

**SUPREME COURT OF VICTORIA
COURT OF APPEAL**

S EAPCR 2023 0101

SOLOMON NHIAL¹

Applicant

v

THE KING

Respondent

JUDGES: McLEISH, TAYLOR and KAYE JJA
WHERE HELD: Melbourne
DATE OF HEARING: 13 November 2023
DATE OF JUDGMENT: 22 November 2023
MEDIUM NEUTRAL CITATION: [2023] VSCA 282
JUDGMENT APPEALED FROM: *DPP v Schnell (a pseudonym)* [2023] VCC 447
(Judge Lauritsen)

CRIMINAL LAW – Appeal – Conviction – Sexual penetration of a child under 16 years – Offending occurred when complainant was 5 or 6 years old – Complainant purported to recognise offender years later – Complainant assumed recognised offender was the applicant – Whether verdict unreasonable or cannot be supported having regard to the evidence – Appeal allowed – Conviction quashed – Verdict of acquittal entered.

Criminal Procedure Act 2009, s 276(1)(a).

M v The Queen (1994) 181 CLR 487; *Lang v The Queen* [2023] HCA 29 applied.

Counsel

Applicant: Mr C Mandy SC with Mr J O'Connor
Respondent: Mr J McWilliams

Solicitors

Applicant: Marco Man & Associates
Respondent: Ms A Hogan, Solicitor for Public Prosecutions

¹ To ensure that there is no possibility of identification of the complainant, pseudonyms, other than in place of the name of the applicant, have been adopted throughout this judgment.

McLEISH JA
TAYLOR JA
KAYE JA:

Introduction and overview

- 1 On 6 July 2022, following a 7 day trial by jury in the County Court, the applicant was convicted of a single charge of sexual penetration of a child under 16 years by majority verdict.
- 2 On 23 March 2023, he was sentenced to 2 years' imprisonment with a non-parole period of 1 year and 2 months.
- 3 The applicant seeks leave to appeal against conviction on the single ground that the verdict of guilty is unreasonable or cannot be supported having regard to the evidence.
- 4 For the reasons that follow, the application for leave to appeal should be granted and the appeal allowed. The applicant's conviction should be quashed and a judgment of acquittal entered on the charge.

Summary of offending and issue at trial

- 5 The allegation against the applicant at trial may be shortly stated.
- 6 The complainant, Priscilla Kean, was playing in the front yard of her home in Pakenham with her siblings and a friend, Martha. She entered the house to get a drink of water. As she did so she saw a man sitting on the couch in the living room. He asked her to greet him. The man picked her up and put her on his lap. He asked her questions about herself and school and, while doing so, he put his hand on the complainant's vagina and touched her beneath her underwear. He then inserted his finger into her vagina. This went on for about five minutes. After withdrawing his hand, the man told Priscilla she could leave.
- 7 For present purposes, at issue in the trial was not the fact of the sexual penetration, but the identification of the applicant as the man who did it.
- 8 Similarly the proposed ground of appeal centres on the argument that it was not open to the jury to find beyond reasonable doubt that the applicant was the man who sexually penetrated Priscilla Kean.

Evidence at trial

- 9 In order to understand the application, it is necessary to detail the evidence led in the trial, particularly with respect to the issue of identification. As will be seen, it is necessary to do so in chronological order of its unfolding.

10 Priscilla Kean was born on 5 March 2007. The indictment alleged that the offence occurred between 5 March 2012 and 4 April 2013.² Priscilla, then aged 5 to 6 years, made no complaint.

11 In 2018, then aged 11 years, Priscilla told her brother, Robert, then aged 12 years, of the offending. He told her to tell their mother.³ Priscilla did so prior to Christmas 2018.

12 The detail of the complaint evidence given by Robert comes from his visual audio recorded evidence⁴ ('VARE'), recorded on 26 June 2019. Robert's VARE was taken subsequent to Priscilla telling their mother about the offending, their mother taking certain actions and Priscilla participating in a VARE on 21 December 2018.

13 In his VARE, Robert was asked to explain 'what happened' to his sister. His first response was:

So my mum said that this happened when she was around five to six years old. Everyone was at, like, the front yard of the house and it was just her and one of my uncles in the room, and then the uncle did something.

