

SUPREME COURT OF QUEENSLAND

CITATION: *R v LBQ* [2026] QCA 181

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

FILE NO/S: CA No 204 of 2025
DC No 150 of 2024

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Mackay – Date of Conviction: 31 July 2025
(Burnett DCJA)

DELIVERED ON: 25 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2026

JUDGES: Bowskill CJ, Henry J, Johnstone J

ORDERS: **1. The appeal be allowed.**
2. The verdicts of guilty on counts 2 and 3 be set aside.
3. A new trial be ordered on counts 2 and 3.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with two counts of indecent treatment of a child under 16 – where a jury convicted the appellant on count 2 and 3 and acquitted him on count 1 – whether the convictions were unreasonable because they are inconsistent with the acquittal on count 1 – where count 1 required proof of elements which were not elements required to be proved for the other counts – whether the jury’s verdicts of guilt were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS FOR APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was charged with two counts of indecent treatment of a child under 16 being where the trial judge did not direct the jury about the defence available under mistake of fact – where the defence of mistake of fact was raised on the evidence – whether the learned trial judge failed to properly direct the jury as to the elements of, and defences available to, counts 2 and 3 such that a miscarriage of justice has occurred

Criminal Code (Qld), s 24, s 93A, s 210(1)(d), s 210(5), s 218(a), s 218A(1), s 281A

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited

R v CX [2006] QCA 409, considered

R v GAW [2015] QCA 166, cited

R v Lockwood; ex-parte Attorney-General [1981] Qd R 209, cited

R v Pollard [2020] QCA 188, cited

Zaburoni v The Queen (2016) 256 CLR 482; [2016] HCA 12, cited

COUNSEL: R M Black for the appellant
N E Friedewald for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **BOWSKILL CJ:** I agree, for the reasons given by Johnstone J, that the appeal should be allowed on ground 2 and a new trial ordered on counts 2 and 3. Although the appellant sought an order that verdicts of acquittal be entered on counts 2 and 3, that would only have been appropriate if count 1 (inconsistent verdicts) had succeeded. The appropriate order, where a miscarriage of justice is demonstrated on the basis of a material error or irregularity in the conduct of the trial, is an order for a new trial. Whether the prosecution proceeds is a matter for the prosecuting authority.
- [2] **HENRY J:** I agree with the reasons of Johnstone J and the orders proposed by his Honour.
- [3] **JOHNSTONE J:** On 31 July 2025, the appellant was convicted after a trial lasting three days of two counts of the charge of indecent treatment of a child under 16 in contravention of s 210(1)(d) of the *Criminal Code* (Qld). The charges were counts 2 and 3 on the indictment. He was sentenced on each count to four months in custody to be served concurrently.
- [4] The appellant was acquitted of count 1 being a charge under s 218A(1) of the *Code* of using electronic communication to procure a child under 16.
- [5] The appellant had already completed his sentences when this appeal was heard.
- [6] The appellant appeals the convictions on the basis that:
 - (a) they are unreasonable because they are inconsistent with the acquittal on count 1 and cannot be supported having regard to the evidence as a whole (**inconsistent verdicts ground**); and
 - (b) the learned trial judge failed to properly direct the jury as to the elements of, and defences available to, counts 2 and 3 such that a miscarriage of justice has occurred (**failure to direct on defences ground**).
- [7] A third ground of appeal was raised on the appellant's Notice of Appeal but not pursued.

Circumstances of the offending

- [8] All three charges concerned messages which the appellant admitted he sent via the Facebook messenger application. The messages were sent to a specific Facebook account which belonged to the complainant, who was 15 years of age at the relevant time.
- [9] There was no dispute that at the time the messages were sent, the complainant was, to the knowledge of the appellant, under the age of 16 years and that he was an adult. There was a dispute about who the messages were intended to be sent to.
- [10] The messages the subject of counts 2 and 3 contained videos of the appellant. The video the subject of count 2 was sent on 17 September 2023 and showed the appellant touching and pointing at his penis. The video the subject of count 3 was sent on 16 September 2023 and showed the appellant on a bed moving his penis around.
- [11] The relevant particulars for count 1 were, in essence, that on 6 August 2023 and 18 September 2023 the appellant, being an adult, used an electronic communication with intent to procure the complainant, a person under 16 years, to engage in a sexual act, when he messaged her via Facebook with sexually explicit messages.

