MWL v The Queen [2016] NTCCA 6

PARTIES:	MWL v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	21354549
PRONOUNCED:	12 December 2016
DELIVERED:	22 December 2016
HEARING DATE:	15 April 2016
JUDGMENT OF:	SOUTHWOOD, BLOKLAND and HILEY JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – Jury directions – failure to give a direction about lies – failure to direct the jury in accordance with the principles enunciated in *Edwards v The Queen* and *Zoneff v The Queen* – real or perceptible danger that the jury may find the appellant's denials to be lies inconsistent with his innocence – real danger that if the direction were not given, the jury would use the appellant's lies as evidence of his guilt – direction necessary to avoid perceptible risk of miscarriage of justice – appeal allowed on this ground by Southwood and Blokland JJ, Hiley J dissenting – convictions set aside – retrial ordered

EVIDENCE – Sexual offences – admissibility of evidence about the complainant's behaviour – failure to give a direction about the use of

evidence about the complainant's behaviour – appeal allowed – convictions set aside – retrial ordered

CRIMINAL LAW – Jury directions – sexual offences – failure to direct the jury about forensic disadvantage due to the delay in the complaint – failure to direct the jury about the unreliability of the complainant's evidence resulting from such delay and other factors – unreliability direction necessary in relation to count 1 – appeal not allowed on this ground by Blokland and Hiley JJ, Southwood J dissenting as to count 1 on the indictment – *Evidence (National Uniform Legislation) Act 2013* (NT) s 165, s 165A, s 165B

CRIMINAL LAW – Jury directions – sexual offences – hard swearing case – complaint evidence – complaint evidence could be used for two purposes – failure to direct the jury how the evidence of complaint could be used – risk that the jury may use the hearsay contained in the complaint evidence to independently support the complainant's evidence – direction about uses of complaint evidence necessary – appeal allowed on this ground by Southwood and Blokland JJ, Hiley J dissenting – convictions set aside – retrial ordered – *Evidence Act* (NT) s 26E; *Evidence (National Uniform Legislation) Act 2013* (NT) s 66(2)

Evidence (National Uniform Legislation) Act 2013 (NT) s 66, s 135, s 137, s 165, s 165A, s 165B

Evidence Act (NT) s 26E

Dhanhoa v The Queen (2003) 217 CLR 1; *Edwards v The Queen* (1993) 178 CLR 193; *R v Cassebohn* (2011) 109 SASR 465; *Simic v The Queen* (1980) 144 CLR 319; *Zoneff v The Queen* (2000) 200 CLR 234, applied

Broadhurst v The Queen [1964] AC 441; *Flora v The Queen* [2013] VSCA 192*; Hermanus (A Pseudonym) v The Queen* [2015] VSCA 2; *Jarrett v The Queen* [2014] NSWCCA 140; *Lawson v The Queen* [2004] NTCCA 7; *Mayberry v The Queen* [2000] NSWCCA 531; *MLB v The Queen* (2010) 27 NTLR 198; *Papakosmas v The* Queen [1999] 196 CLR 297; *PT v The Queen* [2011] VSCA 43; *R v Cuenco* (2007) 16 VR 118 (CA); *R v Renzella* (1997) 2 VR 88 (CA) and 88 A Crim R 65; *R v Russo* [2004] 11 VR 1; *R v Hartwick* (2005) 14 VR 125, referred to

Benbrika v R (2010) 29 VR 593; R v TJF [2001] NSWCCA 127, followed

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	P Usher and G McMaster

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	86

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

MWL v The Queen [2016] NTCCA 6
No. 21354549

BETWEEN:

MWL
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 22 December 2016)

THE COURT:

[1] On 12 December 2016 his Honour Southwood J pronounced the Court of Criminal Appeal's decision. The appeal was allowed, the appellant's convictions were set aside and a retrial was ordered. Following are the members of the Court's reasons for decision.

SOUTHWOOD J:

Introduction

[2] On 2 July 2015, following a retrial before a jury, the appellant was convicted of two counts of indecently dealing with AH, a child who was under the age of 10 years. The first trial proceeded between 13 and 17 April

2015. The retrial was necessary because the jury in the first trial could not reach a verdict.

[3] On 21 January 2016 the appellant was granted leave to appeal against his convictions. The grounds of appeal are that her Honour the trial Judge erred in:

1. not directing the jury in accordance with the principles enunciated in *Edwards v The Queen;*[1]

2. admitting evidence about the complainant's behaviour, and [alternatively], if the evidence was admissible, no adequate direction was given as to how such evidence could be used;

3. not directing the jury about the forensic disadvantage due to the delay in the complaint under s 165B of the *Evidence (National Uniform Legislation) Act 2013*(NT) and in not directing the jury about the unreliability of the complainant's evidence due to delay;

4. failing to direct the jury as to how the evidence of complaint could be used under s 26E of the *Evidence Act* (NT); and

5. that the summing up by the trial Judge had the effect of putting the Crown case too high and undermining the defence submissions.

[1] (1993) 178 CLR 193.

The Crown case

[4] The Crown case was that on the night of 11 February 2012 the appellant and his partner, TB, babysat AH and two other young children. While the children were being babysat the appellant touched AH on her vagina twice. Each of these acts constituted an indecent dealing by the appellant with AH.

[5] The mothers, RG and SB (TB's sister), of the three children left them with the appellant and TB while they went out for the evening. The three children were placed in the appellant's and TB's lounge room on two air mattresses so they could entertain themselves by watching DVDs before they went to sleep.

[6] At about 8.00 pm TB retired to her bedroom and fell asleep. AH remained awake but the other two children fell asleep. While AH was awake the appellant went into the lounge room and touched her on her vagina for the first time. He touched her vagina through her pants. AH then fell asleep. After she fell asleep the appellant took her pants off and touched her on her vagina a second time.

[7] The case was essentially a hard swearing case. The main Crown witness was AH. She gave the following evidence about the two incidents of indecent dealing. When she was on the bed watching DVDs the appellant came into her 'comfort zone' and touched her vagina on top of her pants. She says she then moved to the other side of the air mattress so that the appellant would leave her alone and she fell asleep. She woke up later to find her pants were

off. The appellant pulled her to where he was seated on the floor and sat her between his legs. They were both facing the television. The appellant touched the outside of her vagina with both hands and he used his fingers to pull open her vagina. While he was touching her vagina he looked over her shoulder at her vagina and asked, "What is that?" The appellant then left the room. The following morning AH and the other children were picked up by SB. AH did not complain to any adult about what happened to her until 31 October 2013 when her mother asked her some questions about the night of 11 February 2012.

[8] As is not uncommon with the evidence of a child, AH's evidence was at times disjointed but there is a strong suggestion through her evidence that the appellant was in the lounge room with the children and he was watching DVDs with them before he engaged in the acts of indecent dealing. Among other things she states the following:

> We stayed up all night watching movies.
>
> He would not let me sleep and would not leave me alone.
>
> He touched my rude part when E and C were asleep after we watched the first movie.
>
> We watched one or two movies and E and C got tired so they fell asleep and I was still awake and he sat on the bed and touched my rude part.
>
> And the man was still awake and he was sitting on the bed and he touched my rude part.

> So (inaudible) went under the blanket of the bed so he would leave me alone and I fell asleep for an hour.
>
> I fell asleep for a little bit and I don't know what happened while I was asleep but I woke up and my pants were on the bed and he was still sitting next to the bed. I came off the bed to get my pants back on but while I did that – I sat down, he grabbed me in front of him and then he touched my rude part again.
>
> E and C woke up and we watched movies for the rest of the night. E and C were awake for the rest of the night so he didn't do it again.

[9] In support of AH's evidence the Crown relied on the following evidence.

[10] First, the evidence of TB about a conversation she said she had with the appellant when he came to bed at about 2.00 am on 12 February 2012. She told the jury the following.

> At about 2 o'clock in the morning [the appellant] walked back into the bedroom which woke me up. I said to him, "What are you doing out there? What are you doing?" "I was just watching DVDs with the kids." That is what he said to me.

[11] When she gave that evidence, TB indicated with her bodily movements that the appellant put his hands out and shrugged his shoulders when he answered her. Crown counsel described TB's gestures while she gave that evidence as follows.

> Your Honour, just for the sake of the transcript I am going to describe her actions. *She put her two palms out in front of her and raised her shoulders in a shrugging sort of motion.*

[12] TB then gave the following evidence.

> I said, "Well it is like 2 o'clock in the morning. What are you doing up with children on your own at 2 o'clock in the morning? They are someone else's children. You don't keep children up until 2 o'clock in the morning and you don't put yourself in a position on your own with children like that." And he responded to me, "Okay."

[13] TB indicated that the appellant shrugged again when he said "okay". TB also gave evidence that the appellant was not using his computer because he told her that he was up watching DVDs with the children and they would have interfered with his work. This evidence was mere conjecture as TB went to sleep at 8.00 pm on 11 February 2012.

[14] The appellant denied that there was such a conversation. During the cross-examination of TB, defence counsel put to her that the 2.00 am conversation did not happen. There was the following exchange.

> Counsel: And really would it be fair to say that your role on that night was fairly minimal in terms of your connection with the children. Would that be fair?
>
> TB: Yes, yes.
>
> Counsel: So in terms again, of this alleged 2 am conversation, you are just not certain of …?
>
> TB: I am very certain.
>
> Counsel: And it did not happen, did it?
>
> TB: I am very certain; I remember exactly what he said. I have known the man for seven years. I know his actions. *I know when he is telling the truth. I know when he is lying. I remember the way he moved his body when he answered that question. I remember exactly.*

Counsel: Well that is wrong as well isn't it? In terms of the way he moved isn't it? I suggest to you that did not happen either?

TB: Well that is what happened.

[15] The purpose of TB's evidence was to support AH's evidence by establishing independently of AH that the appellant had been in the lounge room late at night with the children watching DVDs and had the opportunity to commit the offences with which he was charged. The appellant's presence in the lounge room with the children was sought to be established by AH's evidence and by proving an admission by the appellant to TB to that effect. The first ground of appeal is about this evidence and the appellant's denial that there was such a conversation with TB.

[16] Second, the Crown relied on evidence from SB about a conversation she had with TB when the children were either collected or dropped home the next morning. SB said when she came to collect the children on the morning of 12 February 2012, TB told her that the children were good but AH and C had trouble sleeping so the appellant had been out there with them during the night. This evidence was led as evidence of a prior consistent statement by TB that bolstered TB's evidence about her 2.00 am conversation with the appellant. The evidence was led to rebut any suggestion by the defence that TB had invented the 2.00 am conversation with the appellant because they had separated since they babysat the three children and she was prejudiced

against him. SB's evidence bolsters TB's evidence but it does not corroborate AH's evidence.

[17] Third, the Crown relied on evidence from RG about a conversation she had with AH on 31 October 2013 during which AH told her what she said the appellant did to her when he babysat her on 11 February 2012. Her evidence about the conversation was as follows.

> I asked AH if she remembered that she stayed at SB's sister's house and I had been told that they were watching movies up late because they had not been able to sleep and I asked her if there was any reason why she had not been able to sleep. At that point I noticed that AH sat upright, very stiff and straight in her seat and shifted and she said to me "You remember that man was there? He made me feel really uncomfortable." I said to her, "How did he make you feel uncomfortable?" She said, "He sat on the bed and would not go away and then he asked me to take my pants off." I said, "What and next." AH said, "He looked at my private parts and would not go away." I asked, "Did he touch you?" and she looked incredibly embarrassed and uncomfortable and said, "Yes." I said, "Where did he touch you?" So because she was not able to articulate where, she showed me with her hand by placing her pointy and her middle finger on the length of her vagina with the base of her hand resting on her pelvic bone. So the gesture that she made was [RG then described the gesture]. I then asked her, "How did he touch you?" [RG then described AH's actions] and she repeated this action three times. I said to her that she was very brave to have told me this and that I believed her. She said to me that she had wanted him to stop and that she had wanted to scream but her fear was that she was going to wake up the whole house if she did that.
>
> She said, "I wanted to tell him to stop but what was I supposed to do, wake up the whole house?" From there, I said that it was not okay, it wasn't right what was happening, and again, "I believe you", and she said that she wrapped the blanket around herself like a cocoon and moved away so that he knew to leave her alone.

[18] The evidence was led both as evidence going to establish guilt in accordance with s 66 of the *Evidence (National Uniform Legislation) Act* or, alternatively, under s 26E of the *Evidence Act*; and as evidence of complaint.

[19] For the purpose of putting this conversation in context, RG also gave evidence about a persistent change in AH's behaviour that she had first witnessed some weeks after 11 February 2012. AH's change in behaviour resulted in her receiving counselling for an extended period of time.