14 He said he found out when his sister told him. Priscilla said something like, 'this happened to me' or 'I need to tell you something'. Robert continued:

The — this was a long time ago, you know, like — like, what she said. "You know, [Martha's]" — I wanna say that 'cause I'm not a hundred per cent sure, but it was someone — 'cause I don't wanna — she said, "Well, this person did this to me ... when I was, like little."

15 He said that the conversation ended when he told Priscilla to tell someone.

16 When pressed for more detail, Robert said Priscilla told him that she was alone with the uncle, 'all the aunties' were outside and 'we' (the children) were outside. She said that the uncle touched her between her legs, 'touching her there and stuff'. Robert said that Priscilla told him it happened 'when she was little' and that their mother told him a few months later that it happened when she was '5 or 6 years old'. Robert said that he could not remember, but thought that Priscilla said that the uncle was 'Martha's dad'. Robert said that he later asked Priscilla if she had told anyone and she said she had told their mother.

17 In cross-examination at a special hearing⁵ in June 2022, Robert, then aged 15 years, agreed that Priscilla had told him that at the time of the incident all the aunties and the

² Just prior to the trial, the prosecution made an application to extend the date range of the alleged offending in the indictment from 5 March 2012 to 4 April 2013, to 5 March 2012 to 4 March 2015 on the basis that the evidence of Priscilla's brother and a statement given by their mother left open the possibility that it might have been committed later. That application was refused.

³ The word 'mother' is used for ease of reference. It was explained to the jury that Priscilla's mother was in fact her biological aunt, who had raised her.

⁴ Pursuant to s 367 of the *Criminal Procedure Act 2009* ('CPA').

⁵ Pursuant to s 370 of the CPA.

children were outside in the front yard. He also agreed that at the time of his VARE he was unsure if Priscilla had told him that the uncle was ‘Martha’s dad’. He said that he remained unsure if she had, but believed she had. Robert was also not sure if he learned that from his mother, but accepted that his mother had since told him that the offender was Martha’s father, as well as telling him the incident occurred when Priscilla was 5 or 6 years old. Robert said that he moved with his siblings and mother to the Pakenham house in 2014.

- 18 Priscilla’s mother gave evidence that in August or September 2018 Priscilla asked if Robert had ‘told her anything’. Priscilla then said that when she was six or seven years old she had been playing in the back yard and went to the kitchen to get a glass of water. She saw a man — ‘Martha’s dad’ sitting in the lounge room, who called her over. The man put her on his lap and put his finger in her vagina. Priscilla told her mother that the man had a golden cap on his tooth.
- 19 Priscilla’s mother added that ‘this guy’ did have a gold cap on his tooth but had since removed it.
- 20 When asked in examination in chief who ‘this guy’ was, Priscilla’s mother named the applicant and said she knew his full name from Facebook. She said that she thought he was the man described by Priscilla because she remembered when he came to visit her house in Pakenham. He only visited once. Priscilla was then 6 or 7 years of age. Priscilla’s mother said that on that occasion her own elderly mother was present at the house, as was the applicant’s wife and granddaughter, Martha. For cultural reasons, the women were in one room and, when the applicant arrived, Priscilla’s mother placed him in another room by himself. Martha was in the back yard playing with other children. Although Martha was the granddaughter of the applicant and his wife, she called them ‘daddy’ and ‘mummy’.
- 21 When asked what she did after Priscilla had told her about the incident, Priscilla’s mother said that she telephoned the applicant’s wife, who said that the applicant would never do such things. Prior to that phone call, the applicant’s wife and Martha would frequently visit her house. Afterwards, the applicant’s wife never visited her house again. Priscilla’s mother also said that she had never visited the applicant’s wife at her home with Priscilla when the latter was 6 or 7 years or older.
- 22 In cross-examination Priscilla’s mother said that between 2012 and 2014 she was living between Fitzroy and Pakenham and moved to Pakenham permanently in 2014. On the day the applicant visited her house, he arrived after his wife did. Priscilla’s father, against whom Priscilla’s mother had an intervention order, was not at home. There were no other visitors present. The children were running around, alternating between playing in the back yard and the playroom.
- 23 When asked about the detail of what Priscilla had told her, Priscilla’s mother said that Priscilla told her she came from the playroom to the kitchen to get a drink of water. Priscilla’s mother accepted that she had told police that Priscilla said she had gone to the kitchen from ‘the back yard’, adding that if she came from the back yard she would have had to come through the playroom. She said that after Priscilla said ‘you know Martha’s dad?’ she replied, ‘well we know two Marthas’. Priscilla’s mother

