

SUPREME COURT OF QUEENSLAND

CITATION: *R v SFD* [2026] QCA 152

PARTIES: **R**
v
SFD
(appellant)

FILE NO/S: CA No 107 of 2026
DC No 1555 of 2025

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 22 April 2026 (Farnden KC DCJ)

DELIVERED ON: 21 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 29 July 2026

JUDGES: Mullins P, Bond JA, Bradley JA

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – GENERAL PRINCIPLES – where the appellant was convicted on two counts of indecent treatment of a child under 16, under 12, under care and one count of observing the child complainant – where the crown led evidence of an uncharged act as evidence of the appellant’s sexual interest – where appellant’s trial counsel did not object to admission of evidence or to direction – where the trial judge’s direction to jury permitted use of that evidence as propensity evidence – whether the uncharged act evidence was inadmissible per the *Pfennig* test – whether the evidence was material and the reasoning expressed in *MDP v The King* applied – whether a miscarriage of justice was occasioned by the trial judge’s direction

MDP v The King (2025) 99 ALJR 969; [2025] HCA 24, cited *R v LBE* (2024) 19 QR 530; [\[2024\] QCA 53](#), cited

COUNSEL: R M O’Gorman KC for the appellant
M P Le Grand, with Z A Kaplan, for the respondent

SOLICITORS: Robertson O’Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MULLINS P:** I agree with Bond JA.
- [2] **BOND JA:** On 22 April 2026 after a two day jury trial in the District Court, the appellant was convicted of the following offences:
- (a) Count 1: Indecent treatment of a child under 16, under 12, under care, the particulars of which were that he had touched the complainant's buttocks with his hands and at a time when she was under 12 and under his care.
 - (b) Count 2: Indecent treatment of a child under 16, under 12, under care, the particulars of which were that he had touched the complainant's breasts with his hands and at a time when she was under 12 and under his care.
 - (c) Count 3: Observations or recordings in breach of privacy, the particulars of which were that he had observed the complainant when she was naked in the shower.
- [3] Upon his conviction he was sentenced to imprisonment for a period of 12 months suspended after serving a period of six months' imprisonment for an operational period of 18 months.
- [4] He appealed to this Court against his conviction on all counts. The sole ground of his appeal was that a miscarriage of justice had been occasioned by the trial judge making a wrong decision on a question of law when her Honour gave the jury a propensity direction concerning evidence which they had heard of a so called "truth or dare incident". The appellant contended that this Court should quash the convictions and order a new trial.
- [5] The respondent argued that the direction accorded with the law but accepted that if the Court reached a different view the error should be regarded as a material error which would have occasioned a miscarriage of justice. On that assumption, the orders which the appellant sought should be made.
- [6] For the following reasons, the respondent was correct to contend that no error of law had been made. The appeal must be dismissed.

The complainant's evidence at trial

- [7] The complainant's evidence at trial was contained within –
- (a) a recorded statement to police on 19 June 2023 played to the jury and tendered pursuant to s 93A of the *Evidence Act 1977*; and
 - (b) the complainant's pre-recorded evidence on 9 February 2026 played to the jury and tendered pursuant to s 21AK of the *Evidence Act 1977*.
- [8] The complainant was the appellant's stepdaughter. His offending against her occurred between 1 January 2020 and 31 December 2021 when the complainant was 10 or 11 years of age. She described four relevant incidents involving the appellant, which she placed in this order:
- (a) the truth or dare incident;
 - (b) the bunk-bed / buttocks incident (which was the incident the subject of count 1);

- (c) the breast touching incident (which was the incident the subject of count 2); and
- (d) the shower incident (which was the incident the subject of count 3).