What was the real issue at the trial?

- [12] Section 210(1)(d) of the *Code* provides that a person who wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender is guilty of an indictable offence. The element of the offence which requires the Crown to prove that the offender *wilfully* exposed *a child* to an indecent act requires proof that in exposing the complainant to the indecent act, the offender acted deliberately or intentionally (in the sense that the offender knew that the exposure to the child was a likely consequence of doing the indecent act): *R v Lockwood; ex-parte Attorney-General* [1981] Qd R 209.
- [13] Section 218A(1) of the *Code* relevantly provides that a person commits a crime if the person is an adult who uses electronic communication with intent to procure a person under the age of 16 years to engage in a sexual act, either in Queensland or elsewhere.
- [14] Intent, in a legal context, carries its ordinary meaning. Absent an admission, the question of an accused's intention is resolved by a rational and reasonable inference drawn from the facts as proved. Where an element of an offence includes the proof of intention to produce a particular result, the Crown must prove that the accused "meant to produce the particular result": *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [15].
- [15] In respect of all three charges, the essential issue at trial was whether the Crown could prove that the intended recipient of each message was the complainant. To expand on this slightly, the real issues were whether, in respect of count 1 the appellant sent the messages intending to procure the complainant to engage in a sexual act; and in respect of counts 2 and 3, whether the appellant wilfully, that is deliberately, sent the videos to the complainant.
- [16] The appellant's defence at trial was conducted on the basis that when he sent the messages and the videos, he was mistaken as to whom he was sending them to. The appellant relied on evidence which was led in the Crown case that at the time he sent

the messages, he did so believing the Facebook account belonged to the complainant's mother and that the complainant's mother was the intended recipient.

What was the evidence as to the Facebook account and the intended recipient?

- [17] The complainant first met the appellant when she was 13 years old. The complainant said she never knew him by his name, because "all I used to call him, is uncle". The complainant also said that her father grew up with the appellant's family. The appellant also is the uncle of the complainant's friend, EB. EB's mother is Ms M and EB's maternal grandmother is Ms B (who is the appellant's aunt).
- [18] The appellant lived with his aunt, Ms B, and her husband, her son who is now deceased, and her son's partner. The complainant's friend, EB, and her mother Ms M, also lived in the same house.
- [19] Ms B said that most days of the week and most nights of the week the complainant would also be at her house, if EB was not at the complainant's house.
- [20] The complainant lived with her mother and her mother's then partner, Mr A, who considered the complainant to be his stepdaughter.
- [21] In addition to the complainant, her mother, EB, Ms M, Ms B, Mr A and two police officers gave evidence in the trial.
- [22] The complainant's evidence comprised her s 93A statement given to police on 18 October 2023 and pre-recorded oral evidence given on 22 and 24 July 2025.
- [23] In her pre-recorded evidence, the complainant identified the messages the subject of the counts which she said were sent to her Facebook account by the appellant. However she did not recall which Facebook account received the messages. She did say that the account was in a different name and that she believed it had a profile picture depicting her with short hair, wearing a yellow jumper with a tiger on the front of it. She said that she believed she opened that Facebook account in 2022, because she needed a new one as her old account had stopped working and she could not get into it any longer.
- [24] In her s 93A statement, the complainant said that she was "getting sent inappropriate images and messages by [the appellant]". She said that the last time he had messaged her before being sent the relevant messages was "a year ago" although he had started messaging two years ago. The complainant said she did not report it then, and the messages were asking her "to come over and drink and perform oral sex and all this..." She said that she ignored the messages that were sent two years earlier, that he had not messaged in the last year at all, but that they started again that year. However, when cross-examined in her pre-recorded evidence, the complainant was asked "Do you say that [the appellant] has ever sent you any other inappropriate messages besides those messages that were shown by the prosecutor to you?" and she responded "I don't remember".
- [25] The complainant said that she was using the Facebook account at the time other messages from the appellant had come through which were not related to any of the charges and to which she had not responded, however, she did not know about the messages the subject of any of the counts until her mother showed EB, and then the complainant.