[20] RG's evidence was as follows. Within a few weeks after 11 February 2012 she noticed a change in AH's behaviour. By March it had really become a problem. She noticed that AH had started having difficulty sleeping. She was avoiding going to bed. She would not go into the bedroom. She did not want to stay in the bedroom. She would want the lights on and she would want the bedroom door left open. After she went to bed AH would try to sneak out into the lounge room to be closer to RG. If RG got up through the night, she would often find AH awake with the light on. Also, after school, she would come home quite angry and upset. She would yell and scream, and she would have more fights with her brother. AH was standoffish when she first met RG's new partner, Ray, in May 2012 (RG started going out with Ray in January 2012). AH had previously been much more friendly and outgoing. She previously had been a very bubbly, engaging and friendly child. RG had discussions with her but she could not work out what was the problem. In October 2012 AH started counselling through Catholic Care.

Counselling continued until January 2014. It was play based or play therapy based counselling. It was about providing a safe place for children to go and play. The counsellor said AH was anxious and nervous.

[21] At no stage during her evidence did RG give evidence that the reason she asked AH about the night of 11 February 2012 was because of AH's change in behaviour. She described AH's demeanor immediately before she asked her about the night of 11 February 2012 as follows.

> AH said they'd had a really good day. She had what was a fun Friday afternoon where she got to play and have fun.

[22] The second and fourth grounds of appeal are about the evidence referred to at [17] to [21].

[23] Fourth, the Crown relied on the evidence from Senior Constable First Class Emma Maree Carter who conducted a child forensic interview with AH. She gave evidence that at no stage during the period that AH received counselling did she raise any concerns or complain to her counsellor about what she said the appellant did to her on 11 February 2012. The counsellor told Senior Constable Carter that if AH had raised any concerns with her it would have been reported under the mandatory reporting requirements.

[24] During her final address Crown counsel made the following statements to the jury.

> TB, well, she obviously has had quite a lot to do with [the appellant]. She was engaged to him for six or seven years and the defence would have you believe she had a strong dislike of him to the extent that

she was ready to sink the boot into the [appellant]. But she was not cross-examined about any change in her evidence from the previous time. Her evidence was the same. She stuck to the story. Indeed, she was accused of toning down her evidence this time around.

It is a matter for you to consider whether she was telling the truth, but if she was intent on sinking the boot in, one would assume that she would not change her tactics. The fact is that there were no tactics and she said to you that the first time she was angry, now she just had to come back and give evidence a second time. She could not articulate her feelings for the [appellant], but that is again in the context of having previously had quite a substantial relationship with him and now not being in one.

She accepted she was angry the first time she gave evidence and you might think that it is normal that a person might run out of steam eventually. *Her evidence – a crucial part of her evidence was that* [the appellant] *came into the room at 2 am, she admonished him for being out with the children and keeping them up and he shrugged and said, "I was only watching DVDs"*. She could not give a cogent reason as to why she said 2 am. She said, "body clock". I suggest to you that the time is not crucial. AH has said things happened at midnight and then she fell asleep and TB has said 2 am. Whatever it was, it was late at night or [in the] early hours of the morning.

SB gave evidence last, and it may have seemed inconsequential. But, in fact, her recollection of a conversation with TB about the kids being up late, is an important piece of evidence that you can rely on to assist you in evaluating the truth of the witness.

The [appellant] gave evidence in a previous trial and we played the evidence. I would suggest to you that his evidence of the night's events was equally hit and miss. He started by saying that he had a fragmented memory of the evening and he used the term, "fragmented", several times in his evidence. And he also used terms such as "this is an impression".

In examination-in-chief he was asked about – that is, when my learned friend was asking questions – he was asked about the sofa. And he said "No, it was definitely not there". In cross-examination when I pressed him about the sofa, he said, "It might have been." He could not be sure. When my learned friend asked him about sitting on the blow up mattress or beside the bed he said he did not sit on the

blow up mattress or beside the bed. In cross-examination, he said, “Possibly did sit there.” He could not be sure.

In examination-in-chief he was asked, “Did you watch” – he said “I did not watch DVDs with the children”. In cross-examination he said he may have watched something but he has no memory of it.

An interesting aspect of his evidence was when he was describing the mattresses. Now, you have heard TB say they were single sized. You know, a normal single sized mattress, and also that the evidence came from SB, because she was the one who bought them from Target.

When [the appellant] was asked to describe them he said that it was a small mattress, perhaps a metre long and 2 feet wide. It was extended out to about 1 metre 20. You could hear on the audio that he was obviously gesturing with his arm as to the length of these things and that was confirmed by counsel and her Honour as to how big they were. So we were left with I think 1 metre 20 in length, and 2 feet wide.

You might think that he was trying to make them so small that it was impossible for him to sit on. But I would suggest to you that if they were that small it would have been very, very difficult for the three children to sleep on them.

In his evidence he did not, of course, because he denies it, say anything about sexually interfering with AH.

He did talk about changing DVDs. He said he did early on in the night. And then later in his evidence he said it was an impression that AH may have done it but he couldn’t remember, but she was fully capable of changing them. I suggest that he said that to show he was not near the children in the latter part of the night. But to what end when he later says he had a memory of the looping sound of the DVD, which one presumes he turned off, as the children were just lying there.

I suggest to you that there is a pattern in his evidence. In examination-in-chief he was completely sure of many matters. But when pressed in cross-examination, *he conceded he could not really remember*. He says, “It was an unremarkable night.”

> The fact that he may have been in the end room working on computers does not preclude him from being in the lounge room with the children at any point during the night. Indeed, he seemed to be saying that at some point he was. That staying up late with his nephew on previous occasions had never been an issue, that is, with TB. But later he said he could not remember if he stayed up late or not. These comments were made in relation to the conversation he says did not happen when TB chipped him. And you might consider he was trying to cobble together an explanation of it being okay to be up late with the children. But that is a matter for you.
>
> Ultimately, the appellant's evidence comes down to denying three key components of the Crown case. He never touched AH (the first). There was no argument between him and TB about being up late and alone with the kids, and that he did not have the opportunity, as the risk of being caught was too high. The dogs could have come in. TB could have come out. Though he did try to say she was a very heavy sleeper. She denied that. But that is a matter for you where that goes; and, of course, the possibility of the children waking up.

Defence objections to the evidence

[25] As to grounds of appeal 2 and 4, before the first trial the appellant objected to the following evidence.

1. RG's evidence about the changes in AH's behaviour on the grounds of relevance and hearsay. The defence submitted that the change in AH's behaviour was not the reason why RG asked AH if anything had happened on the night of 11 February 2012. She asked AH if anything had happened because she had heard about a complaint against the appellant involving another child. The defence also submitted that there was any range of reasons why a child's behaviour may change.

2. RG's evidence about the complaint conversation she had with AH on 31 October 2013, on the ground that it was unclear if the Crown

proposed to use the evidence as direct evidence of guilt under s 66 of the *Evidence (National Uniform legislation) Act* or s 26E of the *Evidence Act* as well as evidence of complaint. The defence submitted that the evidence was not admissible under s 66 because the statements were not made at a time when the occurrence of the disputed fact was fresh in AH's mind and was not sufficiently reliable to be admissible under s 26E.

[26] In response to the objection to the evidence about the change in AH's behaviour the Crown submitted the following.

> The evidence of the mother (RG) about the changes in AH's behaviour was admissible. The mother was best placed to observe such changes in behaviour, and such changes gave a plausible explanation in relation to [AH's] failure to disclose [the incident]. These statements are relevant, as the absence of her observations about the behaviour make the questioning of AH by RG on 31 October 2013 as to anything occurring in February 2012, otherwise seem bizarre, or even give rise to a motive that does not exist: that RG 'had it in for the accused' and then looks like she forced the complainant to make such statements. The alternative is that RG be permitted to give evidence about finding out about the original complaints by EM which is likely to be more prejudicial. Further, the Crown does not know what questions will be asked in cross-examination of RG, and anticipates some questioning about having a falling out with SB, and perhaps even asking if SB had a falling out with the accused.
>
> The evidence about the complainant's behaviour is relevant and admissible which is not necessarily the case for any evidence about the accused having interfered with EM. While the evidence about the accused might be prima facie admissible, its exclusion via the mandatory/discretionary exclusions (s 135 to s 137) would almost be inevitable due to the unfair prejudice.

> If the evidence of RG's observations and steps taken to address the behavioural issues are admitted there must almost certainly be a specific direction about the use that can be made of the evidence so that the jury cannot fall into error. Specifically, the Crown contends that the evidence can only be used as an explanation as to why RG decided to ask her daughter if anything had happened on the night she stayed at the accused's house.

[27] On 10 April 2015, at the first trial, the trial Judge ruled that the evidence was relevant and admissible because it was one of the reasons that led the mother to ask AH if anything had happened on 11 February 2012. The ruling was carried into the second trial.

[28] In fact, at no stage did RG give evidence that the reason she questioned AH about the night of 11 February 2012 was AH's change in behaviour. During her summing up on 1 July 2015 the trial Judge did not direct the jury about how they may use RG's evidence about the change in AH's behaviour.

[29] The fact that RG did not give evidence about why she questioned AH on 31 October 2013 was a matter about which counsel for the defence addressed the jury at the end of the first trial. Counsel for the defence told the jury that the lack of this evidence was a gap in the Crown case. The trial Judge found the statement of counsel for the defence to be grossly unfair because the Crown was unable to lead evidence about the reason why RG had questioned AH.

[30] As to the defence's objection to the tender of RG's evidence about the complaint AH made to her on 31 October 2013, the Crown submitted the following.

> [The evidence is] prima facie hearsay but the Crown contends that the evidence is admissible pursuant to s 66(2) of the *Evidence (National Uniform Legislation) Act*. The accused objects to the admission on the basis that the occurrence was not 'fresh in the memory' of the complainant at the time the representations were made.
>
> Consideration of 'freshness' required by s 66(2) of the *Evidence (National Uniform Legislation) Act* is not merely a consideration of the temporal relationship between the occurrence of the fact and the time of the complaint (see *R v XY* (2010) 79 NSWLR 69 at par [79]).
>
> …
>
> [The] representations made to RG on 31 October 2014 (sic) must be considered in the context in which they were made. The observations made by RG about the complainant's body language (sat upright, stiff in seat), the specific nature of what was alleged (looking at her private parts and touching) and her response (wrapped the blanket around herself like a cocoon) as well as the specific movements shown, indicate a strong recall. It is submitted by the Crown that the events were fresh in the complainant's memory despite the lapse in time.
>
> Alternatively, the evidence may be admitted under s 26E of the *Evidence Act*. The Court must be satisfied there is sufficient probative value in the complaint to justify its admission. Again, it is submitted that the complaint was sufficiently detailed and unambiguous, such that it has significant probative value.

[31] On 10 April 2015, her Honour the trial Judge gave the following ruling.

> In light of the matters that Ms McMaster has put in her written submissions, namely the child gave a clear account and her postural [reaction which is described by her mother], I consider that the evidence is admissible under s 66 of the *Evidence (National Uniform Legislation) Act*. If it were not, I also consider it admissible under s 26E of the *Evidence Act*. This is notwithstanding the child's almost throwaway remark, "Well, I guess I forgot about it a couple of days later", because she did give a clear account after giving that answer in cross-examination. I think the evidence has sufficient probative value to justify its admission under s 26E as well.

> So, firstly, I think it is fresh within her memory, within the meaning of s 66 and I do think it has probative value under s 26E of the *Evidence Act*. So, I will admit the evidence.

Defence's request for directions to the jury

[32] As to ground 3 of the appeal, on 15 April 2015, before the trial Judge's summing up in the first trial, the appellant asked for two directions. First, under s 165A(2)(a) and (b) of the *Evidence (National Uniform Legislation) Act,* the appellant asked her Honour to inform the jury that the evidence of AH may be unreliable and warn them that they needed to exercise caution in determining whether to accept her evidence and the weight to be given to it. Counsel for the defence submitted that the evidence of AH may be unreliable for the following reasons: (1) AH was of a very young age at the time she said that the appellant indecently dealt with her; (2) there was a gap of one year and nine months before AH made a complaint to anybody about the appellant indecently dealing with her; (3) there was a further gap of one year and three months between when she spoke to her mother and participated in the child forensic interview and when she gave evidence at the special hearing in the Court; (4) during the child forensic interview AH said that she had no recollection of the alleged events shortly after they are said to have occurred, she said, "I guess I forgot about it a couple of days later'; and (5) the numerous inconsistencies between the various statements made by AH about what she said the appellant did to her.

[33] Second, under s 165B of the *Evidence (National Uniform Legislation) Act,* the appellant asked her Honour the trial Judge to inform the jury of the

nature of the significant forensic disadvantage that the appellant had suffered because of the consequence of AH's delay in making a complaint and the need to take this disadvantage into account when considering the evidence in the case.

[34] In relation to both these applications her Honour the trial Judge gave the following ruling.

