IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No: B72/2016

BETWEEN:

GAX

(Appellant)

-and-

THE QUEEN

(Respondent)

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RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION ON THE INERNET

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

PART II: RESPONDENT'S STATEMENT OF PRESENTED ISSUES

2. The respondent agrees with the formulation of the issues stated by the appellant.

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

3. The respondent considers that notice is not required pursuant to section 78B of the *Judiciary Act 1903 (Cth)*.

Submissions
Filed on behalf of the Respondent

Form 27D
R 44.03.03

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PART IV: CONTESTED MATERIAL FACTS

4. The respondent accepts that the facts outlined in paragraphs 6 to 16 of the appellant's outline provides a sufficient summary of the evidence at trial.

PART V: APPELLANT'S STATEMENT OF APPLICABLE STATUTES

5. The respondent accepts the appellant's statement of the applicable statutes as set out in the annexure to his submission.

PART VI: STATEMENT OF THE RESPONDENT'S ARGUMENT IN ANSWER

10 **Ground One.**

6. The Court of Appeal had before it two grounds of appeal. Each alleged that the conviction on the sole count of which the appellant was convicted was unreasonable because, first, it could not be supported by the evidence and, secondly, that the conviction on one count was inconsistent with the acquittals on the other two counts.

7. The majority of the Court of Appeal (Atkinson J, Morrison JA agreeing) dismissed both grounds of appeal. The third member of the Court, McMurdo P. would have allowed the appeal on the first ground agitated, and did not consider the second ground. The appellant has not complained in this Court about the correctness of the decision on the ground concerning the inconsistent verdicts.

20 8. The majority correctly cited the test to be applied[1] and hence were aware of the nature of the test to be applied. It was also correctly noted that under the first ground of appeal a consideration of some of the evidence relevant to the two counts resulting in acquittal was required.[2] The appellant does not suggest that the test was misunderstood, rather that the reasons do not expose that the necessary independent assessment of the evidence was in fact undertaken.[3] This is not a matter where there has been a complete refusal to provide reasons at all.

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[1] AB288 at [25].
[2] *ibid*
[3] Appellant's submissions at [21] – [25].

9. It is accepted that there is an obligation on the intermediate appellate court to provide reasons sufficient to reveal to the parties the reasons for the decision reached. In *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* it was said, in the context of a failure to provide reasons for refusing leave to appeal:

> "*The disappointed applicant (and any court asked to review the refusal) must, however, be able to know from the reasons given by the primary judge why the judge reached the decision to refuse leave.*"[4]

10. The rationale for the requirement to provide reasons is not limited to the ability of the parties to assess their prosects on appeal or to understand their respective rights. In an extra-curial statement by Gleeson CJ, his Honour noted that the obligation to give reasons promotes good decision making, assists with issues of democratic institutional responsibility and promotes public confidence and acceptance of the decisions.[5]

11. French CJ and Kiefel J in *Wainohu v State of New South Wales,* after citing that extra curial statement, said:

> "*Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision.*" [6]

12. There is no one correct way to write a judgment. This Court in *BCM v The Queen*[7] and *SKA v The Queen*[8] has emphasised that the reasons for dismissing an appeal against the reasonableness of the verdict concerned with the sufficiency of the evidence must disclose the court's independent assessment of the capacity of the evidence to support the verdict. But, whilst respecting that minimum requirement, there is no required formula or prescription for the contents of the judgment, nor the manner in which the assessment of the capacity of the evidence is undertaken.

13. The task required of the Court in determining the ground alleging inconsistent verdicts (and hence an unreasonable verdict) bears marked similarities with the test concerning the sufficiency of the evidence. It requires the appellate court to assess the evidence for itself to determine whether the impugned verdict is unsafe and unsatisfactory. This

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[4] (2001) 207 CLR 72, per Gaudron, Gummow, Hayne and Callinan JJ at 83, [26].
[5] Cited in *AK v Western Australia* ((2008) 232 CLR 438 at 470 [89].
[6] (2011) 243 CLR 181 at 214-215 [56]
[7] (2013) 303 ALR 387, [31].
[8] (2011) 243 CLR 400, [22]-[24].

necessarily requires it to assess the sufficiency of it to determine if there is a proper way the different verdicts can be reconciled. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court to substitute its opinion of the facts for one which was open to the jury.[9] The appellant has not complained about the dismissal of this ground in the Court of Appeal, and may be taken to be content that the assessment of the evidence was undertaken for the purposes of that ground below.