- [26] The complainant's mother asked EB if she knew who it was (in the videos) and EB said that it was her uncle. The complainant agreed that when she was first shown the videos by her mother, she did not know who was in them.
- [27] EB also gave evidence by way of a s 93A statement and pre-recorded evidence. She said that on arriving at the complainant's house on the relevant day, the complainant's mother showed her and the complainant the videos. EB said she identified the appellant in the videos. She said she later told the appellant's aunt (that is, her grandmother, Ms B), about the messages. She also confirmed that she sent a message to the appellant from the account which read "Oi. This is [EB]. If you don't stop, Imma talk to Nan about it."
- [28] In cross-examination, the complainant said that she had "a fair few" Facebook accounts over the years and was shown copies of five separate accounts that she agreed she had created in her name. None of those accounts was in the name of the different account name identified by the complainant. The complainant did say that she used the differently named account to message her friends but there was no evidence led of these messages. The only evidence of messages having been sent from that account were a limited number sent to two other profiles in relation to buying and selling items on Facebook Marketplace which the complainant agreed were sent by her mother.
- [29] The complainant said she had last accessed the relevant Facebook account before the mobile phone was handed to police but could not recall when. She also could not recall which email address or phone number had been provided to open the account but then did confirm that both the mobile phone number and the email address used to open the account were her mother's. The complainant did however say that she was the one who authenticated the account using her mother's email address which she accessed using the mother's phone. She said her mother was not present when she did this. The complainant also agreed that she was not exactly sure what profile picture was on the particular account. She gave evidence that she had accepted a friend request from the appellant on that account.
- [30] The relevant Facebook account had been deleted and therefore it was not in evidence. The messages in evidence had been obtained from the appellant's phone.
- [31] The complainant denied being the person who deleted the account. Her mother gave evidence that she did not know if the account was still active. She agreed that police had spoken to her in the previous week and she said, "I think it was, about recovering it".
- [32] Detective Senior Constable McNeil gave evidence that she attended the complainant's home on 10 October 2023 during which she was handed a phone by the complainant's mother, which was logged into a Facebook account that allowed her to "interact" with another Facebook account in the name of the appellant. DSC McNeil could not recall the name of the Facebook account that the phone was logged into at the time of this interaction, though her accessing of the phone was captured on her body-worn camera and played for the jury.
- [33] In cross-examination, DSC McNeil said that this mobile phone was delivered to the police station by Mr A on 17 November 2023. By the time the phone was delivered,

she had been told by the complainant and her mother that the Facebook account that had received the messages from the appellant had been deleted.

- [34] Plain Clothes Senior Constable Van Blerk gave evidence that in July 2025 he had tried to assist the complainant to access the Facebook account that received the messages from the appellant but the complainant was unable to do so. In cross-examination, he agreed that when he tried to recover the Facebook account he said to the complainant and to her mother that “you and your mum had mentioned you guys had deleted the Facebook account you were using”.
- [35] The complainant’s mother gave evidence that in September 2023, the complainant had a mobile phone and a Facebook account. The complainant’s mother said that she “transferred [the complainant] onto my account as well so I could keep an eye on what she was doing.”
- [36] The complainant’s mother said that the complainant had several accounts “later on”, but not at that time. She also said that she herself had another Facebook account in her name at that time.
- [37] The complainant’s mother initially denied having ever communicated with the appellant in any way, but in cross-examination agreed that she told police that “I asked him to stop sending messages. I’ve got a partner, rah-rah-rah.” The complainant’s mother did say however that she did not remember messaging the appellant.
- [38] The complainant’s mother said that she was on her phone when she first saw the messages and thought she was signed into her own Facebook account. She initially gave evidence that she was “[h]undred per cent sure” the account was in the different name identified by the complainant, but later conceded that she could not say which account received the messages from the appellant.
- [39] She also said that she did not realise that the messages had been sent to the complainant’s account until she was talking to her and EB later. She said, “[t]he reason I’d asked the girls is because I was going to send a message to him and let him know that I knew who he was now, and I would take action if he kept sending messages like that to me.” She said that when EB sent the message to the appellant, she was “still thinking it was for me. And – um – I was doing something else on my Facebook and realised that I wasn’t getting my usual feeds, so checked it and I was on [the complainant’s], and that’s when I realised he was sending them to [the complainant].”
- [40] As to the account itself, the complainant’s mother agreed that the complainant had opened the Facebook account using the mother’s email address and date of birth. She said the complainant would have done this when she was asleep. The complainant’s mother agreed that she was logged in both to her own, and to the complainant’s Facebook accounts on her phone simultaneously and that she was logged into the Facebook account for a month and a half. She also agreed that the complainant had changed the account setting of the age of the mother’s Facebook account to be under 18.
- [41] In cross-examination, the complainant’s mother was shown a number of Facebook profiles and accounts that resulted from a live search under the complainant’s name.

