HIGH COURT OF AUSTRALIA

BELL, GAGELER, NETTLE, GORDON AND EDELMAN JJ

GAX APPELLANT

AND

THE QUEEN RESPONDENT

GAX v The Queen
[2017] HCA 25
21 June 2017
B72/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 22 July 2016 and in its place order that the appeal to that Court be allowed, the appellant's conviction be quashed and a judgment and verdict of acquittal be entered.*

On appeal from the Supreme Court of Queensland

Representation

M J Copley QC for the appellant (instructed by Macrossan & Amiet Solicitors)

M R Byrne QC with S J Farnden for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

GAX v The Queen

Criminal law – Appeal – Verdict unreasonable or insupportable having regard to evidence – Where appellant convicted on one count of aggravated indecent dealing with child and acquitted on two counts of aggravated indecent dealing with same child – Where appellant appealed conviction as unreasonable and inconsistent with acquittals – Whether Court of Appeal made independent assessment of sufficiency and quality of evidence in determining whether verdict unreasonable – Whether verdict unreasonable.

Words and phrases – "unreasonable verdict".

1 BELL, GAGELER, NETTLE AND GORDON JJ. The appellant was convicted before the District Court of Queensland (Smith DCJ and jury) of aggravated indecent dealing with a child, his lineal descendant[1]. The offence was the third count of three counts charged in the indictment. The appellant was acquitted of the first two counts, which charged aggravated acts of indecent dealing with the same child. The appellant was sentenced to 12 months' imprisonment, the term to be suspended after five months[2].

2 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland (McMurdo P, Morrison JA and Atkinson J)[3], contending that the verdict was unreasonable and that it was inconsistent with the verdicts of "not guilty" returned on counts one and two. By majority, the Court of Appeal rejected each ground. McMurdo P, in dissent, held that the evidence did not suffice to prove the appellant's guilt beyond reasonable doubt.

3 On 16 December 2016 French CJ, Bell and Keane JJ granted the appellant special leave to appeal. The Court of Appeal majority's conclusion that the verdict on count three was not inconsistent with the verdicts on counts one and two is not challenged. In this Court, the appellant contends that the Court of Appeal majority failed to make an independent assessment of the sufficiency and quality of the evidence in determining that it was open to the jury to convict (ground one) and that their Honours erred in concluding that the verdict was not unreasonable (ground two). As will appear, there is a somewhat arid quality to the controversy concerning the sufficiency of the Court of Appeal majority's analysis of the unreasonable verdict ground in circumstances in which their Honours' conclusion that the evidence was capable of supporting it cannot stand. To explain why that is so, it is necessary to refer in some detail to the evidence adduced in support of count three.

The evidence

4 The complainant is the appellant's natural daughter. She was aged just under 13 years at the date of the offence, which was particularised as occurring between 11 and 14 July 2003. Her first complaint concerning the offence was made a little over a decade later. On or about 2 November 2013, the complainant

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1 *Criminal Code* (Q), s 210.

2 The suspension of the sentence was conditioned on the appellant not committing any offence punishable by imprisonment within a period of two years.

3 *R v GAX* [2016] QCA 189.

attended at a police station and gave an account of the matters that formed the basis of the offences charged in the indictment.

5 The complainant's evidence adduced in chief, without objection, was that the appellant had "started touching" her from when she was aged six, seven or eight years. The touching had been "unappropriate", but at the time the complainant thought that it was normal. The offence charged in count three was the last occasion of inappropriate touching. The complainant identified this offence as the time "where he was caught". It occurred in the complainant's bedroom, which she shared with her sister, DML. It was the only occasion on which the complainant recalled an incident of inappropriate touching in her bedroom.