added that in the family the two were known as 'white Martha' and 'black Martha'. White Martha is Priscilla's step-sister, and the child of Priscilla's mother's husband.

24 Priscilla's mother said that she went to the police and told them what Priscilla said had happened. Before she signed her statement, she was shown a photograph of the applicant, taken from Facebook. In it, the applicant's mouth was closed. She said that she had told police about the golden cap on his tooth.

25 Priscilla's mother accepted that the applicant's wife had four adult sons but did not know who lived in their house.

26 Priscilla, then aged 11 years, participated in a VARE on 21 December 2018. She said that when she was 5 or 6 she was playing 'tiggy' outside in the front yard with her siblings, running around, and came in to drink water. She thought there were 'quite a lot of aunties' at her house. She saw a man who asked her to greet him. He picked her up, put her on his lap and started asking her questions about school. He put his hand in her 'front part' and touched everywhere. By front part she meant vagina. The man put his 'pointy finger' inside her vagina, 'not deep' but 'circling it and stuff'. It lasted for about five minutes. It did not hurt but she felt scared. A few years went by and she told her brother. He said to tell their mother, so she did. She told her mother about how the man looked 'with his gold tooth' and how he had a daughter named Martha.

27 When asked to say everything she remembered about the man Priscilla said he was 'kind of tall', 'around five ten'. She said that 'he had, I think, two gold teeth' and a daughter named Martha who was playing outside as well. She said he was black, 'quite dark', came from a particular country and had a two-storey house. Priscilla said that the gold teeth were in the back on both sides. When asked how she could see them, Priscilla said that she was really close to his mouth and he was moving his mouth.

28 Priscilla said that she had not met the man before the incident, but that his wife was friends with her mother and still came to the house. She saw the man again when she went to 'his house' in Officer and saw him getting out of a room downstairs when she was upstairs. Priscilla said that she would recognise him if she saw him again.

29 In cross-examination at a special hearing conducted in February 2022, Priscilla, then aged 14 years, said that she knew that the man was Martha's father 'because after that incident happened, I went to their house, um, and they lived in the same house. So I assumed.'

30 Priscilla also said that she assumed the auntie present on the day of the incident was the man's wife because 'they were all living in the same house', 'their house'. She said that the auntie had visited her house before the incident and had frequently visited afterwards. Priscilla said she was not sure if other aunties were also present on the day of the incident.

31 The applicant's wife was cross-examined by defence counsel pursuant to an application under s 198A of the *Criminal Procedure Act 2009* ('CPA'). She said that between 2016 and 2018 Priscilla's mother had not visited her house. She also said that they were not 'exchanging visits'. The applicant's wife said that between 2012 and

2014 her four adult sons lived with her and the applicant. Martha, her granddaughter, also lived there. She was not called to give evidence in the trial, but her evidence informed the cross-examination of the informant.

32 The informant, Detective Sergeant Jennifer Williams gave evidence in the trial. DS Williams said that she spoke with Priscilla's mother before conducting the VARE with Priscilla. She agreed that Priscilla did not provide the name of the applicant and that the extent of Priscilla's description of him was his ethnicity and the two gold teeth in the back of his mouth, being someone she thought to be Martha's father. Priscilla said that she had seen the man a maximum of twice, once in a double-storey house. DS Williams accepted that she relied on Priscilla saying the man who offended against her was 'Martha's father,' but never asked Priscilla, 'Well, who is Martha's father?'

33 When asked if, by the end of the VARE, she had no idea of the identity of the man spoken about by Priscilla, DS Williams said that her subsequent investigations were designed to find out. DS Williams described subsequently speaking with Priscilla's mother, who provided a statement two months later in which she said that she thought the man was the applicant. DS Williams said that while Priscilla's mother did not witness the incident, she knew who the man was because 'she knows what [Priscilla] told her'. DS Williams accepted that there was no other identification evidence.