> I have been asked by defence counsel to give a direction to the jury in relation to the potential unreliability of the child's evidence pursuant to s 165A(2) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it if I am satisfied – if the party requesting it, that is the defence has satisfied me that there are circumstances particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning.
>
> And the matters relied on by defence counsel were essentially the child's age, the length of time between the alleged event and her telling her story to the police in the CFI. That is one year and nine months, I think. And the further length of one year and three months, making three years in total to the time when she gave evidence in the pre-recorded cross-examination as well as the inconsistencies between the three versions.
>
> I do not think those circumstances affect the reliability of the child's evidence to a degree that warrants the giving of a warning. Defence counsel can and did make very strong suggestions in relation to these matters and it is proper for the jury to take those into account. Other submissions were made by counsel for the Crown in relation to why they should accept her evidence. And I don't think there is anything special about this case that takes it outside the general prohibition in relation to s 165A(1) and makes it appropriate or warrants the giving of a warning. So I don't intend to do so.
>
> I do note that in the case referred to in the New South Wales Bench Book in the pages referred to by Mr Thomas, his Honour Basten JA in *Jarrett v The Queen* [2014] NSWCCA 140 said this: 'Without being prescriptive there must be something in the evidence sufficient

to raise in the judge's mind the possibility that the jury may legitimately consider that delay could cast doubt on the credibility of the complainant. Usually one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute "good reasons" why there was no timely complaint for the purposes of par (b) but, if not believed, may form the evidence justifying the warning under par (c).

Now, I'm quoting that case in relation to the next submission by defence, and that is that I should give a warning to the jury that the delay in complaining was a legitimate matter that they should take into account as affecting the credibility of the child. Again I don't think that there is something in the evidence sufficient to raise, in my mind, the possibility that the jury may consider, legitimately consider, that the delay could cast doubt on the credibility of the complainant as distinct, for example, from her memory. So I decline to give that direction as well.

I have been asked to give an oath on oath direction and I have already said I had intended and do intend to do so.

Now there was another matter. Essentially, I guess it is all bound up into one, but a *Longman* direction in relation to forensic disadvantage caused to the defence as a result of the delay in complaining.

I do note from the Bench Book that the principles in *Longman* have been really overtaken by s 165B of the *Evidence (National Uniform Legislation) Act*. Essentially, it says this at s 165B: 'If the court on application by the defendant is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence'. That is pretty much the gist of it.

The matters relied on by Mr Thomas, as constituting forensic disadvantage, were set out, I am just trying to find them. Not being able to take photos of the precise nature of the furniture in the house at the particular time the offence is alleged to have occurred. He says that directly affects the evidence concerning the sofa in this case, which was the subject of an attack on the complainant's credibility. Further, the [loss of] physical evidence, of items such as two mattresses, in respect of which the complainant was sleeping on,

upon which or near where the crimes were committed, has compromised the defence position. In addition, he says the delays resulted in possible distortions of the child's memory.

I don't consider that those matters constitute significant forensic disadvantage, or indeed much, if any, disadvantage.

Firstly, the question about the furniture in the room turned out to be a non-issue. It was used as an attack upon the child's credibility, but in the end, the child conceded that there might not have been a sofa there. [The appellant] conceded that there might have been a sofa there and nobody seemed to know. So really, the ability to take photographs of what was in the room is really neither here nor there.

Again, there was no real issue arising as to the mattresses, apart from their size and I don't consider that to be a significant forensic disadvantage. It really was a most minor point, if anything.

Those four possible distortions in the child's memory, given that the defence case is that the child wasn't telling the truth, I don't consider that – or that what she says was not true – I'm struggling to see how the delay, which admittedly may have caused distortions in her memory, could have caused a significant forensic disadvantage to the defence. Indeed, defence counsel appears to be using it to forensic advantage.

So, I decline to give the warning requested, under s 165B.

[35] The same directions were sought by defence counsel at the end of the retrial and were rejected by her Honour the trial Judge on the same grounds.

[36] As to ground 4 of the appeal, on 15 April 2015, counsel for the defence sought a direction about the complaint evidence. There was the following exchange between counsel for the defence and the trial Judge.

Her Honour: Any other specialised directions, if any?

Counsel:	Yes, also complaint evidence, your Honour.
Her Honour:	That has changed now.
Her Honour:	It has changed. The standard direction we used to give about complaint evidence is no longer appropriate because under the *Evidence (National Uniform Legislation) Act* it has all changed. [The evidence] can now be used as evidence of the truth of what was said.
…	…
Counsel:	Well in terms of how it is in evidence should be specified, your Honour.
Her Honour:	I do not see why. It is just simply a piece of evidence that they can use as they see fit these days. Now some people say this – and I know this is done in New South Wales. They go into a great spiel about complaint evidence – [how] it used to only be used for this purpose and that purpose but now the law has changed and you can use it as evidence of the truth of what was asserted. Why on earth would you bother to do that when if you say nothing at all that is precisely what [the jury] will do, they will use it as they see fit.

The defence case

[37] The appellant's evidence can be summarised as follows.

[38] He arrived home at some time in the afternoon on 11 February 2012. When he arrived home TB, SB and RG were talking on the patio of his house. They were having a glass of wine. Sometime later the three children arrived. He was standing in the lounge room with the three adult women when they arrived. It was apparent the children were staying the night as two inflatable

mattresses had been set up on the floor in the lounge room. There was also a DVD player and a television in the lounge room.

[39] At some point SB and RG left the house and the three children remained. The children entertained themselves by watching DVDs in the lounge room.

[40] At some point TB went to bed. She is a heavy sleeper. She suffers seizures if she does not get enough sleep. There was no discussion about who would look after the children before she went to bed.

[41] He spent most of the night in the computer room which was at the opposite end of the house to where the children were. This is clearly shown in a floor plan of the house at p 268 of the Appeal Book. He was working on a silver tower computer. He was taking it apart. He was a shift worker but he operated a computer building and repair business on the side at home. He made money by working on computers at home. He also read a book that night about the computer programming language, Java. He went to bed late. It would have been in the early hours of the morning.

[42] He did not remain in the computer room at all times during the night. He was out of the room for short periods from time to time. There was some interaction between him and the children. He put a DVD on at some stage. AH may have changed the DVDs. She was capable of doing so. It is possible that he may have sat on the floor with the children or on one of the mattresses although he does not recall doing so. However, he did not watch DVDs with the children.

[43] He remembers that at some stage he saw the children lying asleep on their mattresses. At some stage he heard the TV making the looping sound which occurs at the end of a DVD. This annoyed him and he may have turned the television off. He is not certain that he did so. The children were asleep by this time. The television was off when he went to bed.

[44] He went over to the park the next morning with the children. They did not seem sleepy.

[45] He did not indecently assault any child and he did not touch any child.

[46] The appellant was asked about whether TB had confronted him about staying up late with the children when he came to bed. He could not recall if he had a conversation with TB that night but he did not have the conversation she said they had. He would have remembered such a conversation because he would have taken umbrage with what she said she told him. It would have been preposterous for her to express concern about him spending time with children. He had done so with one of the children in the past and she did not object.

[47] The appellant gave the following evidence-in-chief about the conversation that TB said she had with him at 2.00 am on 12 February 2012.

> Defence counsel: Now, you have heard yesterday, TB said that she confronted you?
>
> Appellant: Mm, mm, yes.

Defence Counsel: In effect, if I can use the phrase and said that she had a conversation, she says at about 2 am?

Appellant: Yes.

Defence counsel: You heard that?

Appellant: I heard that.

Defence counsel: What do you say to that?

Appellant: With the description she gave being in a relationship for that long, if I was to walk in a room and my partner was to have a go at me about, well number one, being out near kids – this was never a problem before being around children. I understand the late night aspect, but again, my nephew at the time, which is TB's brother – brother, sorry nephew as well, he's been up late many times as well and there was never an issue. Secondly, you're walking in, having a partner as she stated, argue and have a go at me, I'd be having a go at her back. Wouldn't be doing that, I'd be asking her why she's having a go at me and so forth. I don't recall an argument, I don't recall her having a go at me; it would be very odd for her to do so.

Defence counsel: She says that you said that you'd been watching DVDs with the kids?

Appellant: Again, sitting there watching children's DVDs, I have better things to do with my time, such as work on computers and that is what I was doing because it made me money.

[48] The appellant was cross-examined about TB's evidence of the 2.00 am conversation as follows.

Crown counsel: How long were you in the computer room for?

Appellant: Timing, I don’t know. I know I was working on the computer to the late hours because it takes a bit of an effort to fix or build a computer. I could not give you exact times of how long I was in the room. I know I was there through the night.

Crown counsel: When you say you were there through the night, would you agree with me that you were leaving the room at different points then coming back?

Appellant: Correct, yes, yes. I wasn’t stuck in that room all night. Yes, I had left the room.

Crown counsel: And as to the time you went to bed, you say you do not know?

Appellant: It would have been later. When I say later in the night, I mean the early hours, so early morning.

Crown counsel: When you walked out of the computer room, on one of those occasions, do you remember the children being awake and having the DVDs still playing much later than you would expect children to be watching DVDs?

Appellant: No. No. Not from my memory. From what I recall, like I was saying, they were lying on their beds and there was the looping sound of the DVD menu. That is all I remember of them in the lounge room, that looping sound.

Crown counsel: So when you heard that looping sound, I think you said that it annoyed you. What did you do?

Appellant: Like I said, I would be of the impression that I would have turned it off.

Crown counsel: What did you do?

Appellant: I don’t know. I don’t know. I just remember the looping sound. This is a memory I have. I remember it going on down the hallway and that it was annoying me.

Crown counsel: Now, you heard TB give evidence yesterday about a conversation that she says she had with you at about 2 am that night?

Appellant: Yes, yes.

Crown counsel: You have given evidence about that for the jury. Are you outright denying that any of that conversation occurred between you and TB that night?

Appellant: If my partner had a go at me as she stated she did, I would remember this. I would remember it because it would be out of the ordinary.

Crown counsel: So you are not saying that a conversation occurred but something different was said?

Appellant: Nothing would have been said. If the context of what you are stating or what TB stated, that would have happened, I would have remembered. I would have been up in arms about the fact that she was having a go at me for being near children like that. [Saying] “What are you doing out there with other people’s children?” That would strike me as odd.

Crown counsel: She was a having a go, if you like, at you about keeping other people’s children up that late. Do you recall that that is what her evidence was?

Appellant: Yes, I recall that was her evidence. As I said, that would stick out in my mind if she had a go at me for that, because it has never been an issue before, being up late with E for instance and hanging around children for instance. It wasn’t – it would stick out in my mind.

Crown counsel: So I take that as an outright denial of that conversation?

Appellant: I would say, yes.

[49] The effect of the appellant's evidence appears to be that he could not categorically recall whether he had a conversation with TB at the time he went to bed but he did not have the conversation TB said they had. He denied that conversation outright. He was able to say that because there would have been an argument if he was challenged in such a way and he would remember such an argument. TB had no issue with him being near children and one of the children had stayed up late on a number of prior occasions. He had better things to do and he was working on a computer.

[50] During the appellant's cross-examination, it was not put to him that his denial of the 2.00 am conversation with TB was a false denial or that he denied having such a conversation because he knew that the conversation implicated him in the crimes with which he was charged. Nor was it put to him that he was telling a deliberate lie when he said he did not watch DVDs with the children.

[51] In substance, the defence case was that the evidence of the appellant was utterly plausible and should be accepted by the jury for the following reasons. It was not disputed that he operated a computer business on the side or that he stayed up late at night working on computers. The appellant was not shaken in cross-examination. The chance of being caught in the act was

so high that no rational person would attempt such acts even if they had the inclination to indecently deal with children. The chance of being caught was high because there were two other children sleeping right next to AH, his wife's bedroom was adjacent to the lounge room, at any time she may have to let the dog outside to urinate, and access to the two most obvious outside doors involved a walk through the area where the children were in the lounge room. The conversation that TB said occurred at 2.00 am in the morning beggared belief. The notion that someone who had committed such serious criminal acts would inculpate himself by saying he was up very late watching DVDs with the victim does not make sense. It does not have the ring of truth and reality. TB conceded that she was angry and it appeared from the evidence that she had made up her mind that the appellant had committed the offences. She could not properly be regarded as independent and there was a risk that her evidence was tainted. There were a number of factors in her evidence that raised issues both as to her reliability and her honesty. Finally, there were serious inconsistencies in AH's story and her story changed overtime. Her evidence should be rejected. TB gave evidence during her cross-examination that all of the children were happy the next morning and did not want to go home.

Ground 1 – Failure to give a direction about lies

[52] Her Honour the trial Judge did not direct the jury about lies. Her Honour gave the jury a *Broadhurst v The Queen*[2] direction in the following terms.

> By going into the witness box, [the appellant] exposed himself to the dangers of cross-examination by the Crown prosecutor. You are entitled, if you see fit, to give [the appellant] some credit for this. It is a matter for you to decide whether your estimation of the [appellant] has been improved by the fact that he has taken the oath and exposed himself to the test of cross-examination without being under any obligation to do so.
>
> Now having said that, when considering [the appellant's] evidence, you might, like any other piece of evidence, decide to accept it or reject it in whole, or in part. If you decide to reject his evidence – or reject the part that goes to an essential issue in the case, that is, by itself, not enough for you to convict him. The Crown still has to prove his guilt beyond reasonable doubt. If you disbelieve the [appellant], all that means is that you do not accept his evidence. You put it to one side; you cannot convert his denials into positive evidence that he did what he is accused of doing.
>
> Nor is it just a matter – and this is important – of saying well, I have heard two versions of what happened, AH's and the [appellant's] which one do I believe? That is not the way it works. You still have to look at the rest of the evidence in this case and in particular the evidence of AH and ask if you are convinced beyond reasonable doubt that the essential elements of the charge have been made out.