6 The material part of the complainant's evidence-in-chief, critical to the determination of the appeal, is set out below:

> "[M]y mum came in asking – she had pulled the sheets up before – sorry. I used to sleep in the room with my sister. We were in the same room, and she was asleep in her bed. The light had been turned on and Mum had come in. She pulled the blanket up after seeing Dad just hopping out of the bed.
>
> Q: So I'll - - - ?
>
> A: When she pulled the sheets, my underwear were down at my ankles.
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> Q: How did your underwear get down to your ankles?
>
> A: Time, I didn't know. All I knew was my Dad had just hopped off the bed.
>
> Q: What was he doing while he was on the bed?
>
> A: Well, I was asleep before and ended up finding out what happened, but - - -
>
> Q: No, I don't want you to tell us what you ended up finding out?
>
> A: No. I was like - - -
>
> Q: What do you remember?
>
> A: When I was laying there, I could feel hands down near where my underwear were – were supposed to be.

Q: Well, what was happening with the hands?

A: I can't say. Sorry, I can't say. I don't remember.

Q: So you felt the hands down around where your underwear was supposed to be. Whereabouts? Can you say in particular where the hands were?

A: His fingers were near my vagina, and I don't remember what was happening. All I remember is his fingers were down there until the light – until we realised that someone was coming down the hallway.

Q: How long were his fingers down there?

A: I would not be able to recall."

7 The complainant explained that when she referred to her mother pulling the sheets up she meant that her mother had pulled the bed covering off her. It will have been observed that the complainant said DML was asleep in her bed at the time.

8 DML's account was that she had been out with her mother and brothers on a car trip and on their return she and her mother had gone to the bedroom that she shared with the complainant. When they entered the bedroom she saw the appellant in bed with the complainant. The mother asked the appellant what he was doing a few times and he did not reply. He was either asleep or pretending to be asleep. The complainant got out of the bed and ran out of the room crying. The complainant's undies were "right down" and her nightie or shirt was "above her boobs".

9 The complainant's mother, GJC, gave evidence dating the incident by reference to an entry in a calendar. She had placed an asterisk next to Saturday 12 July 2003, signifying that the incident had occurred on the previous night, a Friday. She said the asterisk marked the day after "I caught [the appellant] in bed with [the complainant]". GJC explained that on the evening of Friday 11 July she had gone out to buy takeaway food. She could not recall whether DML accompanied her or stayed at home. On her return with the dinner, GJC called out to the complainant, and when there was no response, GJC went to look for her. She turned the light on in the complainant's bedroom and saw "[the appellant] cuddling up with [the complainant] in the bed and the sheets were pulled right up". The complainant was snuggled up to the appellant with her eyes "scrunched up". The appellant appeared to be asleep. GJC announced "dinner's here" and pulled back the covers. She observed that the complainant's knickers were folded down about an inch. The complainant was wearing a pink singlet

and pink knickers. The singlet was pulled down in a normal fashion. GJC tried to wake the complainant and she yelled at the appellant and pulled him out of bed. She saw that he was wearing boxer shorts and a t-shirt. The complainant remained in bed with her eyes scrunched up.

10 The complainant acknowledged that she had regularly wet the bed up until high school. She accepted that she would often take off her underwear and leave them in the bed or on the floor by the bed after an episode of bed-wetting. The complainant's recall of events was generally poor. In examination-in-chief she volunteered that "[m]y mind's just all mumbled up right now". In cross-examination she acknowledged that her memory was unreliable and that this was a problem that she had experienced most of her life. She also agreed that she had been "easily led" at school and that she was a person who would "believe what anyone told [her] at that time".

11 GJC described the complainant as having learning difficulties at school and as having been assessed as in the "borderline or below-average range of intellectual function". She agreed that the complainant had had difficulties with long-term memory throughout her life.

12 GJC acknowledged that not quite three weeks after she made her statement to the police about this matter she commenced proceedings in the Federal Circuit Court of Australia against the appellant seeking a division of property and spousal maintenance. She also acknowledged that in an affidavit filed in those proceedings she had described the complainant's allegations as "very unexpected and very shocking".

13 The particulars of the offence charged in count three furnished by the prosecution before the trial were that "[t]he [appellant] touched the complainant on the vagina". At the conclusion of the prosecution case, counsel submitted that there was no evidence to support the case of touching on the vagina. The prosecution successfully applied to amend the particulars to assert that the appellant touched the complainant "on or near the vagina".

14 The appellant gave evidence and denied that he had inappropriately touched the complainant on any occasion. He denied that there had been any occasion when he had been in the complainant's bed with her.