34 DS Williams rejected the proposition that she had accepted that Priscilla and her mother were referring to the same event at face value, given that the applicant was identified as 'Martha's dad'. She similarly rejected the proposition that there were 'large discrepancies' between the evidence of Priscilla and her mother. DS Williams said that she believed the difference between descriptions of two gold teeth in the back of the mouth and one gold cap on a front tooth to be explicable by Priscilla's age and a matter to be considered in context with other evidence. She accepted there were other differences, such as the presence of other aunties and whether the children were playing in the front yard, back yard or playroom. DS Williams said that it crossed her mind that the event described by Priscilla and that by her mother might not be the same.

35 DS Williams said that when interviewed the applicant said he had a granddaughter named Martha born in 2011 or 2012. She accepted that she neither made enquiries about the applicant's four adult sons, nor investigated whether the applicant lived in a double-storey house. She accepted that while she considered showing Priscilla a photo board, she did not do so.

36 The jury also viewed the record of interview given by the applicant in February 2019 in which he said he lived in Officer. His eldest grandchild was Martha, then aged about 7 years. He said Martha's mother is his daughter, but he and his wife have care of Martha (and her brother). The applicant said he had been to Priscilla's mother's house once to take some chairs to her husband and on another occasion at the invitation of her husband, who showed him the house. The applicant said he had at the relevant time had a gold front tooth. He denied the offending.

Applicant's contentions

- 37 The applicant submitted that the jury could not have been satisfied that he was the man who sexually penetrated Priscilla when she was 5 or 6 years of age. At the time of the incident, Priscilla was unable to name him and had never met him before. Years later she visited a house in Officer and then said she recognised the man who had assaulted her. She assumed that man to be 'Martha's father' because he and Martha lived in the same house. Priscilla's mother's identification of 'Martha's father' as the applicant would be of no weight if either Priscilla's recognition of the man or her assumption that he was 'Martha's father' were unreliable. And, it was argued, both the recognition and the assumption were unreliable.
- 38 It was advanced that identification evidence is notoriously uncertain. Priscilla's recognition of the man she met once when she was 5 or 6 years of age came from a fleeting observation made some years later. Even if that recognition was reliable, Priscilla's assumption that the man she recognised was 'Martha's father' was not. Priscilla gave no evidence as to what house she had visited, other than saying it was a two-storey house in Officer. Even if it had been the applicant's house, it was not established by evidence whether or not his four adult sons also resided there.
- 39 It followed, the applicant argued, that it was reasonably possible that Priscilla's mother — in accepting that Priscilla was correct that her assailant was 'Martha's father', and therefore, the applicant — had recalled a day when the applicant was present and sitting by himself in her house when Priscilla was 5 or 6 years old. The import of that recollection was, however, entirely dependent upon Priscilla's recognition years later of a man coming out of a room in a house and, given the significant discrepancies between their evidence about a day when a man (Priscilla's account) or the applicant (Priscilla's mother's account) came to the house, it was reasonably possible that each had been describing a different day.

Respondent's contentions

- 40 The respondent emphasised that the prosecution case was circumstantial. The jury was required to consider Priscilla's evidence of recognition of the man she assumed to be 'Martha's dad' in the context of all other evidence.
- 41 Priscilla's evidence that she went to '*his* house' — that is the house of the man she recognised as her assailant — was not challenged. The assumption (or inference or supposition) she drew that the man she recognised was 'Martha's dad' was reasonable. The applicant's wife was a friend of her mother's. Their granddaughter Martha did live with the applicant and his wife and referred to them as 'mummy' and 'daddy'. The applicant did have a gold tooth at the relevant time. Priscilla's mother recalled a day when the applicant was alone in her house in circumstances very similar to those described by Priscilla as the day on which she was assaulted.
- 42 In short, it was submitted that it was open to the jury to draw the ultimate inference of guilt beyond reasonable doubt.