She conceded that a number of the accounts in the complainant's name contained false information including about the complainant's place of work and study.

[42] Ultimately, the complainant's mother admitted that she could not say which account received the messages from the appellant.

[43] During cross-examination, counsel also undertook a live search for Facebook accounts under the other similar account name which the complainant's mother had identified as hers. The complainant's mother agreed that that search revealed the existence of a Facebook account in another name again but which displayed a handle in the name of the complainant's mother's.

[44] The search also revealed other Facebook accounts which contained personal information of the complainant.

[45] Ms M gave evidence that after she had attended at the complainant's mother's residence, she confronted the appellant and asked him if he was texting the complainant to which he said "No" and that it was "sickening and disgusting".

[46] The appellant's aunt, Ms B, gave evidence that the appellant was working at the time and he would work "normal hours" from eight in the morning until five and be home "just after six in the afternoon". She said that the appellant would be home most times when the complainant was there in the afternoon.

[47] The appellant's aunt said that she remembered learning about the messages from the complainant, after hearing the complainant "ranting, raving and screaming" on the street and then eventually in her house and in her bedroom. She said the complainant was:

"...swearing and that, going on about her mum being, um, or using her profile, and that she had been talking to [the appellant]. And she said, 'I told – told her to stop using my effing profile.' Now, I didn't know which profile it was. Um, and then she said, uh, that [the appellant] had sent some photos or videos of himself, but, um, it was to her mother, not to her because [the complainant] was with [EB] that night."

[48] The appellant's aunt said she had a phone conversation with the appellant whilst he was at work, two or three days later, after first speaking to Ms M. She said that she asked the appellant what was going on however he did not respond.

[49] When the appellant came home, the appellant's aunt said: "I asked him again what was going on". The transcript records the following:

"What did he say?---He said he was being, um, accused of sending, um, photos and that to, uh, [the complainant].

And did you ask him any more questions?---I asked him did he, and he said to me 'I swear on my mum and dad's grave', he said, 'I did not'. And he wasn't under the influence of any kind of substance. He was just straight.

Okay. And you mean to say that he wasn't affected by anything when he's telling you these things?---Exactly.

Okay. And have you asked him any more questions?---I asked him who he was talking to – um – and he replied that he was talking to – um – [the complainant]’s mum - - - Okay?--- - - - um – her profile, on [the complainant]’s profile.

Did he say how he was doing that?---Uh – no, actually.”

[50] When this evidence was explored in cross-examination, the appellant’s aunt said:

“- - - [the appellant] said, ‘They’re trying to say that I sent photos and videos to [the complainant], but I didn’t. I was talking to her mum’?---Yes.

Then you wrote in your statement, ‘I said, “[the complainant’s mother]?’” He said, “Yeah”?---Mm-hmm.

And you wrote in your statement, ‘I said, “[appellant], no matter what you do in this town, I will find out”?---Exactly.”

Ground 1 – the inconsistent verdicts ground

[51] Having regard to his acquittal on count 1 and his conviction on counts 2 and 3, the appellant framed the question as being whether it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the guilt of the appellant on the two counts on which he was convicted.

[52] The principles applicable where an appeal is brought based on inconsistent verdicts are well settled: *MacKenzie v The Queen* (1996) 190 CLR 348, 366 – 367.

[53] Jerrard JA summarised those principles in *R v CX* [2006] QCA 409, [33] as follows:

- “1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury’s duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.
2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?
3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that

conclusion will generally be accepted. It is not the role of an appellate court to substitute its opinion of the facts for one which was open to the jury, if there is some evidence to support the verdict alleged to be inconsistent.