The Court of Appeal

15 Atkinson J, in the leading majority judgment, reviewed the evidence in support of count three. This was done in the course of addressing the inconsistent verdicts ground. In this context, her Honour observed that the

complainant's evidence of the offence charged in count three had been supported in important ways by DML and GJC[4]. The complainant's evidence of the offences charged in counts one and two was by contrast "vague and uncertain"[5]. The verdict on count three could be explained in light of the evidence of DML and GJC, who had found the appellant in "a compromising position" in bed with the complainant, whose underwear was "down". Any suggestion that the appellant had been checking to see if the complainant had wet the bed by lying in it was "plainly ridiculous". The inconsistencies between the evidence of the complainant, DML and GJC were "relatively minor" and tended against any suggestion of collusion[6].

16 The appellant identifies the following two paragraphs as the critical passage in Atkinson J's reasons:

> "[49] ... The different quality of the evidence for count three and the support given by the evidence of two other witnesses provides a rational basis for convicting on count three notwithstanding the acquittal on the other two counts. It also shows that the verdict of the jury should not be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence.
>
> [50] True it is, as the President has observed, that in later years the complainant enjoyed a cordial, even close, relationship with her father but that in no way suggests that the count on which the appellant was convicted did not occur but that it was rather, as she and her mother testified, the last occasion on which he molested her."

17 McMurdo P, in dissent, would have allowed the appeal. Her Honour accepted that the jury was entitled to reject the appellant's evidence and to find that the appellant had been discovered in the complainant's bed on the evening of Friday 11 July 2003[7]. Nonetheless, her Honour observed, the issue was whether the prosecution had established beyond reasonable doubt that the appellant had

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4 *R v GAX* [2016] QCA 189 at [43].

5 *R v GAX* [2016] QCA 189 at [35].

6 *R v GAX* [2016] QCA 189 at [43]-[44].

7 *R v GAX* [2016] QCA 189 at [11].

indecently touched the complainant on that occasion. Her Honour noted that the only evidence of indecent touching came from the complainant. Her Honour considered that particular caution was needed before accepting the complainant's evidence given the lengthy delay in reporting the matter; the timing of the complaint proximate to the mother's commencement of property and maintenance proceedings; the complainant's admittedly unreliable long-term memory and her acceptance of being prone to suggestion[8].

18 A further matter that McMurdo P took into account was her understanding that in the initial complaint to the police the complainant had said that the appellant had put his fingers in her vagina on the occasion charged in count three[9]. In this respect, McMurdo P's understanding of the evidence was in error. The complainant told the police that the appellant had put his fingers in her vagina on occasions, but she did not say that he had done so on this occasion. This error does not appear to have been material to McMurdo P's ultimate conclusion. That conclusion was that the real possibility that the complainant's account was a reconstruction could not be excluded beyond reasonable doubt[10].

19 For completeness, it should be noted that McMurdo P considered that the inconsistencies between the complainant's evidence and the evidence of GJC and DML were more than minor: GJC said the complainant's underwear was folded down an inch, whereas the complainant and DML described them as down near the complainant's ankles and "right down" respectively; GJC saw nothing out of the ordinary about the complainant's singlet, whereas DML said it was above the complainant's "boobs"; and on the complainant's account, DML was asleep in her bed at the time[11].

The parties' submissions

20 The principles to be applied by the appellate court in determining an appeal against conviction on the ground that the verdict is unreasonable[12] were

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8 *R v GAX* [2016] QCA 189 at [17].

9 *R v GAX* [2016] QCA 189 at [6].

10 *R v GAX* [2016] QCA 189 at [19].

11 *R v GAX* [2016] QCA 189 at [18].

12 *Criminal Code* (Q), s 668E.

not in contention in the Court of Appeal or in this Court[13]. They were correctly summarised by Atkinson J at the commencement of her reasons: the court was required to review the whole of the evidence to determine whether it was open to hold that the appellant's guilt had been proved beyond reasonable doubt[14].