The truth or dare incident

- [9] The incident occurred in about 2020, when she was in Grade 4. It occurred at a different house from the one where the later incidents occurred. The house where it occurred was across the road from, or near, her school.
- [10] She and the appellant were at home while her mother was in the shower and her brother was also present in the house. She and the appellant were watching television in the lounge room at night after dinner. Her brother was probably gaming at the time across the room from the lounge room.
- [11] It was about 7.30 pm. Because she and the appellant were bored, they began playing a game of truth or dare. He asked her to choose between truth or dare and she chose “dare”. He told her to get undressed and run down the street “fully naked” and he would record her. There had been earlier truth or dare questions but she couldn’t remember what they were.
- [12] She refused to become fully naked but removed her clothes in front of him in the lounge room until she was wearing only her underwear. She then went outside and ran a short distance down the street wearing only her underwear while the appellant recorded her on his mobile telephone. They came back inside and watched the recording. They both laughed.
- [13] In response to being asked how playing truth or dare made her feel, the appellant said that they had been asking “like normal questions” but then it got to a point when the appellant began asking what she described as inappropriate questions before telling her to run down the street. She didn’t remember what the inappropriate questions were. Looking back on the incident later she felt disgusted.
- [14] During cross-examination in 2026, the complainant gave the following evidence about this incident:
 - “In relation to the truth or dare [incident], [the appellant] did not say to you to get fully naked? --- I don’t remember.
 - [The appellant] did not film you on his mobile phone running down the street? --- Yes, he did.
 - [The appellant] actually told you to stop? --- No, he didn’t.”

The bunk-bed / buttocks incident

- [15] The incident was the first time the complainant touched her inappropriately.
- [16] The complainant said that, when she was in Grade 5, she was lying face down on the bottom bunk of her bunk bed after school, using an iPad and was on a FaceTime call with her best friend.
- [17] The appellant “creeped up behind” her. She was looking down and she did not initially see him. He then “squished her butt” and immediately afterwards lay on top

of her. She told him that she could not breathe and asked him to get off, but he did not do so. She then turned around and pushed him off with her hands and he left the room afterwards.

- [18] She thought only her brother may have been home at the time. He was in his room. She thought that her mother was at work. She said the incident made her feel “weird” and “uncomfortable” and that she did not like it.
- [19] In her pre-recorded evidence in 2026 she confirmed that when she told police the appellant had “squished” her bottom, she meant that he rubbed it with both hands. In cross-examination she said she had told her mother about it but could not remember when she had done so or what she had told her. She rejected the suggestion that the appellant had never at any time “touched her bum” or laid down on top of her.

The breast touching incident

- [20] The complainant said that, while she was in Grade 5 she was asleep on the bottom bunk of a bunk bed when the appellant came into her room to wake her for school. It was at about 6.00 to 6.30 am.
- [21] The appellant grabbed her arm and pulled or dragged her out of bed. As she gripped the top bunk and was standing on the bottom bunk, the appellant pulled her shirt up to about neck level using both hands and then “squished my boobs”. She demonstrated to police that he used both hands while standing in front of her. She said it lasted a couple of seconds and that she didn’t like it and was uncomfortable.
- [22] She said his conduct was aggressive, saying he dragged her up aggressively, pulled up her shirt aggressively, squeezed her breasts aggressively, and then told her to get ready for school. She said her mother was already at work and she thought only her brother was at home. After the incident she got ready for school.
- [23] She was cross-examined on the incident in her 2026 evidence. She agreed that she had not told her mother about it the next time she saw her after the incident. She rejected the suggestion that the appellant had never at any time dragged her out of bed, pulled her shirt up, or touched her breasts.

The shower incident

- [24] The complainant said that, on a separate occasion in about 2021 after renovations had recently been completed to her mother’s ensuite bathroom, she and her mother had been having a fight in the kitchen and her mother told her to have a shower. Her brother was using the main shower, so she went to shower in her mother’s shower.
- [25] The appellant was outside doing yard work in the front lawn. From that position he could see into the shower through a window. Before she got undressed, she tried to close the window but could not. The appellant told her through the window to “just keep it open”.
- [26] She undressed, entered the shower and was about halfway through showering when the appellant stopped his work, ducked down below the window opening and looked through the window into the bathroom. The appellant looked directly at her, smirked or smiled, remained looking for about five seconds, and then resumed his yard work.

- [27] The window was partly open, requiring the appellant to crouch or duck down in order to see through the open section. She said there was no obstruction between the window and the shower: the shower had ordinary glass, and a person looking through the window could see directly into the shower.
- [28] The complainant said she was naked in the shower at the time. She believed the appellant knew she had seen him because he looked directly at her and smirked.
- [29] After finishing the shower, the complainant immediately told her mother that the appellant had been looking at her while she was showering. Her mother said she would talk to the appellant and then went outside to do so.
- [30] In her 2026 evidence she was cross-examined on this evidence. She agreed that she told her mother that the appellant was spying on her. She repeated that the appellant had stared at her deliberately. She did not immediately remember whether the appellant spoke to her after that, but agreed when asked that she remembered that the appellant told her that looking into the shower was an accident and that she thought that had happened on the day of the incident.