Analysis

43 The test to be applied⁶ in considering a ground that a verdict of guilty on a charge is unreasonable or cannot be supported having regard to the evidence is that established in *M v The Queen*.⁷ The appellate court must consider whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty,⁸ and decide this question by making its own independent assessment of the evidence.⁹ Whilst a doubt experienced by an appellate court will often be a doubt the jury ought also to have experienced, if the jury's advantage in seeing and hearing the evidence is capable of resolving such doubt, then the court may find that no miscarriage of justice has occurred.¹⁰ Further:

Where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.¹¹

44 Relevantly, in a circumstantial case:

‘...the appeal court must weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard.’ A circumstantial case must not be considered ‘piecemeal’. If, on the whole of the evidence, ‘the prosecution has failed to exclude an inference consistent with innocence that was reasonably open’, then the jury is not able to draw that ultimate inference. Accordingly, in a circumstantial case, it is impermissible to consider any piece of evidence in isolation from the whole.¹²

45 To that extent, the respondent was correct to emphasise the circumstantial nature of the prosecution case.

46 While the applicant's central argument has more than a faint suggestion that the reliability of Priscilla's identification of the applicant as the offender in the house years after the incident was an indispensable intermediate fact,¹³ it is better understood as contending that the strands of the circumstantial case were simply incapable of

⁶ See *Lang v The Queen* [2023] HCA 29, 67–68 [250]–[251] (Jagot J) (*Lang*).

⁷ (1994) 181 CLR 487; [1994] HCA 63 (*M*).

⁸ *M* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

⁹ *Ibid*, 492 (Mason CJ, Deane, Dawson and Toohey JJ).

¹⁰ *Ibid*, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

¹¹ *Ibid*, 494–5 (Mason CJ, Deane, Dawson and Toohey JJ).

¹² *Lang* [2023] HCA 29, 67 [251] (Jagot J) (citations omitted).

¹³ Section 62 of the *Jury Directions Act 2015* abolished certain common law obligations, including the rule in *Shepherd v R* (1990) 170 CLR 573 that in appropriate cases a jury must be directed that it must be satisfied beyond reasonable doubt of an indispensable intermediate fact.

interweaving to produce a cable unless Priscilla's identification of the offender as 'Martha's dad' some years after the event was reliable. If it was not, then not only could that evidence not inculcate the applicant as the offender, but neither could the evidence of Priscilla's mother. That was because Priscilla's mother's identification of the applicant as the offender — and her evidence of his opportunity to offend in a situation similar to that described by Priscilla — was necessarily dependent upon Priscilla's (unreliable) identification.

47 We accept that analysis as correct and approach our own review of the evidence on that basis. It is therefore necessary to examine the reliability of Priscilla's identification evidence.

48 The first step is the recognition of the offender — and not the applicant — in the double-storey Officer house some three or four years after the offence.

49 The man who offended against Priscilla was previously unknown to her. She did not know him as 'Martha's dad'. While accepting that a child of very tender years might not be accurate in estimates of time, Priscilla said as an 11-year-old during the VARE, that the offending, which happened five to six years earlier, took place over about five minutes as she sat on his lap. Her descriptors of the man were very generic — tall, black skin tone, a certain ethnicity — except for her observation that he had two gold teeth in the back of his mouth.

50 Years later Priscilla was upstairs in a two-storey house. She recognised a man coming out of a room downstairs as the man who had offended against her.

51 The respondent correctly submits that that evidence of recognition was not challenged in the trial. That lack of challenge, however, cannot mask the obvious inadequacies in the evidence. Priscilla gave no physical description of the man she recognised as the offender, not even of his skin tone or ethnicity. The offender had been seated. The man she recognised was walking. If he was exiting a room, she had very little time to observe him and then only from a position above him and from some distance. It is unclear whether he was walking towards or away from her. And, she gave no evidence as to whether he had a gold tooth or teeth. In other words, the basis for Priscilla's recognition of the man as the offender is unknown.

52 The well-recognised frailty of identification evidence finds statutory expression in s 36 of the *Jury Directions Act 2015* ('JDA') and the judge charged the jury to exercise caution with respect to it.¹⁴ Given the obvious deficiencies in the evidence, prudence was indeed required.