21 The argument advanced in support of the appellant's first ground is that the only analysis of the capacity of the evidence to support the verdict is in the concluding sentence of [49] and [50]. The appellant adopts McMurdo P's analysis of the deficiencies in the evidence and complains of the Court of Appeal majority's failure to address those deficiencies. The appellant's argument in support of his second ground is that it was not open to the jury to be satisfied to the criminal standard that the complainant was touched on or near her vagina. This is because the only evidence of the touching was the complainant's evidence extracted above, which, it is said, does not admit of satisfaction beyond reasonable doubt that she had any actual recollection of being touched.

22 The respondent's contention is that the appellant's analysis of Atkinson J's reasons has an air of artificiality to it. Her Honour is said to have fairly reviewed the whole of the evidence relevant to count three in the course of dealing with the inconsistent verdicts ground. The respondent submits that there was a substantial measure of overlap between the two grounds before the Court of Appeal. The complainant's evidence that "[h]is fingers were near my vagina, and I don't remember what was happening. All I remember is his fingers were down there" sufficed to establish an indecent touching on or near her vagina. This evidence, it is said, was materially supported by GJC's and DML's evidence that the complainant's underwear was "disorganised". The respondent submits that the possibility of an innocent explanation for the appellant's presence in the bed was excluded beyond reasonable doubt.

The criticisms of the treatment of the unreasonable verdict ground

23 It may be accepted that Atkinson J's consideration of the unreasonableness ground was not confined to the concluding sentence of [49] and [50]. As the respondent submits, her Honour's rejection at an earlier point in her reasons of the possibility that the appellant was checking to see if the complainant had wet the bed and her conclusion that inconsistencies in the evidence were "relatively

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13 The principles are collected in *SKA v The Queen* (2011) 243 CLR 400 at 409 [22]-[24] per French CJ, Gummow and Kiefel JJ; [2011] HCA 13.

14 *R v GAX* [2016] QCA 189 at [25] citing *SKA v The Queen* (2011) 243 CLR 400 at 408-409 [20]-[22].

minor" were evaluative assessments of the evidence considered as a whole. The respondent is also right to point to a measure of overlap in the task of determining whether the verdict of guilty was inconsistent with the verdicts of acquittal and, if it was not, whether it was supported by the evidence. It remains that the tasks are distinct.

24 In the course of dealing with the inconsistent verdicts ground Atkinson J said that the jury had been entitled to accept that the risk of reconstruction had been avoided because the prosecutor directed the complainant to only give evidence of what she remembered[15]. It will be recalled that the complainant's initial response to the question of how her underwear had come to be around her ankles was "[t]ime, I didn't know. All I knew was my Dad had just hopped off the bed" and that her next answer was "I was asleep before and ended up finding out what happened". At this point the prosecutor told the complainant not to give evidence of what she had found out but to state what she remembered. Following this instruction the complainant stated "I could feel hands down near where my underwear were - were supposed to be" and "[h]is fingers were near my vagina, and I don't remember what was happening". The last-mentioned assertion was the evidence on which proof of count three depended.

25 Accepting that the assertion "his fingers were near my vagina" was in law evidence of an indecent dealing within the amended particulars, the issue raised by the unreasonable verdict ground was one of fact[16]. Determination of this ground turned on the Court of Appeal's own assessment of whether it was open to the jury to be satisfied of the appellant's guilt to the criminal standard[17]. Atkinson J's view, that the jury had been entitled to reject the possibility of reconstruction, was a matter which her Honour took into account in identifying a rational explanation for the differing verdicts. It is less clear that her Honour was expressing an independently formed conclusion about the capacity of the evidence to exclude the possibility of reconstruction. There is force to the contention that the reasons do not disclose her Honour's own assessment of the sufficiency and quality of the evidence of the particularised touching.

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15 *R v GAX* [2016] QCA 189 at [44].

16 *M v The Queen* (1994) 181 CLR 487 at 492; [1994] HCA 63.

17 *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14] per French CJ, Gummow and Kiefel JJ.

The sufficiency of the evidence

26 This was a short trial at which the evidence was taken in under two days. In the circumstances, consistently with the parties' agreement on the hearing in this Court, any deficiency in the Court of Appeal majority's analysis of the reasonableness of the verdict should not lead to a remitter. The interests of justice favour this Court itself determining that question.