Preliminary complaints

- [31] The complainant said that the first time she told anyone about any of the incidents was when she complained to her mother immediately after the shower incident. She later disclosed the shower incident, the bunk-bed / buttocks incident and the breast-touching incident to an after-school-care worker at school during Grade 6. She also told some school friends.

Other evidence at trial

- [32] The jury heard evidence from the complainant's mother and three preliminary complaint witnesses.
- [33] The complainant's mother gave evidence that she confronted the appellant about the circumstances of the shower incident and could not recall whether he apologised for accidentally looking in the bathroom when the complainant had been in the shower.
- [34] The preliminary complaint evidence came from an educator at the complainant's after school care centre and from two of her friends. The evidence from the educator dealt with the fact that in July 2022 the complainant disclosed some of the offending to the educator at after school care. It was that disclosure that led to the police being notified. The evidence from the educator and the other preliminary complaint witnesses is not significant in the context of this appeal.

The impugned direction

- [35] The impugned direction given by the trial judge was in the following terms.

“As I have mentioned, the defendant is charged only with the three offences in the indictment. Those are the charged acts. The prosecution has also adduced evidence and told you about what I will call an uncharged act. That uncharged act is the occasion on which the complainant says she was playing truth or dare with the defendant. So in this case, the Crown relies on the evidence of each charged act

as evidence that the defendant had sexual interest in the complainant and was willing to give effect to that interest. The Crown also relies on the evidence of the uncharged act as evidence that the defendant had a sexual interest in the complainant and was willing to give effect to that interest.

So what that means is that if you are satisfied beyond reasonable doubt that a particular act was done by the defendant, whether charged or uncharged, then that finding may make it more likely that the defendant committed an offence charged in the indictment, but only if you are satisfied that the act was done because the defendant had a sexual interest in the complainant that he was willing to give effect to. If you are so satisfied, then you may use that finding in considering whether the defendant committed the other offences charged in the indictment. If you are not satisfied that any of the charged or uncharged act occurred beyond reasonable doubt, then that may affect your assessment of the complainant's evidence about the acts which are the subject of the charged offences.

The evidence of each charged act or uncharged act must not be used in any other way. It would be completely wrong to reason that because a particular act was done by the defendant, whether charged or uncharged, that he is generally a person of bad character and for that reason must have committed the other offences. You cannot infer only from the fact that this other conduct occurred that the defendant did the things with which he is charged.

If based upon a conclusion that a particular act was done by the defendant, whether charged or uncharged, you are satisfied that the defendant had a sexual interest in the complainant, then it does not inevitably follow you would find him guilty of other counts on the indictment. You must always decide whether, having regard to the evidence relevant to a particular count, the offence charged has been established beyond reasonable doubt.”

The appellant's argument

- [36] The appellant argued that the evidence about the truth or dare incident was not admissible as sexual interest evidence because, like the complainant's sister's evidence in *MDP v The King*¹, the evidence did not meet the *Pfennig* test for admissibility on that basis. That was said to be because there was a rational view of the evidence about that incident which was consistent with the incident having been a non-sexual game and, therefore, a rational view of the evidence consistent with the innocence of the appellant.
- [37] Even though there was no objection to the admissibility of the evidence, the judge should be taken to have made a wrong decision on a question of law in directing the jury that it was open to treat that evidence as evidence that the appellant had a propensity to have a sexual interest in the complainant to which he was willing to give effect and that it could use that evidence to find it more likely that the appellant committed the charged offences.

¹ *MDP v The King* [2025] HCA 24.

There was no error of law

- [38] In *MDP v The King*² the appellant had been convicted of 16 counts on an indictment alleging he had committed sexual offences against his stepdaughter when she had been aged between 7 and 12 years of age. Evidence from the complainant's sister that he would smack the complainant on the backside randomly and even when they weren't doing anything wrong had been led without objection as evidence demonstrating that the appellant had a sexual interest in the complainant and was prepared to act on it. That evidence was characterised as the impugned propensity evidence.
- [39] It had been common ground before the High Court that the question of the admissibility of the evidence was to be dealt with by the application of the *Pfennig* test and that the evidence was inadmissible on the application of that test. The Court concluded although no wrong decision on a question of law was made when the evidence was admitted without objection, such a decision was made when, contrary to *Pfennig*, the trial judge directed the jury that it was open to the jury to treat the evidence as evidence that the appellant had a propensity to have a sexual interest in the complainant.
- [40] Notwithstanding that it had been common ground before the High Court that the propensity evidence failed the *Pfennig* test and was inadmissible, the High Court found that view to be correct. The judgments of Gordon and Steward and of Gleeson, Jagot and Beech-Jones considered the proper application of the *Pfennig* test.
- [41] Gordon and Steward JJ explained:

“The next step in the analysis requires MDP to demonstrate that the decision was ‘wrong’. It was wrong. In *Roach v The Queen*, this Court addressed the ‘rule in *Pfennig* [*v The Queen*]’. The concern in *Pfennig* was the highly prejudicial effect that similar fact evidence of propensity may have for an accused and, ‘[m]ore to the point, the possibility that a jury might reason to guilt, when such a conclusion is not compelled, [which] might be productive of unfairness’. The rule in *Pfennig* addresses that problem of unfairness. It is applied in order to resolve ‘the tension between probative force and prejudicial effect’. What then is the rule in *Pfennig*? Accepting the probative force of evidence of propensity, the rule’s ‘focus is upon the propensity evidence itself’ and it requires a trial judge, when determining whether the propensity evidence is to be admitted before a jury, to apply the standard which the jury must eventually apply. **‘The judge must ask whether there is a rational view of the propensity evidence, seen in the setting of the prosecution case, which is consistent with the accused’s innocence’** and, if so, the evidence ought not be admitted.

As the Crown properly accepted in this Court, the impugned propensity evidence ‘would never have passed the *Pfennig* test’. That is because there is a rational view of the evidence which is consistent with a non-sexual interest, and which is thus consistent with the innocence of MDP. The evidence should not have been admitted for a propensity purpose and yet the trial judge’s sexual interest direction

² *MDP v The King* [2025] HCA 24.

invited the jury to engage in propensity reasoning in relation to that specific evidence. It directed the jury that it was open to them to be satisfied beyond reasonable doubt that the evidence could demonstrate a propensity for having sexual interest in the complainant. That was impermissible. The common law principles regarding propensity evidence did not permit that evidence being admitted, let alone being left to the jury with the direction that they could use it as propensity evidence. The trial judge directed the jury that they could use the impugned propensity evidence as propensity evidence. That was a wrong decision on a question of law.”³

[42] Edelman J noted the only basis on which the evidence could have been admissible was the basis relied on at trial, namely to demonstrate that the appellant had a sexual interest in the complainant. His Honour found that that in the High Court it had properly become common ground between the parties that it was not admissible for that propensity purpose.⁴

[43] Gleeson, Jagot and Beech-Jones JJ noted specifically that the prosecution contention at trial that the evidence could be used to show the appellant’s sexual interest in the complainant and his preparedness to act on it did involve propensity reasoning.⁵ Accordingly such evidence called for the application of the *Pfennig* test. Their Honours observed:

“The ‘*Pfennig* test’ is applied to exclude otherwise relevant evidence that is capable of supporting the existence of the alleged propensity. It requires a trial judge, when determining whether the evidence of propensity is to be admitted, to apply the standard which the jury must eventually apply, **namely whether there is a rational or reasonable view of the propensity evidence, considered in the context of the prosecution case, which is consistent with the accused’s innocence.** If so, and leaving other bases for its admission, the evidence should not be admitted.”⁶

[44] The appellant’s argument before this Court was that the truth or dare evidence necessarily failed the *Pfennig* test and accordingly should not have been admitted. If that contention could be made good then it would not matter that no objection to the admissibility of the evidence had been advanced at trial. The direction would have amounted to a wrong decision on a question of law notwithstanding the defence’s failure to object to it.⁷ As previously mentioned, it was, correctly, common ground that if the truth or dare evidence was inadmissible according to the *Pfennig* test then it would necessarily have been material and the reasoning expressed in *MDP* would apply, the convictions would be quashed and a new trial would be ordered.

[45] The implications of the requirement to consider the evidence “in the context of the prosecution case” were explained by this Court in *R v LBE* having regard to relevant High Court authority in these terms:

³ *MDP v The King* [2025] HCA 24 per Gordon and Steward JJ at [31] and [32], emphasis added.

⁴ *MDP v The King* [2025] HCA 24 per Edelman J at [54].

⁵ *MDP v The King* [2025] HCA 24 per Gleeson, Jagot and Beech-Jones JJ at [131].