[53] Her Honour's direction does not specifically deal with the appellant's denial that he was up late watching DVDs with the children or his denial of the 2.00 am conversation with TB or with the consequence of the jury accepting TB's evidence about the 2.00 am conversation. It does not do so in circumstances where TB's evidence about the 2.00 am conversation was a prominent and important part of the Crown case. If TB's evidence about the

[2] [1964] AC 441.

2.00 am conversation is accepted, it independently supports AH's evidence that the appellant was up late with her.

[54] Senior counsel for the appellant submitted that at the retrial "the learned prosecutor properly identified that the alleged conversation [between the appellant and TB at 2.00 am on 12 February 2012] was central [to the Crown case]. The question as to whether the conversation took place needed to be scrutinised carefully, particularly in the circumstances where the [appellant's] partner conceded that she was angry, and it appears from the evidence that she had made up her mind that the appellant had committed the offences. She could not properly be regarded as independent and there was a risk that her evidence was tainted. It is submitted there are a number of factors in her evidence that raised issues both as to her reliability and her honesty. At the very least her evidence needed to be carefully scrutinised because the consequences of accepting her evidence was a finding that the appellant had lied on oath which undermined the appellant's evidence and raised for consideration whether the appellant had lied out of a consciousness of guilt. The trial required a careful *Edwards v The Queen*[3] direction and it was not given."

[55] Senior counsel for the appellant acknowledged that counsel for the defence did not ask the learned trial Judge to give the jury an *Edwards v The Queen*[4]

[3] (1993) 178 CLR 193.
[4] Ibid.

or *Zoneff v The Queen*[5] direction and the Crown did not particularise or expressly rely on the appellant's denial that he had a conversation with TB at 2.00 am on 12 February 2012 as being a lie which may constitute an admission against interest.

[56] However, senior counsel for the appellant submitted that in the running of the retrial there had been a misapprehension as to the importance of TB's evidence about the conversation between her and the appellant and the consequence of the appellant's denial of that conversation. As a result there was a risk that the jury may misuse the evidence of the appellant's denial of that conversation. There was a risk the jury may find he told lies when he denied being up late watching DVDs with the children and when he denied having the 2.00 am conversation with TB because to have told the truth would implicate him in the offences charged against him.

[57] Senior counsel submitted that the usual *Broadhurst v The Queen*[6] direction was not an adequate direction in the circumstances of this case because the evidence of TB about the alleged conversation with the appellant was evidence that was separate evidence from AH's which the jury may have improperly used to infer that the appellant was not prepared to admit he was watching DVDs with the children because he knew that was an odd thing for him to do and he may well be taken on. Even if the Crown does not make an application to lead certain evidence as consciousness of guilt, where it

[5] [2000] HCA 28; 200 CLR 234.
[6] [1964] AC 441.

becomes apparent to the trial Judge that evidence may be used as consciousness of guilt, the judge may feel it is appropriate to make an enquiry of the parties as to how the issue should be dealt with particularly if, potentially, the evidence may be improperly used by the jury.

[58] It was submitted that the jury should have been given a direction to the following effect.

> When assessing the evidence of TB and deciding whether the conversation she spoke about took place you should take into account the matters that counsel for the defence raised during her cross-examination. If you have a doubt that the conversation took place, it is important you put that to one side. On the other hand, if you found that the conversation took place, you can use it only in assessing the credibility of the appellant when he gives evidence and you can only use it for that purpose. You must not reason that because the appellant has told a lie about that conversation he told the lie out of a fear that the truth would implicate him.

[59] It is true that the Crown did not rely either on the appellant's denial that he watched DVDs with the children or on his denial of the 2.00 am conversation with TB as lies showing consciousness of guilt and going to proof of guilt or even as lies which should cause the jury to reject the appellant's evidence. However, it is well established that the ultimate criterion for an *Edwards v The Queen*[7] or *Zoneff v The Queen*[8] direction is not the prosecution's intention.[9] The ultimate criterion is whether there is an apprehension that there is a real or perceptible danger that the jury might use the lie or lies as evidence that the appellant knew the truth would

[7] (1993) 178 CLR 193.
[8] (2000) 200 CLR 234.
[9] *Zoneff v The Queen* [2000] HCA 28; 200 CLR 234 per Kirby J at 263, [71]; *Benbrika v R* (2010) 29 VR 593 at [179].

implicate him in the commission of the two offences.[10] What is determinative is the way in which the jury might use the evidence if the direction were not given.[11] The Court is required to give all directions that are necessary and practical in the circumstances of the case to avoid a perceptible risk of miscarriage of justice.[12]

[60] Given:

(1) the prominence given to TB's evidence about the 2.00 am conversation with the appellant at the trial and the consequence of finding that the appellant had told his partner that he was up late watching DVDs with the children and had given evidence on oath to the contrary;

(2) the fact that the Crown reduced the defence case down to denying three key elements of the Crown case – the appellant never touched AH, there was no argument with TB about being up late with the children; and the appellant did not have the opportunity to commit the criminal acts because the risk of being caught was too high;

(3) the Crown statement to the jury that, "You might think that he was trying to make [the mattresses] seem so small so that it was impossible for him to sit on them. But I would suggest to you

[10] *Dhanhoa v The Queen* (2003) 217 CLR 1 at [34]; *Lawson v The Queen* [2004] NTCCA 7 at [42].
[11] *Benbrika v R* (2010) 29 VR 593 at [179].
[12] *R v Renzella* [1997] 2 VR 88 at 91 – 92; *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49].

that if they were so small it would have been very, very difficult for the three children to have slept on them."

(4) the Crown statement to the jury that, "And then later in his evidence he said it was his impression that AH may have [changed the DVDs] but he could not remember but she was fully capable of changing them. I suggest that he said that to show that he was not near the children in the latter part of the night";

(5) Crown counsel's statement to the jury that,

> The fact that he may have been in the end room working on the computers does not preclude him from being in the lounge room with the children at any point during the night. Indeed he seemed to be saying that at some point he was. That staying up late with his nephew on previous occasions had never been an issue, that is, with TB. But later he could not remember whether they had stayed up late or not. These comments were made in relation to the conversation that he says didn't happen when TB chipped him. And you might consider he was trying to cobble together an explanation of it being okay to be up late with the children. But that is a matter for you.

(6) Her Honour the trial Judge's statement in her summing up that:

> Ms McMaster pointed to his evidence about the size of the beds and evidence that AH was fully capable of working the DVD – a matter which AH was not asked about – and submitted that, essentially you should conclude that [the appellant] was trying to tailor parts of the detail of his evidence to make it appear less likely that he had done what he was accused of. The beds were too small for him to sit on, AH might have operated the DVD, distancing himself from the room later at night.

if the jury accepted TB's evidence about the 2.00 am conversation, there was a very real danger that the jury may find the appellant's denial that he watched DVDs with the children and his denial of the 2.00 am conversation with TB were lies that were inconsistent with his innocence and constituted an implied admission of guilt. The statement in subparagraph (5) is a significant statement because the appellant's evidence as to why he denied the 2.00 am conversation was not that he would not have made those remarks because he was working on his computer, but that TB would not have confronted him in such a manner because he had stayed up late with children previously and she did not object and he would have taken exception to her remarks. His explanation raises the possibility that the jury may find his denial of the conversation is false. The statement in subparagraph (6) is, in effect, a statement that the Crown is asserting the appellant is falsely adjusting his evidence to avoid being implicated in the crimes with which he is charged. The statement calls for a direction along the lines that, before you accept the Crown's submission, you will need to be satisfied that he is deliberately tailoring his evidence; and, if you come to that conclusion, you will need to consider whether the tailoring of his evidence shows a knowledge of his guilt or simply shows that the appellant is trying to bolster his defence or to avoid an unjust accusation.

[61] The following factors raise the possibility that the jury may find that the appellant may be telling lies when he denied watching DVDs with the children and denied having the 2.00 am conversation with TB. TB's

evidence about the 2.00 am conversation was supported by the evidence of SB. TB's evidence that the appellant told her he was watching DVDs with the children is inculpatory. If the statement is accepted it corroborates AH's evidence. It puts the appellant with the children at a critical point in time. The characterisation of the defence case as mere denials. The number of suggestions that the appellant was deliberately tailoring or fabricating other evidence to distance him from the charges against him and shore up mere denials. Furthermore, as the appellant's denials go to a critical aspect of the Crown case, namely his presence in the lounge room with the children late at night, there is a real danger that if the jury were to find the appellant was lying they would also find the lies went to his guilt.

[62] Consequently, the jury, in this particular case, should have been given a direction along the following lines.[13]

(1) When giving you the following direction, I am not expressing an opinion of mine about whether the appellant is telling lies. Findings of fact are for you the jury.

(2) It may be that you think the appellant may be telling lies when he says that he did not watch DVDs with the children and when he says that he did not have the 2.00 am conversation with TB. On the other hand, you may accept his evidence.

[13] There are a number of reports of decisions of various intermediate courts of appeal which set out such directions or instructions. Such directions or instructions are also set out in various texts such as the *Criminal Trials Courts Bench Book* published by the Judicial Commission in New South Wales and D Ross, *Crime* (6th ed. 2013). The direction is an adaption from a number such sources.

(3) It is for you to make up your own mind about whether the appellant was telling lies or telling the truth when he said that he did not watch DVDs with the children and that he did not have the 2.00 am conversation that TB spoke about, and, if you find he was telling lies, whether he did so deliberately knowing that what he said was false.

(4) It is for you to decide what significance any such lies have in relation to the issues in the case but I give you this warning: do not reason that just because the appellant is shown to have told lies about these matters that must be evidence of guilt.

(5) In most cases lies go only to credit. They may help you decide whether you accept or reject the evidence of the appellant. A person may lie for many reasons, for example: to bolster a true defence, or out of panic or confusion, or to avoid an unjust accusation.

(6) Lies told by a person may nevertheless go further, they may amount to conduct which is inconsistent with innocence and may also go to guilt, but before you could use the appellant's denials in such a way you would need to be satisfied of the following.

- You must be satisfied beyond reasonable doubt that the appellant spoke the words that TB said he spoke.

- You must be satisfied beyond reasonable doubt that the appellant has told deliberate lies. If you are unable to find the words spoken were lies then that is the end of it.

- You must be satisfied beyond reasonable doubt that the words spoken by the appellant show knowledge of the offences that he has been charged with or some central aspect of them.

- You must be satisfied beyond reasonable doubt that the only reason for what was said by the appellant is that he realised his guilt and was afraid to tell the truth.

- If you think it is possible that the appellant spoke the words for an innocent reason, such as to bolster a true defence, or out of panic or confusion, or to avoid an unjust accusation, or because he is painting the lily then you cannot find that they go towards his guilt. They will simply assist you in determining whether to accept or reject some parts or the whole of his evidence.

(7) In order to determine what significance you give to what was said by the appellant you need to scrutinise the evidence of TB about the 2.00 am conversation very carefully. In assessing her evidence you should take into account the fact that she and the appellant had an unhappy separation and her evidence may be tainted as a result. You should take into account the matters that counsel for the defence raised during the cross-examination of TB. You may think that the

2.00 am conversation she spoke about does not make sense. If you came to this conclusion, you would reject her evidence and you could not find that the appellant has told lies which go to his guilt. You should also consider whether there is any other evidence which supports the evidence of TB and in this regard you may consider the evidence of SB. If you have a doubt that the 2.00 am conversation took place, you must put the conversation to one side and you cannot conclude that the appellant's denials amounted to deliberate lies which can be used to establish his guilt.

(8) In considering whether the appellant has told lies, you may also consider the fact that the Crown has not said the appellant has told any lies that are inconsistent with his innocence.

[63] In my opinion this ground of appeal is made out. It is reasonably possible that the failure to direct the jury about lies may have affected the verdicts.[14]

Ground 2 – The direction about the complainant's behaviour

[64] As to this ground of appeal, I have had the benefit of reading a draft of his Honour Hiley J's reasons for decision and I agree with his Honour for the reasons that he gives that this ground of appeal is made out. There should have been a direction as to the limited purpose for which the evidence about AH's change in behaviour was led and a direction to the effect that there could have been numerous reasons for the various changes in AH's

[14] *Simic v The Queen* (1980) 144 CLR 319 at 332; *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49].

behaviour, all consistent with innocence. That direction should have mentioned that over a period of 18 months AH made no complaint to her counsellor about any indecent dealing. It is reasonably possible that the failure to give this direction may have affected the verdicts of the jury.