14. The judgment of Atkinson J. was written in a manner which considered the overlapping considerations without separating them into separate specific parts of the judgment, although some parts of the judgment are obviously attributable to particular grounds. Some parts of the judgment other than those under the heading "Consideration" also reveal an assessment of the evidence.

15. The appellant submits that the judgment of Atkinson J does not disclose "*an assessment or weighting (sic) of the evidence*".[10] Qualitative statements indicting that her Honour assessed the evidence can be found at various places in the judgment, including:

a. At [29] Atkinson J prefaced her recitation of the evidence in chief dealing directly with the allegation in count 3 with the word "importantly". This marked a conclusion as to the significance of the fact that the complainant was directed to testify only as to her recollection.

b. At [35] Atkinson J observed that the complainant's evidence concerning counts 1 and 2 on the indictment was "*vague and uncertain*" and thereby distinguished that evidence from the evidence concerning count 3. Her Honour's conclusion in the first sentence of [47] is a further statement of distinction between the detail and clarity of the evidence concerning the first two counts on the one hand and count three on the other hand.

c. At [43] Atkinson J observed that "*The complainant's evidence was supported in important ways*" thereby acknowledging the existence of supportive evidence that went to matters of importance.

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[9] *MacKenzie v The Queen* (1996) 190 CLR 348 at 365 – 368 per Gaudron, Gummow and Kirby JJ.
[10] Appellant's submissions at paragraph 21.

d. Later in [43] Atkinson J assessed a theoretically possible innocent explanation as being "*plainly ridiculous*" and noted that it was in any event contrary to the case put by the appellant at trial through cross examination.

e. The term "*compromising position*" used in [44] was not used at any stage of the trial. It indicates an assessment of the effect of the evidence on the topic.

f. The phrase "*relatively minor inconsistencies*" used later in [44] marked a qualitative assessment of the state and effect of the conflicting evidence and stands in contrast to the assessment of McMurdo P at [18] which Her Honour considered "*more than minor*". That Atkinson J did not use the phrase "*I consider*" does not deprive those words of the quality of a personal assessment, as opposed to being a mere recitation of the evidence.

g. Atkinson J considered, it is submitted correctly, later again in [44] that the jury were entitled to accept that any risk of reconstruction was avoided by the complainant being told to testify only as to what she recalled.

h. At [45] Atkinson J recognised the evidence of the mother as to marking the calendar the day after finding her husband in bed with her daughter and considered that it "*added credibility and reliability to the complainant's evidence in relation to count three.*"

i. Each of the first sentences of [46], [47] and [49] are statements by her Honour concerning the relative strength of the evidence on count 3. To have reached that conclusion necessarily required an independent assessment of that evidence.

j. At [50] Atkinson J considered the evidence of a cordial relationship between the complainant and the appellant in later years, but considered that did not preclude the acceptance of the complainant's evidence.

16. Whilst it may be accepted that Atkinson J did not descend into the same level of itemised detail as McMurdo P did at [17],[11] it is submitted that some of the factors relied on by McMurdo P. did not deserve the significance apparently attributed to them, for the reasons outlined at paragraphs 30 and 31 herein. Atkinson J's assessment of the strength of the evidence on count 3 necessarily dispensed with any concerns that the evidence

[11] See the appellant's submission at paragraph 24.

did not establish beyond reasonable doubt that a touching occurred, as particularised or that the complainant was not testifying as to an actual recollection

Ground 2

17. The only matter in issue in the trial on the charge of which the appellant was convicted was whether the prosecution had proven beyond reasonable doubt that the appellant had indecently dealt with the complainant, as particularised.

18. The relevant act was particularised as the appellant touching his 12 year old daughter on or near the vagina.[12] The prosecution was conducted on the basis that the occasion of the touching was on the bed in the child's room whilst the mother and sister were out, and whilst the child's underwear had been re-positioned and which was interrupted by the mother turning on the bedroom light.

