 52 line 40

45 Transcript p2 – 26 lines 19 - 40

46 Transcript p25 line 35

47 Transcript p25 line 43

48 Transcript p2 – 7 lines 1 - 11

49 Transcript p2 – 42 line 43

50 Transcript p2 – 42 line 45 – p2 – 43 line 4

33. The complainant had memory problems. Her mother said that for the whole of her life the complainant did not have a long term memory.<sup>51</sup> The complainant accepted that she did not have a reliable memory<sup>52</sup> and that it was a difficulty that she had endured for most of her life.<sup>53</sup>
34. The delay between when count 3 allegedly occurred and the complainant's first disclosure of it to anyone on 2 November 2013<sup>54</sup> was in the order of a decade. This was a very substantial period in a situation where she had problems with her long term memory.
35. A manifestation of the difficulty with memory was conceded by the complainant. She had said that she could not sit with the appellant on his loungeroom chair without something very inappropriate occurring.<sup>55</sup> She agreed that she had never previously made any allegation of impropriety in a lounge chair.<sup>56</sup> She agreed that her evidence about the lounge chair was an example of her unreliable memory.<sup>57</sup>
36. The complainant had previously described her relationship with the appellant as a beautiful relationship.<sup>58</sup>
37. Despite what the mother saw she never made a complaint to the police. There was evidence from her that permitted the view to be taken that in 2003 she was not averse to making complaints on her daughter's behalf.<sup>59</sup>

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<sup>51</sup> Transcript p2 – 42 lines 23 - 29

<sup>52</sup> Transcript p33 line 17

<sup>53</sup> Transcript p2 – 6 lines 1 - 3

<sup>54</sup> Transcript p1 – 24 lines 5 - 15

<sup>55</sup> Transcript p29 lines 30 - 36

<sup>56</sup> Transcript p1 – 27 lines 1 - 23

<sup>57</sup> Transcript p1 – 28 lines 10 - 17

<sup>58</sup> Transcript p2 – 13 line 15

<sup>59</sup> Transcript p2 – 44 line 33 – p2 – 45 line 2

**PART VII APPLICABLE STATUTORY PROVISIONS**

38. The applicable statutory provisions are attached.

**PART VIII ORDERS SOUGHT**

39. That the appeal be allowed.

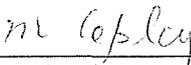
40. Set aside the order of the Court of Appeal of the Supreme Court of Queensland and in lieu order that the appeal to that Court be allowed, the conviction quashed and a judgment and verdict of acquittal entered.

10 **PART IX TIME ESTIMATE**

41. It is estimated that the appellant's argument will take approximately one hour.

DATED: 27 January 2017

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M. J. Copley

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