Ground 3 – Failure to warn about delay and unreliability

[65] As to ground 3, I largely agree with the reasons of his Honour Hiley J. However, I disagree in one respect. In my opinion, her Honour the trial Judge should have given the jury an unreliability direction about AH's evidence about count 1 on the indictment. This ground of appeal should succeed in relation to count 1 on the indictment but not count 2.

[66] Section 165A of the *Evidence (National Uniform Legislation) Act 2013* states:

> (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
>
> (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
>
> (b) warn the jury or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
>
> (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child;
>
> (d) in the case of a criminal proceeding – give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that evidence of the particular child may be unreliable and the reasons why it may be unreliable; and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

[67] Section 165A does not preclude a judge from giving a warning consistent with the warnings contemplated by s 165 of the *Evidence (National Uniform Legislation) Act 2013* providing the warning does not infringe s 165A(1).

[68] Section 165 of the *Evidence (National Uniform Legislation) Act 2013* states:

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

(a) evidence in relation to which Part 3.2 (Hearsay) or 3.4 (Admissions) applies;

(b) identification evidence;

(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;

(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;

(e) evidence given in a criminal proceeding by a witness who is a prison informer;

(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;

(g) in a proceeding against the estate of a deceased person evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable; and

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A(2) and (3).

[69] Subsection 165(2) of the *Evidence (National Uniform Legislation) Act 2013* provides that the judge is to give a warning if a party so requests unless there are good reasons for not doing so. The warning is to be given where the evidence *may be* unreliable.

[70] AH's evidence about count 1 was very vague and lacking in detail. She does not mention count 1 when she first speaks to her mother about the events of 11 February 2012. She only mentions one incident of indecent dealing when she speaks to her mother. Despite very considerable efforts by the police officers who conducted the child forensic interview to obtain details about count 1, AH was incapable of providing any real detail of that incident during the interview, and during her cross-examination at the special hearing there was the following exchange between her and counsel for the defence.

Counsel:	AH, you say right now that this fellow touched you on top of the pants twice?
AH:	I can't remember.
Counsel:	Is it the case right now that you just can't remember what did happen on that night?
AH:	Yes
…	…

Counsel: AH, you just said just before you can't remember what happened on that night, was that right?

AH: Yes

[71] The following factors suggest that AH's evidence about count 1 may be unreliable. As at 11 February 2012, AH was 7 years of age. She was in a strange house. She could not sleep and had stayed up very late. She had dozed off from time to time during the night while she was watching television. There was a delay from 11 February 2012 to 31 October 2013 before she spoke to her mother, a further delay until 7 November 2013, close to 22 months, before she participated in the child forensic interview, and a further delay to 6 February 2015, a delay of almost three years, before she participated in the special recording of her evidence. Tiredness, broken sleep and delay all have the capacity to affect the reliability of, or distort, a young child's recollection of events.

[72] In contrast to count 1, AH's evidence about count 2 was vivid and detailed and her mother described her as having a kind of physical reaction when she described the indecent dealing said to constitute count 2. The incident described as count 2 was also a far more serious and protracted incident.

[73] In my opinion, the vagueness of AH's evidence about count 1 is such that the jury may legitimately consider that the factors I have referred to at [71] could cast doubt on the reliability of AH's evidence about count 1. There is

a reasonable possibility that the brief act said to constitute count may have been part of count 2, or did not occur.

[74] In this regard, as to count 1, a warning along the following lines was required.[15]

> I need to give you a warning about the time that elapsed between 11 February 2012 and the time that the complainant, AH, first spoke to her mother about these matters, and then to the police and then to the court, delays of about 21 months, 22 months and three years respectively. A consequence of such delay is its possible effect on the reliability of AH's memory. Counsel for the appellant spoke to you at some length about this.
>
> You will easily understand that the passage of time may affect any witness's memory. While in some cases people simply forget things, in other cases their memory may become distorted. That is, they may claim to remember things that did not really happen.
>
> Experience has shown that human recollection is frequently erroneous and liable to distortion in this way and that the likelihood of error increases with the passing of time. The risk may be enhanced if the complainant is very young at the time of the alleged offending and if it occurs in circumstances which may affect anyone's memory such as a strange house, late night, broken sleep and sleeping in front of the television.
>
> It is therefore important that you carefully consider not only whether AH's evidence is honest, you may well have thought she was doing her best to tell the truth in the sense that she believes it to be true, but also whether it is in fact true. As to count 1 on the indictment, you must consider the possibility that AH honestly believes what she is saying but she is mistaken due to a distortion of her memory. You may find that her evidence about count 1 is vague and that she struggled to give the police any detail about this incident during the

[15] There are a number of reports of decisions of various intermediate courts of appeal which set out such directions or instructions. Such directions or instructions are also set out in various texts such as the *Criminal Trials Courts Bench Book* published by the Judicial Commission in New South Wales. The direction is an adaption from a number such sources.

> child forensic interview. During her cross-examination she stated she cannot now remember what happened on that night.
>
> It is a matter that you take into account and it is a matter entirely for you. You do not have to find that AH's memory is distorted because these events occurred more than three years ago and she was very young at the time but you need to bear that in mind and look at that question when considering her evidence about count 1 and determining whether you are satisfied beyond reasonable doubt that the appellant committed the offence pleaded in count 1 on the indictment.
>
> I must also tell you that delay in complaining does not necessarily indicate the allegation is false. There may be good reasons why a victim of a sexual offence may hesitate in complaining about it.

[75] There is no good reason not to give such a warning. It is reasonably possible that the failure to give such a warning may have affected the verdict for count 1.

Ground 4 – Failing to direct the jury about how the evidence of complaint could be used

[76] As I have stated at [36] her Honour the trial Judge ruled that it was unnecessary to give the jury a direction about the evidence of complaint given by RG and the use which could be made of that evidence. Her Honour stated that the jury may use the evidence as they see fit. The appellant submits that her Honour erred in so ruling.

[77] Senior counsel for the appellant said that this was a discrete issue but an important issue particularly in a case where the evidence of complaint was quite traumatic. He submitted that the evidence of complaint could be used for two purposes. It may be used as some evidence of the matters

complained about taking place and it may be used to assess the credibility of the complainant, AH, by considering whether she conducted herself in a way that one would expect. But the hearsay contained in the evidence of complaint could not be used as evidence which independently supported the evidence of the complainant and the Crown did not seek to use AH's reaction when answering her mother as evidence of distress that was capable of corroborating the evidence of AH. In essence, it was submitted that the jury should have received a direction about these different aspects of the complaint evidence.

[78] When I first considered the appellant's submissions in this regard I was of the preliminary view that a detailed direction about the use of the complaint evidence at trial may have done more harm to the appellant's case than good. However, on further consideration I am of the opinion that such a direction should have been given because without it there was a risk that the jury may think that RG's evidence was evidence that independently supported the evidence of AH.

[79] In my opinion, fairness required that the jury fully appreciate the importance of scrutinising the evidence of AH because this was a hard swearing case in which there was very little evidence that was independent of AH that supported her evidence. In order for the jury to understand this aspect of the case, so they could assess the evidence in a balanced way, the learned trial Judge should have directed the jury about the uses that could be made of all the evidence in the case in a similar manner to that set out at [7] to [23] and,

in this context in this particular case, her Honour should have given the jury a direction about the complaint evidence in a similar manner to the direction commonly given in New South Wales.

[80] In this particular case, it was important that the jury understood that the evidence of RG about what AH told her was not evidence that independently supported AH. It was simply evidence about what AH told her mother about what she said occurred on 11 February 2012, that is hearsay evidence, and the fact that AH repeated her story a number of times cannot convert any untruth to truth or any unreliability to reliability or make any truth truer. After all, AH had forgotten that she had this conversation with her mother. It was also important that the jury understood that RG's description of AH's reaction to her question was not evidence that went to guilt but was evidence that only went to assessing the credibility of AH. The jury should have also been told that in assessing the credibility of AH they should take into consideration the way in which her evidence changed over time.

[81] There should have been a direction to the jury along the following lines.[16]

> The Crown relies on RG's evidence about what AH told her for two purposes. First, the Crown relies on the evidence of RG as evidence of the fact of such an indecent dealing with AH. Second, the Crown relies on the evidence as evidence supporting the credibility of AH.
>
> RG's evidence about what AH told her is hearsay evidence. It repeats what AH said. It is the report of an out of court statement made by

[16] There are a number of reports of decisions of various intermediate courts of appeal which set out such directions or instructions. Such directions or instructions are also set out in various texts such as the *Criminal Trials Courts Bench Book* published by the Judicial Commission in New South Wales. The direction is an adaption from a number such sources.

> AH. Therefore, as to the indecent dealing itself, it is not evidence that is independent of AH and it is not evidence that independently supports her version of events. It is based on what she said and the fact that her mother repeats it does not mean RG is giving independent evidence about what happened on 11 February 2012.
>
> If you accept RG's evidence about what AH said to her, you may use that evidence as some evidence that such an indecent dealing occurred. You may find that the evidence adds nothing to what AH said during the child forensic interview in Court; or you may find that AH's complaint to her mother was made at a time and in a manner that would indicate that what she told her mother was reliable and unlikely to be fabricated.
>
> In considering the reliability of the statements that AH made to her mother, you should consider that there was a considerable delay before she spoke to her mother, her story has now changed to some degree, which you may or may not consider to be significant, she does not remember what she told her mother and as a result counsel for the defence was unable to cross-examine her about what she told her mother. If you thought the changes in her story were significant that may cause you to doubt the reliability of her evidence. However, there will invariably be some changes in a person's evidence overtime.
>
> Of course, the fact that a person says something on more than one occasion does not mean that what is said is necessarily true or accurate. A false or inaccurate statement does not become true or more reliable because it is repeated on one or more occasions.
>
> What weight you give RG's evidence about what AH told her is a matter for you.
>
> You may also think that AH's conversation with RG is consistent with how someone who has been indecently dealt with would behave. If you do, you may think that makes her evidence more credible.

[82] Senior counsel for the appellant also appeared to be suggesting from time to time during his oral submissions that an unreliability direction under s 165 of the *Evidence (National Uniform Legislation) Act* should be given about

the complaint evidence. It is the experience of the Court that evidence of out of court statements may be unreliable and as his Honour Studdert J stated in *R v TJF*[17] evidence of complaint, being hearsay evidence, may be unreliable for a number of reasons. Those reasons include:[18]

(a) It involves a potential compounding of weaknesses of perception, memory, narration skills and sincerity – the witness may not have accurately recalled or repeated what the complainant said, errors can occur when the original statement is made, when it is heard or when it is repeated in court;

(b) it may not be properly subject to cross examination;

(c) it is not made in a court environment;

(d) it is not on oath;

(e) people sometimes cannot remember things they hear as well as they can remember things they see;

(f) it was not possible for the jury to assess the complainant's credibility at the time she made the representation;

(g) the witness may be honestly doing her best to recall what the complainant said and appear truthful but the evidence might not be an accurate representation of what was said; and

(h) the complainant may have been subject to pressures that caused the complainant to make an inaccurate or untruthful statement where the complainant was not under the same obligation to tell the truth as a witness giving evidence in court.

[83] The law requires that every jury must take this potential unreliability into account when considering evidence of an out of court statement. It is

[17] [2001] NSWCCA 127; (2001) 120 A Crim R 209 at [55].
[18] S Odgers, *Uniform Evidence Law* (11th ed. 2014) at [1.4.2920].

important to note that the warning is to be given when the evidence *may* be unreliable and it is for the jury to determine if the evidence is unreliable or not. It is not for the court to resolve the question of reliability in determining whether or not there are good reasons for not giving such a warning.

[84] In this case, the evidence of complaint was potentially unreliable because AH could not remember the conversation with her mother and therefore could not be cross-examined about the statements that she made at that time; the statement AH made to her mother was made sometime after the incident and was different to other statements she made about what occurred on 11 February 2012; RG had to interpret what AH was saying because AH was incapable of verbalising everything she complained was done to her; RG's observations were apparently made while RG was driving a motor vehicle and AH was a passenger in the front seat of the car; and there were significant inconsistencies between what AH told her mother and the statements she made to the police during the child forensic interview.[19]

[85] However, it is unnecessary to resolve this latter point as it was not fully argued and developed by counsel for the appellant.

[86] I find that this ground of appeal is also made out. It is reasonably possible that a failure to give such an instruction may have affected the verdicts. Had the jury been instructed about the use that was to be made of the evidence of

[19] *Mayberry v The Queen* [2000] NSWCCA 531 at [60].

each witness and the instruction at [81] been given the jury may have taken a different view of the complaint evidence, and, in consequence, a different view of how the complainant's evidence was to be regarded.

Ground 5 – the trial Judge's summing up was unbalanced

[87] In light of my findings about grounds of appeal 1, 2, 3 and 4 it is unnecessary to decide this ground of appeal.

Conclusion

[88] It follows from the findings that I have made that the appellant's convictions cannot stand. I would allow the appeal. The appellant's convictions should be set aside and there should be a retrial.