27 The appellant's contention below that the prosecution failed to exclude the possibility of collusion, and allied suggestion of collusion associated with GJC's application to the Federal Circuit Court for the division of property and spousal maintenance, can be immediately put aside. The suggestion that the complainant, DML and GJC colluded to falsely accuse the appellant of impropriety in order to bolster GJC's claim in the Federal Circuit Court was not put to any of them. Moreover, given that the appellant was charged with these offences on 4 November 2013 and released on bail conditioned that he not return to live at the family home, the circumstance that his wife commenced proceedings in late November 2013 to obtain maintenance is hardly remarkable.

28 It should be accepted, as McMurdo P did, that the prosecution established that the appellant was discovered in bed with the complainant on the occasion charged in count three. It is a circumstance that fairly attracts suspicion. It remains that it was necessary to prove an act of indecent touching on or near the complainant's vagina. The complainant's evidence allowed the inference that there had been such a touching. This is not to say, however, that it was open to draw that inference beyond reasonable doubt.

29 The complainant's answers to the questions of how her underwear came to be down to her ankles and what the appellant was doing while he was on the bed were, respectively: "[t]ime, I didn't know. All I knew was my Dad had just hopped off the bed" and "[w]ell, I was asleep before and ended up finding out what happened". If true, they pointed to her further answers on this topic as a reconstruction. Her inability to give any details of the touching is consistent with that possibility. So, too, is GJC's evidence that the complainant appeared to be asleep when she pulled the bed covering off.

30 Finally, there is the issue of the state of the complainant's underwear at the time of the incident. The marked inconsistencies between DML's account of the incident as a whole and the complainant's and GJC's accounts lessen the capacity of DML's evidence, that the complainant's underwear was "right down", to support acceptance of the complainant's evidence of the state of her underwear. GJC's rather precise recall that when she pulled off the bed coverings, the complainant's underwear was folded down about an inch is again suggestive of

reconstruction: when the complainant was pressed to describe what she remembered, she said, "I could feel hands down near where my underwear were - were supposed to be".

31 This is not a case in which the jury's advantage in seeing and hearing the evidence can provide an answer to the challenge to the sufficiency of the evidence to support the verdict. McMurdo P was right to conclude that the real possibility that the complainant's evidence was a reconstruction and not an actual memory could not be excluded beyond reasonable doubt[18].

Orders

32 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 22 July 2016 and in its place order that the appeal to that Court be allowed, the appellant's conviction be quashed and a judgment and verdict of acquittal be entered.

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18 *R v GAX* [2016] QCA 189 at [19].

33 EDELMAN J. I agree with the reasons given in the joint judgment for why the verdict of the jury was unreasonable in the sense that it was not open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offence charged in count three. I therefore agree that the appeal should be allowed on the second ground of appeal. I also agree with the orders proposed in the joint judgment.

34 In light of this conclusion, it is unnecessary to consider the first ground of appeal, which is that the majority of the Court of Appeal of the Supreme Court of Queensland failed to make an independent assessment of the sufficiency and quality of the evidence in determining that it was open to the jury to convict the appellant. This ground of appeal, often summarised as one which complains of inadequate reasons, refers to the obligation of the appellate court to make an independent assessment of the capacity of the evidence to support the verdict[19].

35 As the joint judgment observes, the first ground of appeal is arid. It serves no purpose in circumstances where both parties accept that there is no basis to remit this matter to the Court of Appeal. However, as I differ from the conclusion of the joint judgment about the force of the submissions on the first ground of appeal, it is necessary to make two related observations about the first ground and to explain the reasons why, if it were necessary to decide, I would dismiss that ground of appeal.

36 First, there is no single, correct way in which reasons must be written. The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision"[20]. In the context of appellate consideration of the reasonableness of a conviction where the court is required to show an independent assessment of the sufficiency and quality of the evidence, the content and detail of the reasons may depend on matters such as the length of the trial, and the issues which assumed importance during the trial. The content and detail of reasons may also be affected by the focus of submissions on the appeal, particularly if the parties are represented by able counsel. Thus, if submissions are made on a matter which is important or critical to the appellant's case and this is not referred to in the reasons then it might be inferred that the court overlooked the evidence or failed to give consideration to it[21].