19. Although the trial judge left the possibility that the appellant was checking for bed-wetting as an issue relevant to the proof of indecency,[13] the appellant's sworn account was that he did not get into the bed with the child to check if she had wet the bed,[14] that he could not recall any occasion when he got into the bed with her,[15] and that any occasion of him lying in the bed with his daughter when his wife came home and switched on the light did not happen.[16]

20. As a later decision of this Court observes, the fact that the appellant's testimony was disbelieved does not mean that his denials of checking for bed wetting had no relevance to the consideration of a theoretically possible innocent explanation.[17] In any event, the issue of indecency was only remotely in issue at trial, was not in issue in the Court of Appeal and is not in issue in this Court. The appellant submits in this Court that it was not open for the jury to be satisfied that the complainant had any actual recollection of being touched on or near the vagina,[18] and hence it was not open to the jury to convict on the case as particularised and left to it on count 3.

21. At the point in evidence in chief when the complainant was about to testify about count 3, the following exchange occurred:

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[12] AB205 lines 26-30.
[13] AB206 lines 20-24.
[14] AB139 line 23
[15] AB139 line 21
[16] AB137 lines 21-25; AB139 lines 35-39.
[17] *The Queen v Baden-Clay* (2016) 334 ALR 234 at 244 [57].
[18] Appellant's submissions paragraph 28.

> "*Do you remember anything else happening between yourself and your father of any – you know, any specifics? --- There was a time where he was caught. When was that? --- That would have to be the last time it happened. I – my mum came in asking – she had pulled the sheets up before – sorry. I used to sleep in the room with my sister. We were in the same room, and she was asleep in her bed. The light had been turned on and Mum had come in. She pulled the blanket up after seeing Dad just hopping out of the bed.*
> *So I'll - - -? --- When she pulled the sheets, my underwear were down at my ankles.*
> *How did your underwear get down to your ankles? --- Time, I didn't know. All I knew was my Dad had just hopped off the bed.*
> *What was he doing while he was on the bed? --- Well, I was asleep before and ended up finding out what happened, but - - -*
> *No, I don't want you to tell us what you ended up finding out? --- No. I was like ...*"[19]

22. She was then directed to only testify as to what she remembered and testified that she could remember "*feeling*" the appellant's hands near where her underwear was supposed to be, that she didn't remember what was happening with his hands, but that his fingers were near her vagina and that they stayed there until the light came on.[20] She was not cross-examined as to the details of what she remembered about feeling the appellant's hand near where her underwear was supposed to be. The evidence was sufficient to establish a touching on or near her vagina.

23. The complainant was testifying a little over 12 years after the occurrence of the event she described. Although there was evidence that she was easily led at high school and that she had a poor memory, there was a consistent pattern of answering by her which permits confidence in the proposition that she was only answering as to what she remembered at the time of the trial.[21] It is against that background that the complainant maintained that the incident happened when it was put to her that it did not.[22]

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[19] AB23 lines 19-33
[20] AB23 lines 30-47.
[21] For example AB31 line 44; AB33 lines 23 and 47; AB34 line 1; AB35 lines 1-4; AB35 line 45 to AB36 line 4; AB37 lines 37-39.
[22] AB38 line 39.

24. It should not be lightly assumed that the complainant was recounting a reconstruction or other suggestion of events when there was no questioning to suggest that she had been prompted by any person in any way as to what to say. It is speculative to suggest that the mother was likely to have discussed the incident with the children. It is one thing to have told "one person" about the incident,[23] but entirely another to be discussing it with children. The passage cited by the appellant in support of the proposition that it seems as though it was a topic the mother raised with the children[24] says nothing about what was discussed with the children, nor that it was even about the actual conduct of the appellant in the bed. There were many things she could have spoken about. It was evidence that was properly stopped in evidence in chief and the appellant's trial Counsel chose not to pursue the topic in cross examination. Counsel also chose to not cross examine the mother on the topic.

25. The fact that there was the occasion when the appellant was found in the same bed as the complainant, an allegation expressly denied by the appellant, was corroborated by the accounts of the mother and sister. The inconsistencies between the three accounts were minor, and especially given the passage of time, to be expected. The mere fact that the mother took the effort to mark the calendar is important in itself in that it expresses the significance the event had at the time.