BLOKLAND J:

Introduction:

[89] Southwood and Hiley JJ have both set out detailed summaries of the history of both trials and the cases put by the parties on the principal issues raised. I will not repeat all of those matters and respectfully adopt the extensive overview of the issues already given by each of their Honours.

Ground 1:

That the learned trial Judge erred in not directing the jury in accordance with the principles enunciated in *Edwards v The Queen*.[20]

[90] In his evidence in the first trial, the appellant said that no conversation of the kind alleged by TB at 2:00 am occurred. He did not rule out that a conversation may have taken place with TB but not a conversation in the

[20] (1993) 178 CLR 193.

terms described by TB, which was to the effect that the appellant said he had been watching DVDs “with the kids.” Had it occurred, the appellant’s evidence suggested he would have recalled it given TB’s expression of concern when describing the conversation in evidence:

> What are you doing up with children on your own at 2 o’clock in the morning? They are someone else’s children. You don’t keep children up until 2 o’clock in the morning and you don’t put yourself in a position on (sic) your own with children like that.”

[91] The appellant stated although he understood the reason for TB’s reference to a late night, this had never previously been an issue. He said if a conversation like this occurred, he would have asked TB why she was “having a go” at him and thought it would be very odd for TB to do this. As well as TB giving her version of this conversation in her evidence in chief, under cross examination she remarked she knew the appellant was lying during the conversation and described the appellant’s physical gestures at the time of the conversation to effectively demonstrate how she knew he was lying.

[92] The Crown also led evidence at trial from SB to the effect that TB had told her the next day that two of the children, including the complainant, had trouble sleeping and that the appellant had been with them during the night. SB’s evidence is an indication that the conversation between TB and the appellant was of some significance to the Crown case. The learned trial Judge explained to the jury that the Crown was using SB’s evidence to corroborate the complainant’s evidence that the children were up late. Thus,

the significance of TB's evidence of the conversation between herself and the appellant was in its potential, if believed, to support the complainant's evidence that the appellant was with her.

[93] The respondent's contention was that a direction to the jury as to the use of lies was not necessary because the conversation between TB and the appellant was not used by the Crown as an implied admission or as evidence of the appellant's consciousness of guilt.[21] Rather, it was submitted this was an example of a circumstance that arises in most trials, being conflicting evidence that the jury must resolve, even to the extent of suggesting that one party is lying. In such circumstances, it was argued that it would be a misdirection to tell the jury that lies form part of the prosecution's case, or can be used to prove an appellant's guilt.[22] On appeal, the respondent argued that if an *Edwards* direction was to be given, it was likely to have favoured the Crown. Counsel for the appellant at trial did not seek an *Edwards* direction.

[94] Although at first blush, evidence of the conversation between TB and the appellant may have appeared to simply raise a matter of conflicting evidence and credit, when the case is considered as a whole and in the context of the relatively brief issues at trial, in my view the conversation is reasonably capable of being used in an incriminating way. There was a real risk that its significance went well beyond a credit assessment, given that on the Crown

[21] *R v Cuenco* (2007) 16 VR 118 (CA) Nettle JA at [15].
[22] *R v Renzella* (1997) 2 VR 88 (CA) and 88 A Crim R 65; *R v Russo* [2004] 11 VR 1; *R v Hartwick* (2005) 14 VR 125.

case this conversation took place at a time soon after the alleged offending, and was coupled with evidence suggesting that at the material time the appellant was not working on his computer as he had claimed. Importantly, it went toward demonstrating the appellant had the opportunity to commit the offences. If the credit issue was resolved against the appellant, there remained an almost inevitable path of reasoning towards drawing an inference of guilt. This is because of the proximity of the conversation with the alleged offending that simultaneously detracted from other aspects of the appellant's case, such as the appellant's evidence that he was working on his computers at around the relevant time.

[95] If it were found that the conversation as reported by TB did take place, the appellant's version would have been inconsistent not only with TB's evidence but essentially with the prosecution case. This is demonstrated in the Crown's closing address to the jury, as counsel for the Crown referred to the conversation between TB and the appellant as one of three components of the Crown case that was denied by the appellant. This underlines the material quality of the conversation and of the version that was given by the appellant. In turn it leads to the conclusion that the conversation was far more significant than initially appreciated. Even though the Crown eschewed reliance on the conversation as proof of a consciousness of guilt, looking at the evidence as a whole, the conversation was an important part of the Crown case and required an appropriate direction either in accordance

with *Edwards v The Queen*,[23] or at least as contemplated and elucidated by *Zoneff v The Queen*,[24] and *Dhanhoa v The Queen*.[25] If the credit issue was resolved against the appellant, his version was capable of being regarded as a lie and in the particular context of this trial, capable of supporting a conclusion that he lied about details because he knew the truth of what he had been doing at the material time would implicate him in the offending, thus requiring the further direction.

[96] Although this issue was a matter that should have been raised by counsel for the appellant at trial, and consequently the trial Judge was not assisted appropriately by counsel, on appeal it can be concluded there was a reasonable possibility that a lack of a direction of this kind affected the verdict.[26] Although there was no invitation on the part of the trial Judge or counsel for the Crown to treat any lie as incriminatory,[27] the circumstances gave rise to a perceptible risk the jury may use the evidence in that way. It may be noted that *Lawson v The Queen* involved a similar issue in respect of counsel not raising the need for an *Edwards* direction at trial. Nevertheless, the appeal was there allowed. Notwithstanding the direction was not sought at trial, I would allow this ground of appeal.

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[23] (1993) 178 CLR 193.
[24] (2000) 200 CLR 234.
[25] (2003) 217 CLR 1.
[26] Ibid.
[27] cf *Lawson v The Queen* [2004] NTCCA 7.

Ground 2:

The learned trial Judge erred in admitting evidence as to the complainant's change in behaviour, and if it was admissible, no adequate direction was given as to how, in particular, this evidence should be used.

[97] The first part of this ground was not pressed, nor could it be sustained. Clearly evidence led from RG with respect to the complainant's deteriorating behaviour over the relevant period was led for a particular purpose, namely to explain the circumstances in which a disclosure was made by the complainant and the timing of the complaint. The offending was alleged to have occurred in February 2012 and the first complaint was made in October 2013. Other factors of a prejudicial nature that gave rise to the conversation between RG and complainant were not led, and in the circumstances, could not have been led.

[98] RG's evidence was that during the relevant period she had observed her daughter not wanting to be alone or in the dark at night and wanting to be close to her mother. There were changes in her expression of affection. Given the timing of the onset of the changes in behaviour, they could be seen as coinciding with the offending. Notwithstanding the evidence was not led for that purpose, there was a real risk that without a direction about its use, it could form the basis of an inference being drawn that the change of behaviour was due to the offending. There was evidence that the complainant attended counselling, but the counsellor was not called in the trial. Nothing of significance flows from the counsellor not being called, however, left with the evidence of RG on this point, there was a real risk the

evidence could be erroneously used as probative of the offending without excluding other possible causes for the behaviour. It was merely context evidence, although it had the potential to be prejudicial if misused. This was not a situation in which the jury could have properly used the changes of behaviour as 'post-offence conduct' as it is on occasion referred to,[28] in relation to the complainant, as a type of circumstantial evidence.

Ground 3 (As Amended)

That the learned trial Judge erred in not directing the jury as to the forensic disadvantage due to the delay in complaint pursuant to s 165B of the *Evidence (National Uniform Legislation) Act* or alternatively should have given a general direction as to the matters relevant (including delay, age and ability to recall) to assessing this complainant's evidence.

[99] I would not allow this ground of appeal. The asserted disadvantages as a result of delay in complaint and subsequent police and court procedures could not be said to be "significant" as required by s 165B of the *Evidence (National Uniform Legislation) Act*. In terms of a direction or warning under s 165A(2), although there was no warning in these terms, relevant deficiencies in the complainant's evidence were highlighted by the trial Judge. The jury were alerted to those matters as was appropriate in the context of the trial. Although not in the terms as contemplated by s 165A(2), the jury were well appraised of the issues with respect to the need to scrutinise the complainant's evidence including the features that tended to diminish its reliability.

[28] See *Flora v The Queen* [2013] VSCA 192 [67] - [82] in the context of evidence of distress as circumstantial evidence of 'post-offence conduct'.

[100] I respectfully agree with Hiley J's analysis and conclusions on this ground.

[101] I would not allow this ground.

Ground 4

The learned trial Judge erred in failing to direct the jury as to how the evidence of complaint could be used in particular, under s 26E of the *Evidence Act*.

[102] During the first trial, an opportunity was given to counsel to consider after discussion of the issue, whether there should be a direction with respect to complaint evidence. The issue was not discussed further. Evidence of the complaint to RG was admitted pursuant to s 66 *Evidence (National Uniform Legislation) Act*. The trial Judge recognised that if the evidence were not admissible on the basis of s 66, it would be admissible under s 26E of the *Evidence Act*. Evidence given of a child pursuant to s 26E of the *Evidence Act* may be regarded as evidence of a fact in issue. It is a source of evidence and does not rely on contemporaneity with the alleged offending for its admission.[29] Previously contemporaneity was specifically treated as a factor relevant to the assessment of the weight of the evidence, however that consideration has been repealed.[30] The requirement for admission under s 26E is that the evidence have "sufficient probative value", its probative value need not be "significant" or "substantial".[31]

[29] *MLB v The Queen* (2010) 27 NTLR 198 at [27] - [28], per Martin (BR) CJ.
[30] Contemporaneity was previously a matter of weight under s 26F of the *Evidence Act*, repealed by the *Evidence (National Uniform Legislation) (Consequential Amendments) Act 2012*, No 23, that commenced 1 December 2013.
[31] *MLB v The Queen* (2010) 27 NTLR 198 at [37], per Martin (BR) CJ.

[103] If admitted pursuant to s 66 *Evidence (National Uniform Legislation) Act*, the representation must be 'fresh in the memory' of the person making it, as that term is defined by s 66(2A). Although there was delay, having regard to the factors in s 66(2A), especially the nature of the event and the age of the complainant, there is no reason to doubt the event was 'fresh in the memory' and therefore the complaint admissible.

[104] In the context of this particular trial, although no direction was given as to the use of the complaint evidence, on behalf of the respondent it was pointed out that both the Crown and defence at trial relied on the complaint evidence. On behalf of the Crown, the evidence was led to show that there was no material difference between the various accounts given by the complainant, including to RG. On behalf of the appellant, the evidence was led to show that there were significant differences in her account. The complaint evidence was effectively treated by the parties as a reliability and consistency issue. In that context, it is perhaps unsurprising that in the summing up, the complaint evidence became subsumed with the overall description and summary of the relevant evidence.

[105] Although it is usual for a direction about the two uses of complaint evidence to be given, I would not allow this ground of appeal on the particular basis that the two relevant ways the evidence could be used were not identified expressly to the jury. I respectfully agree with Southwood, however, to the extent that a direction was required in the circumstances of this trial to

ensure the jury did not use or regard the complaint evidence as independent supporting evidence of the offending.

[106] I would allow this ground on that limited basis.

Ground 5

That the summing up by the learned trial Judge had the effect of putting the Crown case too high and undermining the defence submissions.

[107] As the appeal is to be allowed on other grounds, it is unnecessary to decide this ground.

Orders:

[108] I would allow the appeal, set aside the convictions and order a retrial.

HILEY J

Introduction

[109] Following a trial by jury the appellant, MWL, was convicted on 2 July 2015 of two counts of indecently dealing with AH a child under the age of 10 years, namely seven years.

[110] The Crown alleged that MWL had touched AH on the vagina on two occasions on or about 11 February 2012. MWL and his partner, TB, were babysitting AH and two other children who were staying overnight while their mothers, RG and SB (TB's sister), went out for the evening. TB had gone to bed at about 8.00 pm. The children were in the living room on mattresses watching DVDs. TB gave evidence of a conversation with MWL when he came to bed at about 2.00 am the next morning.

[111] Almost 21 months later, AH told her mother, RG, about the touching. RG reported the matter to police. AH participated in a child forensic interview on 7 November 2013. A pre-recording of her evidence was conducted on 6 February 2015.

[112] This was a retrial. The first trial took place between 13 and 17 April 2015. MWL gave evidence at that trial, and his evidence was played to the jury during the retrial. Prior to and during the first trial objections were taken to evidence that the Crown intended to tender. Most of these were ruled on following a voir dire on 10 April 2015. The appeal is against the verdicts returned on the retrial based primarily on alleged omissions to direct the jury on the use of certain evidence.

Objections not taken and directions not sought.

[113] The appellant raised five grounds of appeal and was given leave to amend ground 3 during the hearing of the appeal. I have found ground 2 made out but would reject the remaining grounds.

[114] A number of the grounds assert error on the part of the trial Judge in failing to give specific directions in circumstances where no such directions were sought at trial. Counsel conducting a trial have a positive duty to assist the Court by seeking and clearly articulating directions that should be given to the jury. A failure to do that contributed to the error identified in ground 2 which I have upheld.