4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.
5. Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant."

[54] To succeed, an appellant must demonstrate by reference to the evidence that the verdicts are irrational, not that they may be: *R v Pollard* [2020] QCA 188, [20]. The verdicts must be such that they "cannot stand together because 'no reasonable jury, who had applied their mind properly to the facts in the case could have arrived' at them": *R v GAW* [2015] QCA 166 [19].

[55] In the present case, count 1 required proof of elements which were not elements required to be proved for counts 2 and 3 being:

- (a) that the electronic communication was used by the appellant with intent to procure the complainant to engage in a sexual act; and
- (b) that the appellant intended to do the act in relation to the complainant.

[56] In his summing up, the learned trial judge directed the members of the jury about the particular elements of each of the counts and expressly directed them about their entitlement to return separate verdicts. In so doing, his Honour observed that it would be remarkable if the jury returned verdicts that were different for counts 2 and 3, but emphasised that the evidence in relation to count 1 was different and that on that basis, the jury's verdict across all three charges need not be the same.

[57] The question of separate verdicts was raised again after the jury retired when the jury sent a note, marked as MFI Q, which advised that the jury had reached unanimous verdicts on counts 2 and 3 but not on count 1. The trial judge said that he found this "somewhat puzzling" but agreed during an exchange with the prosecutor, that it would not be proper to give a further direction that the verdicts on all three counts should be the same.

[58] The appellant submitted that the undisputed evidence was that the particular Facebook account that received the messages that were particularised in count 1 was

the same account that received the videos particularised in counts 2 and 3. It was also undisputed that the email address and phone number linked to that account belonged to the complainant's mother, and there was evidence that this account was used by the complainant's mother for the purpose of communicating on Facebook Marketplace, and to comment on photographs of other Facebook users. The appellant also referred to the fact that the acts the subject of counts 2 and 3 were said to have occurred within the date range of count 1.

- [59] The appellant submitted that it followed that the appellant's belief about the intended and probable recipient of the messages particularised in count 1 and the videos particularised in counts 2 and 3 was the same.
- [60] Having regard to the defence available under s 218A(9) about which the jury were directed, the appellant submitted that the verdict of acquittal on count 1 was likely to have been reached on the basis that the jury could not exclude beyond reasonable doubt that the appellant had intended to send the messages to the complainant's mother and not the complainant.
- [61] As the same defence was available in relation to counts 2 and 3, the appellant submitted there was no proper reasoning which can satisfactorily explain the inconsistency in these verdicts, or a way that the verdicts on counts 2 and 3 can be reconciled.
- [62] The respondent argued that the appellant's submission as to the jury's reasoning was not the only basis on which it may have acquitted the appellant on count 1. It submitted that despite the sexually explicit nature of the two messages sent by the appellant over a period of six weeks, the jury may not have been satisfied that the messages were sent with the intent to procure the complainant to engage in a sexual act.
- [63] During the course of the summing up, and again after receipt of MFI Q, the jury were directed as to the definition of "procure" (being to knowingly entice or recruit for the purposes of sexual exploitation) as used in s 218A. The respondent submitted that the two messages sent by the appellant were each in the form of questions which were not the subject of any response, and which were not pursued further by the appellant.
- [64] The respondent submitted, correctly, that in the absence of any further communication from the appellant, the jury may not have been satisfied that the appellant intended to procure the complainant to engage in a sexual act. In those circumstances, the third element of the offence would not have been proved.
- [65] As the intention to procure was not an element of counts 2 and 3, and given that the jury had been directed, correctly, about the separate elements of count 1, of the need to consider count 1 separately, and that their verdicts in respect of all three counts need not be the same, the verdicts are not irrational or inconsistent in the relevant sense.
- [66] The appellant fails on this ground of the appeal.

Ground 2 – failure to direct on defences ground

- [67] During the summing up in relation to counts 2 and 3, the trial judge explained the four elements of the offences under s 210(1)(d). Relevantly, his Honour said, "[t]he

second [element] is that the defendant wilfully exposed the complainant to that indecent act.”

