SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBF* [2017] QCA 142
PARTIES:	**R** **v** **WBF** (appellant)
FILE NO/S:	CA No 307 of 2016 DC No 815 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Leave to Adduce Evidence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 28 October 2016
DELIVERED ON:	23 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2017
JUDGES:	Morrison and Philippides JJA and Atkinson J Joint reasons for judgment of Morrison JA and Atkinson J; separate reasons of Philippides JA, concurring as to the orders made
ORDERS:	**1. The application to adduce evidence is refused.** **2. The appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where the appellant sought to adduce copies of the complainant's medical records from the Caboolture and Redcliffe Hospitals – where the evidence was available to the appellant's lawyers at the time of the trial – where the trial judge made no ruling in relation to the evidence – where the appellant submitted that the medical notes would have revealed inconsistencies in the complainant's evidence – where the appellant submitted that the medical records were necessary to provide an explanation for his responses to the complainant's allegations during a pretext call – whether the evidence would have been deleterious to the appellant's defence at trial – whether leave to adduce the medical records should be granted CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after trial by jury of

seven counts of indecent treatment of a child under 16 with the circumstance of aggravation that the child was a lineal descendant (counts 3 – 5 and 7 – 10) and two counts of indecent treatment of a child under 16 with the circumstances of aggravation that the child was under 12 and a lineal descendant (counts 1 – 2) – where the appellant submitted that there were inconsistencies in the complainant's evidence – where the complainant's uncle, friends and mother also gave evidence – where a recording of a pretext phone call was admitted into evidence – whether the complainant's account was supported by other evidence – whether there were significant inconsistencies in the complainant's evidence – whether on an assessment of the evidence as a whole the verdicts of guilty were open to the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant sought to adduce evidence consisting of the complainant's medical records from the Caboolture and Redcliffe Hospitals – where the appellant submitted that a miscarriage of justice occurred because the whole of the evidence was not available to the jury – where the appellant submitted that the medical records revealed inconsistencies in the complainant's evidence – where the appellant submitted that the medical records were necessary to give context to other evidence that was available to the jury – whether the medical records would have been destructive to the appellant's defence at trial – whether the failure by the appellant's lawyers to tender the medical records at trial led to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where a recording of a pretext phone call was admitted into evidence – where the recording contained implied admissions – where the appellant submitted that his responses during the phone call were not made voluntarily and were unreliable because they were in response to the complainant's threats – whether the complainant was a person in authority for the purpose of determining voluntariness – whether the admissions made during the pretext phone call were involuntary – whether the admissions made during the pretext phone calls were unreliable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted after trial by jury of seven counts of indecent treatment of a child under 16 with the circumstance of aggravation that the child was a lineal descendant (counts 3 –

5 and 7 – 10) and two counts of indecent treatment of a child under 16 with the circumstances of aggravation that the child was under 12 and a lineal descendant (counts 1 – 2) – where the appellant was acquitted of one count of rape (count 6) – where the appellant argued that the strength of the evidence in relation to count 6 was no weaker than in relation to the remaining counts – where the appellant submitted that there were striking similarities between count 6 and the other counts – where the jury was directed as to the requirement of intent to penetrate the complainant – whether there was a rational explanation for the acquittal on count 6 – whether the convictions were impermissibly inconsistent with the acquittal on count 6

Criminal Law Amendment Act 1894 (Qld), s 10
Evidence Act 1977 (Qld), s 93

BBH v The Queen (2012) 245 CLR 499; [2012] HCA 9, applied
Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, applied
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, applied
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
R v B [2000] 1 Qd R 28; [1998] QCA 423, considered
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v Clapham [2017] QCA 99, considered
R v CX [2006] QCA 409, cited
R v GAW [2015] QCA 166, applied
R v Katsidis; Ex parte Attorney-General (Qld) [2005] QCA 229, cited
R v SCH [2015] QCA 38, applied
R v Spina [2012] QCA 179, applied
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, applied

COUNSEL: The appellant appeared on his own behalf
G P Cash QC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA and ATKINSON J:** The appellant was convicted on: (i) seven counts of indecent dealing with a child under 16, who was also his lineal descendant;[1] (ii) two counts of indecent treatment of a child under 16, who was under 12 at the time and his lineal descendant.[2] He was acquitted on a count of attempted rape.[3]

[2] The appellant challenges his convictions on various grounds including:

1. the verdicts are unreasonable and cannot be supported by the evidence;
2. the learned trial judge wrongly ruled certain medical records inadmissible, thus excluding the record of conversations between the child (Z) and others at hospitals;
3. the learned trial judge wrongly admitted the recording of a pre-text call between Z and the appellant; and
4. the acquittal on ground 6 was so inconsistent with the convictions that it rendered the guilty verdicts unreasonable.

Applicable legal test

[3] In a case where the ground is that the conviction is unreasonable or cannot be supported by having regard to the evidence, *SKA v The Queen*[4] requires that this Court perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position that the jury holds as the arbiter of fact.[5] In *M v The Queen* the High Court held:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, 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."[6]

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1 Counts 3-5 and 7-10.
2 Counts 1-2.
3 Count 6.
4 (2011) 243 CLR 400, at [20]-[22].
5 *M v The Queen* (1994) 181 CLR 487, at 493.
6 *M v The Queen* at 494.

[4] Recently this Court re-stated the principles in *R v Clapham*:[7]

> "[4] The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the "starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:
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> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'
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> [5] In *R v Baden-Clay* the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact" and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."