[115] This duty of counsel is particularly important in relation to defence counsel, as there may well be forensic or other legitimate reasons for not taking an objection or seeking a particular direction. Unless counsel comply with this duty it may be difficult for the trial Judge, and for an appeal court, to discern whether the failure to take the objection or to request a particular direction was deliberate or due to counsel's inadvertence, as appears to be the case here.

[116] As a general rule, this Court should be able to assume that failures to take objection to particular evidence during trial, or to seek particular directions during trial or prior to the judge's summing up, reflect a conscious forensic decision on the part of counsel not to object to the relevant evidence or to seek the particular direction.

Ground 1 – failure to give a direction about Edwards lies

[117] Ground 1 is that "the learned trial Judge erred in not directing the jury in accordance with the principles enunciated in *Edwards v The Queen* (1993) 178 CLR 193". During submissions counsel submitted that even if there was no obligation to give an *Edwards* direction the trial Judge should nevertheless have given a direction along the lines of *Zoneff v The Queen*.[32] No such directions were sought by either counsel during (or prior to) the trial.

[32] (2000) 200 CLR 234.

[118] MWL gave evidence during which he denied the allegations of inappropriate touching and asserted that he was in a different room using a computer.

[119] The Crown relied on a discussion between MWL and his then partner TB when MWL came to bed at about 2.00 am. She said that she woke up and had the following conversation with MWL:

> … I said to him, “What are you doing out there? What are you doing?” “I was just watching DVDs with the kids.” That’s what he said to me …
>
> … I said, “Well its like 2 o’clock in the morning. What are you doing up with children on your own at 2 o’clock in the morning? They’re someone else’s children. You don’t keep children up until 2 o’clock in the morning and you don’t put yourself in a position on your own with children like that.” And he responded to me, “Okay”.

[120] TB testified that MWL was not using his computer because he had told her that he was up watching DVDs with the children, and also because he would not have been using his computer because the children would have interfered. SB testified that when she and RG picked the children up the next day she “asked TB how the children were and she said that they were good but AH and C had had trouble sleeping so MWL had been out there with them during the night.”

[121] MWL gave evidence that he remembered putting a DVD on at some stage earlier in the night and the children being on mattresses in the lounge room. He said he remembered pulling a computer apart and connecting things and reading a book. He later saw them asleep on the mattresses and remembers the TV replaying a music loop which was a menu for a DVD. The TV was

off when he went to bed early the next morning, but he did not recall whether he or someone else turned it off. Later in his evidence he conceded that he would have had some interaction with the children and that he might have sat on the floor and/or the mattress at some stage. He may have seen the TV screen at some stage but he did not remember sitting there watching a DVD with the children.

[122] When asked by his counsel about the conversation described by TB he said that he did not recall an argument or her having a go at him, and that it would be very odd for her to do so. In relation to her reference to him watching DVDs with the children he said that he had better things to do with his time such as working on computers and that that was what he was doing because that makes him money. During cross-examination, he was asked whether he was denying that the conversation occurred. He said that if she "had a go at [him] as she stated she did, [he] would remember this because it would be out of the ordinary."

[123] In the Crown's final address the learned prosecutor said to the jury:

> Ultimately, MWL's evidence comes down to denying 3 components of the Crown case. He never touched AH, the first. There was no argument between him and TB about being up late and alone with the kids, and that he didn't have the opportunity, as the risk of being caught was too high. The dogs could have come out. TB could have come out.

[124] On appeal counsel for the appellant contended that the alleged conversation was central to the Crown case. He said that the importance of TB's evidence

appears to have been overlooked. It was a matter which went at least to MWL's credit, and potentially it was a lie from which a consciousness of guilt could be inferred. Counsel pointed out that TB had conceded that she was angry with MWL, and contended that there was a risk that her evidence was tainted because she had made up her mind that MWL had committed the offences. The consequences of the jury accepting her evidence would have been that MWL had lied on oath. That would have undermined MWL's evidence and raised for consideration whether he had lied out of a consciousness of guilt.

[125] The need for an *Edwards* direction was summarised by Charles JA in *R v Renzella* (1997) 88 A Crim R 65 at 70:

> An *Edwards* direction is usually essential if the Crown invites the jury to treat lies by the accused as part of a circumstantial case, as corroboration, as confirmatory or supportive material or simply as evincing a consciousness of guilt.

[126] In *R v Cuenco* Nettle JA, with whom the other judges agreed, said:

> The general rule is that an *Edwards* direction should only be given if the prosecution contends that a lie or other post-offence conduct is evidence of consciousness of guilt, in the sense that it was told or engaged in because the accused knew that the truth or failure to act would implicate him in the commission of the offence, and if in fact the lie or other conduct is capable of bearing that character.[33]

[127] I agree with the respondent that this is a common feature of a jury trial, namely conflicting evidence from various sources, which the jury must resolve. An *Edwards* direction may not be appropriate where there are

[33] (2007) 16 VR 118 (CA) at 125 [15].

simply conflicts in evidence, even to the extent that one party is asserting that the other is lying. In the instant case, MWL's counsel contended that TB wanted to "sink the boot into" MWL and that was why she told the jury that this conversation occurred. She did not retract her evidence under cross examination. The evidence went to the credit of both TB and MWL, and the jury had to assess contradictory evidence of both of them on the conversation.

[128] Even where an *Edwards* direction is appropriate the failure to give the direction will not necessarily result in a miscarriage of justice where the prosecution does not contend that the lie is evidence of guilt.[34] In order to succeed on this ground the appellant must establish that it is a reasonable possibility that the failure to direct the jury may have affected the verdict.[35]

[129] The Crown did not contend that MWL's apparent denials of the conversation with TB and of watching DVDs with the children constituted lies, let alone lies evincing a consciousness of guilt. The Crown relied upon TB's evidence as admissions by MWL that he spent some time in the lounge room with the children and as corroboration of other evidence about the children staying up late at night and not sleeping.

[130] Even if the jury did accept MWL's apparent denials they could still have found that MWL had the opportunity to engage in the conduct alleged. MWL conceded that he would have had some interaction with the children and that

[34] *Dhanhoa v The Queen* (2003) 217 CLR 1 per Gleeson CJ and Hayne J at [34].
[35] Supra at [60].

it was possible that he sat down on the floor with them at some stage. Indeed, after her Honour had completed her summing up, counsel for MWL persuaded her Honour to recall the jury and remind them of MWL's concessions about the possibly of him sitting on the floor and/or the mattress and watching a little of a DVD, although he had initially denied those things.

[131] In circumstances such as these, where neither party had sought such a direction and the Crown had not attempted to rely on MWL's apparent denials as lies, the giving of an *Edwards* direction by the trial Judge could have been unnecessarily prejudicial to MWL. By giving such a direction and raising the possibility that MWL had deliberately lied, there is a risk that some members of the jury may well have thought that the judge considered that MWL had lied, and did so out of consciousness of guilt.

[132] I do not consider that it was necessary (or even appropriate) to give an *Edwards* direction. The appellant has not shown that there is a reasonable possibility that the failure to so direct the jury may have affected the verdict.

[133] During the hearing of the appeal, counsel for MWL submitted that even if an *Edwards* direction was not necessary, her Honour should have provided some other direction about that particular evidence. This should have included a direction to carefully scrutinise TB's evidence particularly in light of her hostile feelings towards MWL, and a *Zoneff* type of direction

concerning the apparent conflict between her evidence and that of MWL. Her Honour did remind the jury of defence counsel's criticisms of TB's evidence including his assertions that she was effectively trying to "sink the boot into" her ex-partner and his contention that the jury cannot accept her evidence about the 2.00 am conversation.

[134] Her Honour gave the usual *Broadhurst*[36] direction. Counsel contended that her Honour should have gone further in relation to the evidence of TB because it was effectively contradicted by MWL. Absent such a direction, the jury may have reasoned that because he effectively denied TB's evidence that the conversation occurred, he was falsely denying that he had been watching DVDs with the children and that he was up with the children at 2 o'clock in the morning. If these denials were false the jury might reason that his other denials, in particular that he indecently dealt with the complainant, were false.

[135] Her Honour instructed the jury as to how they should treat his denials in the course of giving the *Broadhurst* direction. Her Honour said:

> If you disbelieve the accused, all that means is that you do not accept his evidence. You put it to one side. You cannot convert his denials into positive evidence that he did what he is accused of doing.

[136] I do not consider that her Honour erred in failing to provide further direction to the jury about this evidence.

[36] *Broadhurst v The Queen* [1964] AC 441.

Ground 2 – complainant's change in behaviour

[137] Ground 2 is that "the learned trial Judge erred in admitting evidence as to the complainant's change in behaviour, and if it was admissible no adequate direction was given as to how such and, in particular, this evidence could be used." The first part of this ground was not pressed at the hearing of the appeal.

[138] The Crown led evidence about changes in the complainant's behaviour since the night in February 2012 when she had been babysat by MWL and TB. The evidence was led as context evidence. It was one of the matters that led to the complainant's mother (RG) to question the complainant, almost 21 months later, about what happened that night. It helped to explain the complainant's delay before saying anything to her mother about the offending.

[139] Shortly before 31 October 2013 RG had been told something about some other conduct on the part of MWL. Evidence of what those allegations were was not permitted to be led at trial due to its prejudicial nature. It was that recent information, coupled with her observations about changes in AH's behaviour since the night when she was babysat by MWL and TB, that caused RG to ask AH whether she remembered the time she stayed at TB's house the previous year and was up late watching movies and not sleeping. RG and AH were in the car when RG raised this with her. In addition to telling her mother what happened, AH displayed a number of gestures including various actions around her genital area.

[140] During a pre-trial voir dire counsel for MWL objected to the tendering of evidence about RG's observations of AH's changed behaviour, on the basis of relevance. Her Honour ruled, correctly in my view, that the evidence was relevant and that RG, although not an expert, could give evidence concerning her observations of the complainant's behaviour. In written submissions prior to the voir dire counsel for the Crown stated that "there must almost certainly be a specific direction about the use that can be made of the evidence, so that the jury cannot fall into error."

[141] At trial RG was asked whether she noticed any changes in AH after the sleepover on 11 February 2012. RG explained that AH had previously been a sound sleeper with strong routines, but within a few weeks after the sleepover AH was reluctant to go to bed and to sleep with the lights off and doors closed. RG also noticed other changes in her behaviour including that she would sometimes become quite angry and upset with her brother. RG arranged for AH to have counselling.

[142] On appeal, it was argued that the admission of this evidence unfairly prejudiced MWL. There was no evidence linking the changes in AH's behaviour with the alleged offending, but there was a strong risk that the jury might infer that there was such a link because of the temporal proximity between the date of the alleged offending and the onset of her altered behaviour. Hence the need for an appropriate direction to the jury.

[143] I consider that the evidence was very important and its probative value significant. There was no other way in which the pre-complaint delay could be explained without impermissibly referring to the other reason for RG suddenly becoming suspicious that MWL had acted inappropriately that night and consequently asking the complainant about it. The probative value of that evidence was not outweighed by any danger of unfair prejudice to MWL.[37]. It was properly admitted.

[144] However, counsel should have requested the judge to give the jury a direction, preferably at the time when the evidence was led, or at least during summing up, as to how they should use that evidence. Indeed counsel should have reminded her Honour of what the Crown had said in the course of the voir dire submissions – see [140] above. This would have included a direction as to the limited purpose for which the evidence was adduced, and a direction to the effect that there could have been numerous reasons for the various changes in the complainant's behaviour, all consistent with the innocence of MWL.

[145] In the absence of such a direction I consider there is a possibility that the jury misapplied that evidence and regarded it as supporting the conclusion that the changes in behaviour were caused by the particular misconduct with which MWL was charged.

[37] cf *Evidence (National Uniform Legislation) Act 2013* (NT) s 137.

[146] Notwithstanding no direction was sought by counsel for the appellant, given at trial this particular evidence assumed greater importance than may have initially been appreciated and its potential for misuse, I uphold this ground.

Amended Ground 3 – directions regarding delay in making complaint

[147] Ground 3, as amended, is that "the learned trial Judge erred in not directing the jury as to the forensic disadvantage due to the delay in complaint pursuant to s 165B of the *Evidence (National Uniform Legislation) Act* or alternatively should have given a general direction as to the matters relevant (including delay, age and ability to recall) to assessing this complainant's evidence."

[148] Section 165B provides as follows:

> (1) This section applies in a criminal proceeding in which there is a jury.
>
> (2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage to account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay of the forensic disadvantage suffered because of the consequences of the delay.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) For the purposes of this section, the factors that may be regarded as establishing a ***significant forensic disadvantage*** include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

[149] This provision relates to delay in prosecution and includes delay between the alleged offence and it being reported – s 165B(6). Delay alone is not sufficient to constitute significant forensic disadvantage – s 165B(6)(b). Warnings on forensic disadvantage because of delay can only be given in accordance with s 165B.[38] However s 165B(5) does not preclude a judge from giving other warnings to a jury.