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19 *Morris v The Queen* (1987) 163 CLR 454 at 473; [1987] HCA 50; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14]; [2011] HCA 13; *BCM v The Queen* (2013) 88 ALJR 101 at 106 [31]; 303 ALR 387 at 392; [2013] HCA 48.

20 *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [56]; [2011] HCA 24.

21 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443.

37 Secondly, the submissions made to an appellate court in an appeal concerning the unreasonableness of a verdict can assume importance where appellate reasons descend into the detail of a case but are nevertheless said not to reflect an independent assessment of the capacity of the evidence to support the verdict. The obligation to provide adequate reasons does not require a court of appeal to write reasons which disclose every aspect of the thought process which leads to the court's conclusion independently of the manner in which the case was presented. Submissions provide context to the reasons given by a court. For instance, even on this highly focused appeal, despite a minute analysis of a single page of transcript of the complainant's evidence, neither party referred to later cross-examination of the complainant where it was put to her that the incident did not happen at all, or her response, perhaps emphatically although one cannot tell from the transcript, that the incident "did happen". In light of the manner in which the appeal was presented, and the focus before this Court upon the evidence about what occurred *during* the incident, that passage did not assume significance.

38 In this case, the reasons of the majority of the Court of Appeal did not, as the appellant submitted, deal only with the question of whether the verdict was unreasonable in two sentences contained in two paragraphs late in the judgment. Rather, the reasons of the majority (Atkinson J, with whom Morrison JA agreed) dealt, in a compendious way, with both the unreasonableness ground of appeal and the ground concerning inconsistent verdicts. It seems that this joint treatment was the reason for the appellant's submission that the majority had only considered the unreasonableness ground in two paragraphs.

39 In her Honour's reasons, Atkinson J recognised that it was necessary to consider the whole of the evidence in relation to count three in order to assess the unreasonableness ground[22]. Her Honour summarised the complainant's evidence in relation to the count in question[23]. She set out the evidence of the complainant which assumed critical importance on this appeal, including summarising and quoting, respectively, the passages in which the complainant said in response to questions about how her underwear came to be around her ankles that "[t]ime, I didn't know. All I knew was my Dad had just hopped off the bed" and "I was asleep before and ended up finding out what happened"[24]. Her Honour emphasised, in a discussion about that evidence, the exchange which followed immediately afterwards where the prosecutor told the complainant only to relate what she remembered[25]. Her Honour later said, in what must have been one of

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22 *R v GAX* [2016] QCA 189 at [25].

23 *R v GAX* [2016] QCA 189 at [27]-[28].

24 *R v GAX* [2016] QCA 189 at [27], [29].

25 *R v GAX* [2016] QCA 189 at [29].

the reasons why she considered that the verdict was not unreasonable, that "the risk of reconstruction was avoided by the prosecutor directing the complainant to only give evidence of what she remembered"[26].

40 As the joint judgment of the other members of this Court explains, the complainant's evidence about not knowing how her underwear came to be at her ankles, and being asleep and ending up finding out what had happened, assessed in light of GJC's evidence and DML's evidence including inconsistencies about the state of the complainant's underwear, requires the conclusion of unreasonableness of the jury's verdict[27]. This is so notwithstanding the direction given by the prosecutor. However, the appellant did not allege any inadequacy in the reasons of the majority of the Court of Appeal in assessing the extent of the potential for reconstruction notwithstanding the instruction by the prosecutor. Such an allegation, if it had been made, would have invited the response that it removed the distinction between an allegation of error in reasons given and an allegation of inadequate reasons. It might have required consideration of the submissions, written or oral, that were made before the Court of Appeal. No such submissions were provided to this Court. Rather, as I have explained, the appellant's submission was that the majority of the Court of Appeal addressed the unreasonableness ground in only two sentences, within two paragraphs at the conclusion of the reasons, which were said to be completely divorced from the remainder of the reasoning. That submission must be rejected. If it were necessary to decide, I would dismiss the first ground of appeal.

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26 *R v GAX* [2016] QCA 189 at [44].

27 At [29]-[31].