53 The second step is that the offender (recognised in the first step) was 'Martha's father'.

¹⁴ Defence counsel requested a direction pursuant to s 36 but did not specify 'the significant matters that may make the evidence unreliable', cf s 36(2). The judge's charge gave a s 36(3)(a) direction but not a s 36(3)(b) or (c) direction.

- 54 This evidence is particularly problematic. Priscilla was very clear that the labelling of the offender as ‘Martha’s father’ was an assumption on her part. She said that she was in a double-storey house in Officer. While the applicant said he lived in Officer and Priscilla referred to being in ‘his house’, there was no evidence that the applicant lived in a double-storey house or otherwise that the house in which the recognition and assumption were made belonged to the applicant. Priscilla simply said that she assumed Martha to be the man’s daughter ‘because after that incident happened, I went to their house, um, and they lived in the same house’. She was not asked whether anyone else, including the applicant’s four adult sons, also lived there. Priscilla did not say how she identified the man she saw as the owner of the house. Priscilla also said that she assumed that the man she saw was the husband of the woman who was her mother’s friend and who brought Martha to their house some years previously.
- 55 It follows that there are manifest difficulties with Priscilla’s evidence, both with respect to the identification of a man who she saw in the double-storey house as the offender and her designation of that offender as Martha’s father. Despite Priscilla’s evidence that she would recognise the man if she saw him again, no attempt was made to have her do so from an identification parade or photo board.
- 56 These manifest difficulties are not resolved by considering Priscilla’s identification evidence in the context of all the other evidence. The trigger for all of the evidence given by Priscilla’s mother was Priscilla’s statement that the offender was Martha’s father, based on the assumption discussed above. Priscilla’s mother did not see the incident and did not know that it had occurred until Priscilla told her about in 2018. She was then told by Priscilla that the offender was Martha’s father. Her description of the gold cap on the applicant’s front tooth and of an occasion in which he was present in her home, and therefore having an opportunity to offend against Priscilla in the manner she described, do not overcome the weaknesses of Priscilla’s evidence. Indeed, a comparison of the evidence of Priscilla concerning the day of the offence and that of her mother concerning the day the applicant was in her home leaves open the reasonable possibility that different days were described.
- 57 Priscilla’s mother’s evidence relates to a day when Priscilla was 5 or 6 years old, and which reflects the charge period on the indictment. She said it was the only day on which the applicant visited her home. Priscilla’s evidence is that she was playing with her siblings and ‘Martha’, ‘running around’ playing ‘tiggy’. The applicant’s granddaughter was an infant when Priscilla was 5 or 6 and would not readily have been playing with older children in that manner. While the evidence in the trial was clear that Priscilla’s mother moved between Fitzroy and Pakenham at the relevant time and that the offending could have taken place in Pakenham, it is possible that the offending occurred post-2014 when both Priscilla and Martha were older. Indeed the prosecutor made an unsuccessful application to extend the date range of the charge. If the offending did occur later, the very precise recollection of Priscilla’s mother of the day the applicant attended the house, which was tied to Priscilla’s age, was of a different day.
- 58 Further discrepancies include that Priscilla’s mother was clear that only the applicant’s wife was present on the day she recalled, while Priscilla’s evidence was that there were ‘lots of aunties’ present, and that Priscilla’s mother said the applicant’s

wife no longer visited whereas Priscilla said that the woman she assumed to be the man's wife and was present on the day visited frequently. Also, while Priscilla's mother described *the applicant's* gold cap on his front tooth because she was describing the man she was told by Priscilla was the offender, Priscilla described the two gold back teeth of *the offender*. Giving due allowance to the cognitive development of Priscilla, her observation of the gold teeth was very specific and she remembered it clearly. In all the circumstances of this case, the discrepancy is not trifling, particularly recalling that gold teeth played no part in Priscilla's later recognition of her offender in the double-storey house.

59 Thus, having undertaken our own independent assessment of the evidence, we are of the view that on the whole of that evidence it was not reasonably open to the jury to be satisfied beyond reasonable doubt of the applicant's guilt. It follows that leave to appeal is granted, the appeal allowed, the applicant's conviction quashed and in its place a verdict of acquittal entered.