[150] Some examples of significant forensic disadvantage are given in s 165B(7) – the fact that a potential witness has died or may not be able to be located, or

[38] See *Evidence (National Uniform Legislation) Act* s 165B(5) and *Jarrett v The Queen* [2014] NSWCCA 140 at [52] - [54] and [59] - [65].

that any potential evidence has been lost or is otherwise unavailable. Other examples might be where an accused has suffered significant memory loss due to illness since the relevant events and his previous statement to the police about the allegations has been lost.[39] However, even in cases of very long delay, including trials involving allegations of 'historical' sexual offences, it has been accepted that an accused can receive a trial which is not unacceptably unfair.[40]

[151] The requirement of "significant forensic disadvantage", in relation to the application of a similar provision in s 61(1A) of the *Crimes Act 1958* (Vic) since replicated in s 165B of the *Evidence Act 2008* (Vic), has been usefully summarised in *PT v The Queen*,[41] a sexual assault matter involving a delay of some 15 years before complaint to the police. At [23] – [27]:

> 23 The expression 'significant forensic disadvantage', which appears in s 61(1A), is now replicated in s 165B of the *Evidence Act 2008* (Vic). According to the Explanatory Memorandum to the Evidence Bill 2008 (Vic), s 165B was introduced to replace the existing common law regarding what had come to be known as the giving of a '*Longman*' warning. The section recognises that delay in the reporting and/or charging of an offence can create significant forensic difficulties for an accused, and that it may be necessary that these difficulties be drawn to the attention of the jury. By contrast with *Longman*, a court is prohibited from suggesting in any way that it would be dangerous or unsafe to convict the accused solely because of the delay or forensic disadvantage suffered.

[39] *R v Cassebohn* (2011) 109 SASR 465 in relation to the application of a similar provision found in the *Evidence Act 1929* (SA) s 34CB.
[40] *Hermanus (A Pseudonym) v The Queen* [2015] VSCA 2 at [43] – [46].
[41] [2011] VSCA 43.

24 The phrase ‘significant forensic disadvantage’ requires examination of the consequences of the delay for the accused in relation to the particular case. Such disadvantage arises not because of delay itself, but because of the consequences of delay. For example, it may be that potential witnesses have died, or are not now able to be located. Alternatively, potential evidence may have been lost or is otherwise unavailable.

25 What is clear, however, is that the defendant who seeks the warning carries the onus of satisfying the Court that he or she has in fact suffered a significant forensic disadvantage, and that this arises because of the delay that has occurred. A hypothetical disadvantage will not be sufficient. A leading text on the *Evidence Acts* cites the joint view of the Australian, New South Wales and Victorian Law Reform Commissions, which was reflected in the Explanatory Memorandum to the Evidence Amendment Bill 2008 (Cth), to the effect:

> A warning should not be given unless the delay has placed the defendant at a significant forensic disadvantage and the particular risks of prejudice must be identifiable.

The learned authors further note the view of the Law Reform Commissions that ’… the general or nebulous disadvantage’ that a defendant might suffer could be raised by counsel in closing address and need not be underscored by the trial Judge.

26 Referring to the Macquarie Dictionary, the learned authors point out that, for the forensic disadvantage to be ‘significant’, it must be ‘important’ or ‘of consequence’. They provide the following helpful summary of relevant authorities:

> In general terms, delay may lead to forensic disadvantage ‘in respect of adequately testing allegations or adequately marshalling a defence, as compared with the position if the complaint of the offence were of “reasonable contemporaneity”. At common law, instances of forensic disadvantage suffered as a consequence of delay have included the inability of a defendant to establish an alibi or to call more convincing evidence of an alibi, an inability to carry out medical examinations in a timely way, an inability to explore the

> detail of the circumstances of the alleged offending and an inability to identify the alleged events with specificity.
>
> 27 As noted in Odgers, *Uniform Evidence Law*, the provision does not preclude the Court from deciding, in the circumstances of a particular case, that the delay is of such magnitude that significant forensic disadvantage is a matter of necessary inference. But the clear focus of the provision is on identification of the particular consequences of the delay which give rise to significant disadvantage.

[152] Counsel for MWL first sought directions under s 165A and s 165B after the evidence had closed in the first trial. Counsel referred to the inability to obtain photographs of the precise nature of the furniture in the house at the relevant time, the physical absence of items such as the two mattresses on or near which the conduct occurred, and possible distortions in AH's memory. The trial Judge declined to give a warning under s 165B.

[153] On appeal, counsel for MWL contended that the delay before complaint (31 October 2013) and the subsequent recording of the child forensic interview (6 November 2013) and then before the pre-recording (6 – 7 February 2015) put MWL "at a particular disadvantage in not being able to scrutinise the complainant's evidence sufficiently due to the complainant's age and resultant variation in recollection." Had MWL been aware of the complaint and its details much earlier he could have "clarified the layout of the house and [his] computer activity, both matters about which his credit was challenged". Because of the delay he was deprived of "the opportunity of gathering reliable evidence and examine the circumstances of the

occasion with more confidence", for example "the circumstances of [TB] going to bed and whether there was a conversation" between them at the time. Counsel acknowledged that AH did provide a fair amount of detail during the child forensic interview.

[154] Counsel for the respondent pointed out that at the trial the Crown submitted a plan showing the layout of the house, as well as photographs of the house after MWL had vacated the premises. The respondent did not directly challenge MWL in respect of the computer activity. During cross-examination MWL said that he had a good recall of his movements and activities on the night in question. The purpose of the cross-examination was to demonstrate that he did not remain in the computer room through the entire course of the evening, but that he left the room from time to time.

[155] Like the trial Judge, I am not satisfied that MWL suffered a significant forensic disadvantage because of the consequences of delay. There was no cause for giving a warning under s 165B.

[156] In the alternative, counsel for MWL submitted that her Honour should have given the jury a general direction concerning its assessment of the complainant's evidence, having regard to the delay, her age and her ability to recall the relevant events.

[157] Counsel provided by way of example the direction given by Judge Gaynor, the trial Judge in *PT*, set out in [22] of the Court of Appeal's reasons.[42] However that direction was made in the context of earlier legislation which did not permit complaint evidence to be used as evidence of the fact asserted by the complainant[43] and may not have included the restraints now imposed by provisions such as s 165A of the *Evidence (National Uniform Legislation) Act* and s 4(5) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT).

[158] Section 165A of the *Evidence (National Uniform Legislation) Act 2013* (NT) provides:

> (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
>
> (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
>
> (b) warn the jury or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
>
> (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child;
>
> (d) in the case of a criminal proceeding – give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

[42] *PT v The Queen* [2011] VSCA 43.
[43] cf *Evidence Act 1939* (NT) s 26E and *Evidence (National Uniform Legislation) Act 2013* (NT) s 66.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that evidence of the particular child may be unreliable and the reasons why it may be unreliable; and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

[159] During the first trial counsel for MWL requested the trial Judge to give a warning of the kind contemplated in s 165A(2) of the *Evidence (National Uniform Legislation) Act*. Counsel referred to the age of AH, the 20 month delay before her complaint and inconsistencies between what she said to RG, in her child forensic interview and during her pre-recorded evidence.

[160] Following an adjournment, the trial Judge stated that she did not consider "that those circumstances affect the reliability of AH's evidence to a degree that warrants the giving of a warning", and "that there was anything special about this case that takes it outside the general prohibition in s 165A(1) and makes it appropriate or warrants the giving of a warning." Her Honour

quoted the following passage from the judgment of Basten JA in *Jarrett v The Queen*[44] at [43]:

> Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of [the NSW analogue of s 4(5)(b)(v) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT)].

[161] No similar directions were sought prior to or during the retrial. Nor were they sought after the jury had retired to consider its verdict, notwithstanding numerous other complaints by MWL's counsel about her Honour's summing up.

[162] During closing addresses counsel for the Crown stressed the need to assess AH's evidence very carefully and to compare it with what the other witnesses said and to keep in mind that she was seven years old when the alleged offending occurred. Counsel for MWL queried the reliability of AH's evidence having regard to her age at the time of the alleged offending and her memory over the ensuing period. Counsel said she gave different versions of the events when she complained to RG, then to the police during the child forensic interview and then during her pre-recorded evidence. Counsel addressed the jury at length on differences between these versions.

[44] [2014] NSWCCA 140.

[163] During the summing up the trial Judge referred to the importance of AH's testimony and repeated defence counsel's points regarding the reliability of her evidence having regard to her age, the delay and her reduced memory of certain events when called upon to recollect them on later occasions. Her Honour went into some detail about discrepancies asserted by defence counsel when she summarised AH's evidence and she reminded the jury about defence counsel's submissions about AH's credibility and reliability. After telling the jury how to treat the evidence of MWL her Honour stressed the need to look at the rest of the evidence in the case and in particular the evidence of AH, and that the jury's consideration of the key issue in this case "essentially means scrutinising [AH's] evidence and deciding whether you accept it. If you have a reasonable doubt about that evidence, you are required to acquit."

[164] I do not consider that her Honour erred in failing to give additional directions of the kind advanced in relation to this ground of appeal.

Ground 4 – direction about complaint evidence

[165] Ground 4 is that "the learned trial Judge erred in failing to direct the jury as to how the evidence of complaint could be used in particular, under s 26E *Evidence Act*."

[166] Section 26E(1) of the *Evidence Act* provides:

> In a proceeding arising from a charge of a sexual offence or a serious violence offence, the court may, despite the rule against hearsay evidence, admit evidence of a statement made by a child to another

> person as evidence of a fact in issue if the Court considers the evidence of sufficient probative value to justify this admission.

[167] This provision is somewhat similar in effect to s 66(2) of the *Evidence (National Uniform Legislation) Act*, in that evidence of complaint can be used as evidence of the fact in issue, as well as for the traditional purpose of assessing the complainant's credibility. But s 66 would only have applied if the occurrence of the asserted fact, namely the touching of AH on or about 11 February 2012, was fresh in AH's mind when she made the complaint to her mother RG almost 21 months later.

[168] After completion of the evidence during the first trial and before the summing up, counsel for MWL requested her Honour to give a direction about complaint evidence "in terms of how it's in evidence". Her Honour said that "the standard direction we used to give about complaint evidence is no longer appropriate" because of the changes under the *Evidence (National Uniform Legislation) Act*. She pointed out that in light of s 26E of the *Evidence Act* and s 66(2) of the *Evidence (National Uniform Legislation) Act* the jury could use the evidence as evidence of the truth of what was asserted and therefore use it as they see fit. She invited counsel to reconsider his request overnight and raise it again the following morning. Counsel did not raise the issue again.

[169] On appeal, counsel for MWL submitted that a direction similar to that which may be given in relation to hearsay evidence adduced under s 66(2) of the

Evidence (National Uniform Legislation) Act was required. In written submissions counsel contended that:

> Although it is admissible as evidence of the facts in issue it should be scrutinised with a view of measuring consistency of complaint, particularly in circumstances where the defence case was that because of the variation in recollection of the complainant the jury ought to entertain a reasonable doubt. It is important that the jury are directed as to how such complaint evidence can be used rather than leaving it open for different jurors to use it in different ways and as they see fit. This raises the risk that the jury could use the complaint evidence as independent evidence of a corroborative nature. It is usual to give a direction about the proper use of complaint evidence.

[170] It is common for a direction to be given concerning the two ways in which complaint evidence can now be used, namely as evidence of the fact and also to assess the credibility of the complainant, and for the jury to be told that the complaint evidence should not be regarded as evidence independent of the complainant because it was the complainant who was the source of that evidence.[45] However, there is no requirement for such directions to be given in all cases.

[171] During addresses at trial the Crown submitted that there was no material difference between the account given by AH to her mother RG and that which she gave during the child forensic investigation. Although counsel for MWL asserted that there were significant differences they were not clearly identified by counsel.

[45] See for example *Papakosmas v The Queen* [1999] 196 CLR 297 at [7] and [42].

[172] The issue for the jury was whether AH was a reliable historian and whether her account was credible and consistent. This applied to each of her accounts, not only what she told her mother (and was thus admitted as "complaint evidence") but also what she told the police soon after that during the child forensic interview and what she said during the pre-record hearing. As I have already noted, her Honour addressed the jury about the submissions by counsel concerning the various discrepancies.

[173] At the hearing of the appeal, counsel for MWL contended that her Honour should have pointed out to the jury that they could use the complaint evidence in both of the ways noted above, namely as evidence of the facts in issue and also in relation to credibility. I do not consider that any failure to do this could have resulted in any disadvantage to MWL. There is no basis for assuming that the jury would have treated the evidence about what AH said to her mother any differently to her other evidence.

[174] Nor do I consider that her Honour erred in failing to tell the jury that the complaint evidence should not be regarded as evidence independent of the complainant. As I have just noted, the jury would have been well aware of the need to focus upon the reliability of AH's evidence.

[175] I do not consider this ground is made out.

Ground 5 – trial Judge's summing up

[176] As the appeal is to be allowed on other grounds I do not propose to deal with this ground.

Disposition and orders

[177] Because I consider that ground 2 has been made out, the appeal should be allowed. Accordingly the convictions should be set aside. I would order a retrial.