[68] His Honour continued: “[t]he word ‘wilfully’ means that the defendant deliberately or intentionally exposed the complainant to the indecent act, and here it is alleged that he did so deliberately, intending the result charged, namely, exposing the complainant to that indecent video. And ‘exposure’ simply means, in its ordinary English terms, ‘showed’.” His Honour then said “[t]he issue in this trial is whether or not the defendant intended the video to go to a child under 16, in this instance, [the complainant]”.

[69] On the element of unlawfulness, the trial judge said:

“The third element is that by wilfully exposing the complainant to that indecent act, he did so unlawfully. That is, he did so without any authority, justification or excuse. That is, it has not been an issue in this trial. The only issue in this trial has been whether or not it was sent to someone who he intended to send it to, knowing that person was under 16 years of age.”

[70] The trial judge concluded the directions on the elements by saying:

“... you are required to consider each of those four elements. But ultimately, members of the jury, it will come back to your evaluation of the evidence concerning whether or not the Crown have excluded the reasonable possibility that he believed he was sending these images or videos to the adult [the complainant’s mother].”

[71] The appellant’s complaint with these directions is that in the context of all of the evidence, including the evidence which demonstrated that the person who actually received the videos was the complainant’s mother, the direction failed to adequately draw a connection between the element of the offence the respondent was obliged to prove, namely that the appellant deliberately, or intentionally exposed *the complainant*, as opposed to her mother, to the indecent act. The appellant argued that without further context, these directions were apt to confuse the jury and that the jury should also have been told that if they accepted the appellant’s version that the intended recipient of the videos was the complainant’s mother, then they could not be satisfied that the appellant had wilfully exposed the complainant, a child, to the indecent acts. The appellant submitted that the jury had to be satisfied that it was the appellant, and not her mother, who exposed the complaint to the videos.

[72] In giving the directions he did, the trial judge did not specifically direct the jury about the defence available under s 210(5) when it is proved that “the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.” No direction about s 24 was given at all. Neither counsel sought a redirection about this at trial.

[73] Both the appellant and the respondent speculated that the reason no direction about s 210(5) was given was probably because the defence case, that the videos were intended to be sent by the appellant to an adult, being the mother, rendered the appellant’s belief about the complainant’s age irrelevant.

[74] Irrespective of whether that was in fact the reason for not giving a direction about that section, the evidence that had been led in the trial, particularly from the appellant’s

aunt but also from the complainant's mother, squarely raised the real question of whether the appellant was honestly and reasonably mistaken as to who the recipient of the videos in fact was.

- [75] In circumstances where a mistaken belief as to a state of affairs is raised by way of a defence, s 24(1) is enlivened. It provides that a person is not criminally responsible for an act done under an honest and reasonable, but mistaken, belief in the existence of any state of things to any greater extent than if the real state of things had been such as the person believed to exist.
- [76] Where s 24(1) is enlivened, the Crown bears the onus not only of proving each element of the offence or offences charged beyond reasonable doubt, but also of proving beyond reasonable doubt that the defendant did not hold an honest and reasonable, but mistaken belief as to the relevant state of affairs.
- [77] The respondent submitted that given the directions the trial judge gave, a specific direction about the available defence of mistake of fact could not have realistically affected the reasoning. That submission is not accepted.
- [78] Even though the trial judge did seem to suggest that this defence was open during the course of the summing up where his Honour said "[b]ut ultimately, members of the jury, it will come back to your evaluation of the evidence concerning whether or not the Crown have excluded the reasonable possibility that he believed he was sending these images or videos to the adult [the complainant's mother]", that is as far as it went.
- [79] The trial judge did not then go on to explain this defence by reference to s 24 and the obligation of the respondent to disprove the existence of the appellant's honest and reasonable but mistaken belief as to the identity of the recipient of the videos, and how such a belief, if the jury were satisfied it was held, would result in the element of wilfulness not having been proved.
- [80] In the circumstances, the failure to give this direction was an error or irregularity which was material, in the sense that it could realistically have affected the jury's approach to its consideration and conclusion as to the appellant's guilt in respect of counts 2 and 3.
- [81] It follows that the trial miscarried.
- [82] The appeal should be allowed in relation to this second ground.
- [83] In the circumstances, I would order that the appeal be allowed, the verdicts of guilty on counts 2 and 3 be set aside and a new trial be ordered on counts 2 and 3.