26. The evidence concerning the mother and sister finding the appellant in the "compromising position" whilst the complainant's underpants had been moved from their normal position provides important support for the complainant's overall account. Notably both the complainant[25] and the sister[26] recalled that the complainant's underpants were around her ankles when the covers were pulled back. The mother's recollection was that they were folded down about an inch.[27]

27. It is not to the point that the complainant often wet the bed and would in those instances remove her underwear. The questioning of her[28] and her sister[29] on the topic was only in the context of her removing her own underwear when she had wet the bed, not

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[23] AB102 line 34 to AB103 line 29.
[24] AB76 lines 19-40; Appellant's submissions paragraph 30 footnote 45.
[25] AB25 line 25.
[26] AB81 line 46 – AB82 line 2.
[27] AB91 lines 30-41.
[28] AB60 lines 25-37.
[29] AB81 lines 23-35. The mother was not questioned on the topic.

otherwise. It is not a case of conflicting evidence about whether the bed was wet or not, there is no suggestion she had wet the bed on this occasion.

28. Whilst there was an acceptance by the complainant that the mention of the lounge chair was an example of her unreliable memory,[30] the concession was preceded by an explanation that she had not previously mentioned it as she thought it not important.[31] The lounge chair seems to have been something that she had previously recalled but not previously mentioned, as opposed to remembering for the first time ever.

29. Although there was an acceptance by the complainant that she had previously described the relationship with the appellant as a beautiful relationship, this concession was made in the context of the complainant having "*ignored everything*" that had occurred[32] and where she had thought that everything that had occurred was "*normal*".[33]

30. Of other matters raised by McMurdo P at [17], the evidence established that the complaint to police was made weeks prior to any notification of a spousal maintenance claim[34] and the later commencement of proceedings for division of property. There was no evidence that the complaint was borne out of a desire to support any mooted proceedings.

31. There was evidence at trial, led in an incidental manner, that the original complaint to police included an allegation of digital penetration of the child's vagina.[35] However an overall assessment of the cross-examination from AB34 line 35 to AB36 line 2 reveals that it was an incidental detail conveyed in the course of attempting to establish inconsistencies concerning the acts of cunnilingus. The complaint was not asked to explain the differences in accounts concerning digital penetration and Counsel did not address on the topic.

32. This is not a case where there is a reasonable possibility of an innocent explanation for the charged touching, especially given the appellant's denial of checking for bed wetting. The child's account of the appellant being in the bed with her was supported by the evidence of the mother and sister, as well as the fact that the mother marked the

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[30] AB39 lines 10-17.
[31] AB38 lines 5-6.
[32] AB63 lines 7-15.
[33] AB21 lines 45-47.
[34] AB137 lines 34-38.
[35] AB35 lines 15 and 25.

calendar, and there is good reason to accept that the complaint was testifying as to an actual recollection as opposed to a suggested version or reconstruction.

33. An independent assessment of the sufficiency of the evidence concludes that it was open to the jury to convict on count 3 on the indictment.[36] The majority of the Court of Appeal did not err in dismissing the appeal.

Part VII: STATEMENT OF THE RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

34. Not applicable.

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Part VIII: ESTIMATE OF TIME FOR PRESENTATION OF RESPONDENT'S ARGUMENT

35. The respondent estimates that less than 1 hour is required for presentation of the oral argument.

20 **Michael R. Byrne QC**
Counsel
16 February 2017

Sarah Farnden
Counsel
16 February 2017

[36] *MFA v The Queen* (2002) 213 CLR 606, 623 [55].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 72/16

BETWEEN:

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ANNEXURE TO PART V

LEGISLATIVE PROVISIONS

Criminal Code (Qld) Reprint 4J rv (As at 1 July 2003)

210 Indecent treatment of children under 16

(1) Any person who—

(a) unlawfully and indecently deals with a child under the age of 16 years;

(b) unlawfully procures a child under the age of 16 years to commit an indecent act;

(c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years;

(d) wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person;

(e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter;

(f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years,

is guilty of an indictable offence.

(2) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.

(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

Filed on 16 / 02 / 2017 on behalf of the respondent

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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) If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.

(6) In this section—

"deals with" includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

Criminal Code (Qld) (As at 5 May 2016)

668E Determination of appeal in ordinary cases

(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 in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(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) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.