⁶ *MDP v The King* [2025] HCA 24 per Gleeson, Jagot and Beech-Jones JJ at [132], emphasis added.

⁷ *MDP v The King* [2025] HCA 24 per Gageler CJ at [5], per Gordon and Steward JJ at [30]; per Edelman J at [45] and per Gleeson, Jagot and Beech-Jones JJ at [127]–[128].

“Second, the impugned evidence must have sufficient probative force that when it is considered along with the other evidence, there remains no reasonable view that is consistent with the innocence of the accused.⁸ Unless this evaluation can be made, the evidence must be excluded. However, these important further observations must be made:

- (a) This evaluative assessment of the probative force of the impugned evidence must not be of the impugned evidence, standing alone. Rather the impugned evidence must be assessed in the context of the prosecution case on the charges for which it is sought to be tendered and on the assumptions that (1) the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury and (2) the impugned evidence would be accepted as true.⁹
- (b) This requirement was further explained by Hodgson JA in *R v WRC*¹⁰ in terms which have been approved in the High Court¹¹ and often cited in this Court¹²:

‘Plainly, [the discussion in *Pfennig* at (1995) 182 CLR 461, 482–483 of propensity evidence being regarded as a class of circumstantial evidence the admissibility of which is governed by its ability to exclude any rational view of the evidence consistent with the innocence of the accused] does not mean that the judge must look at the propensity evidence in isolation, and not admit it unless there is no reasonable view of the evidence so considered that is consistent with the innocence of the accused of the offence with which the accused stands charged. That approach would be quite inconsistent with the correct approach for considering circumstantial evidence, as explained in *Shepherd* (1990) 170 CLR 573; 51 A Crim R 181; and the quoted passage proceeds by reference to the character of propensity evidence as circumstantial evidence.

On the other hand, nor can it mean that the judge must look at all the evidence in the case, including the propensity evidence, and admit the propensity evidence if and only if there is no reasonable view of all the evidence that is consistent with the innocence of the accused: that

⁸ *Pfennig v The Queen* (1995) 182 CLR 461, 485; *Phillips v The Queen* (2006) 225 CLR 303, 323–324 [63].

⁹ *Phillips v The Queen* (2006) 225 CLR 303, 323–324 [63]; *BBH v The Queen* (2012) 245 CLR 499, 546 [155]; see also *R v McNeish* (2019) 2 QR 355, 375 [65] (per Sofronoff P and Henry J).

¹⁰ *R v WRC* (2002) 130 A Crim R 89, 101–102 [27]–[29].

¹¹ See *BBH v The Queen* (2012) 245 CLR 499, 546–547 [155]–[157].

¹² See *R v Newman* [2020] QCA 92, [59] (per Boddice J, Morrison and McMurdo JJA agreeing); *R v WBN* (2020) 5 QR 566 (per Fraser and McMurdo JJA); *R v Harris* [2021] QCA 96, [44] (per Fraser JA, Sofronoff P and North J agreeing); *R v YF* (2023) 15 QR 30, 42 [19] (per McMurdo JA), 52 [60] (per Brown J, Morrison JA agreeing).

approach would disregard altogether the need for some special probative value of the propensity evidence.

In my opinion, what it must mean is that, if it first be assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence.’”¹³

[46] In my view having regard to the nature of the evidence and on the assumptions which the Court is required to make, the impugned evidence was admissible according to the *Pfennig* test. The appellant’s argument to the contrary tended, in my respectful view, to assess the evidence standing alone. If one assessed the impugned evidence in the context of the prosecution case and on the requisite assumptions, an innocent view of the impugned evidence or of the evidence as a whole could not be regarded as reasonably open. To the contrary, one would conclude that the truth or dare incident represented the appellant starting his sexual interactions with the complainant in a low risk way which could, had complaint been made, have been explained away, but which, when complaint was not made, emboldened the appellant to proceed subsequently in the way revealed by the complainant’s evidence concerning counts 1, 2 and 3. When the impugned evidence was considered with the other evidence there would remain no reasonable view which was consistent with the innocence of the accused.

[47] The evidence was admissible and the asserted legal error was not made.

Conclusion

[48] I would order that the appeal be dismissed.

[49] **BRADLEY JA:** I agree with Bond JA.

¹³ *R v LBE* (2024) 19 QR 530 at [16], footnotes in original, emphasis omitted.