The complainant's evidence

[5] Z's evidence consisted of a transcript of a police interview, tendered under s 93A of the *Evidence Act* 1977 (Qld). In addition, her trial evidence was pre-recorded under s 21AK of the *Evidence Act*.

[6] Z was about 16 at the time of the interview and nearly 17 at the time of her pre-recorded evidence. At the start of her pre-recorded evidence Z confirmed that what she told the police in the interview was the truth. When reviewing Z's evidence we shall identify the counts to which the particular evidence relates.

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7 [2017] QCA 99 at [4]-[5]. Internal references omitted.

The police interview

[7] During the interview, Z gave her first account of the events. She commenced with a general statement that her father had done really bad things to her, starting when she was about six.

Count 1 – watching a pornographic video

[8] Z said in the police interview:

(a) the appellant asked her if she wanted to watch a movie called *The Little Mermaid*;[8]

(b) she went to the lounge room with him and he insisted that she watch a "porn movie"; he held her by the wrist when she tried to go away;[9]

(c) that was after October, "definitely like November, December", in the year she turned six (2005), and in the same year when her cat died;[10]

(d) the movie was on his grey laptop;[11]

(e) she recalled the movie had "a couple of black guys, and a male and female", having sex under a blanket;[12] she could see a woman's bare breasts;[13]

(f) during the movie the appellant was moaning;[14] and

(g) when it was over she ran to her room and pushed her back against the door because she did not want him coming in.[15]

[9] In her trial evidence, Z adhered to that account.[16] She agreed that she put that event at the time her cat died, but denied that her cat died in 2007. She denied the suggestion that the appellant had never shown her any pornographic videos.[17]

Count 2 – masturbating in the car

[10] Z said at the police interview:

(a) just before her Grade 6 birthday, they were together in the car, on the way to her gymnastics; he pulled out his penis and said there was a game that Z could play with her friends; the game was to put a rubber band around his penis and to "use only your mouths to get it off" while he pretended to be asleep; she said no, and the appellant responded "well don't, not now, you think about it and I'll show you what to do"; he then "used his hand, to show what our mouths would do, get the rubber band off, and it squirted, and like all over the car and my shirt";[18]

(b) she saw his pubic hairs and his penis which she described as "maybe six inches, um white, veins popping out";[19]

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8 Appeal Book (**AB**) 265, 266.
9 AB 249, 266-267.
10 AB 254, 265-266.
11 AB 267-268.
12 AB 265, 269-270.
13 AB 270.
14 AB 271.
15 AB 270.
16 AB 36.
17 AB 43.
18 AB 249, 299, 301-304.
19 AB 303.

(c) he used his left hand to get a rubber band and put it on the top of his penis; he then moved his hand up and down the penis to show how to get the rubber band off;[20]

(d) she described his ejaculation: "he's squirted sperm all over the car wheel, the radio and on my shirt … And on my seatbelt";[21] some got on her face and hand;[22]

(e) the sperm was white and like jelly; it came from the top of his penis; she screamed when it hit her;[23] and

(f) she threw the shirt away because "I wouldn't ever have it again … I felt so feral";[24] by the time of the interview, the clothes she wore were at the dump.[25]

[11] In her trial evidence Z adhered to that account.[26] She said it was on a Saturday on the way back from gymnastics. She denied that her Saturday gymnastics commenced in 2013, and that the gymnastics was only on weekdays.[27]

[12] Z denied the suggestion that the appellant had never exposed his penis to her, ejaculated in her presence, or spoken about party games.[28]

Count 3 – the dildo video

[13] Z said at the police interview:

(a) in 2009 or 2010, her uncle had lived with them for a time; after the uncle moved out he left his computer behind;

(b) the appellant showed Z a video on that computer which was of the uncle's ex-wife, using a purple dildo on herself;[29] she had her legs up, and was putting the dildo in her vagina and anus;[30]

(c) when he put the video on, he told Z that if she did not watch it "he'd start in on [Z's younger sister, Q]";[31] and

(d) while she watched it he was watching from the bathroom;[32] he undressed to have a shower, and Z saw his naked body, including his penis and testicles.[33]

[14] In her trial evidence, Z denied the suggestion that the appellant had never shown her any pornographic videos.[34] She denied the suggestion that the appellant had never exposed his penis to her.[35]

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20 AB 304-305.
21 AB 299.
22 AB 306-307.
23 AB 305-306.
24 AB 249, 297.
25 AB 309.
26 AB 38.
27 AB 38.
28 AB 44.
29 AB 285-286.
30 AB 286-287.
31 AB 288.
32 AB 288-290.
33 AB 290.
34 AB 43.
35 AB 44.

Counts 4 and 5 – in the shed

[15] Z said at the police interview:

(a) she used to help the appellant by working for him in the shed;[36]

(b) she worked there in the 2012 June/July holidays, from about 6 am to midday;[37]

(c) one day she saw that he was searching "blow job" on his computer;[38]

(d) he clicked on some videos, and she could hear the videos, which involved a man "moaning and a woman saying you've been a bad boy", moaning noises and sucking noises;[39]

(e) he pulled his penis out, and she said at that point "it didn't look hard yet";[40] he was "standing at the computer wanking himself"; she told him to stop but he did not; she tried to leave and he shut the door, pulled her back to her work station, and told her to go back to her work;[41]

(f) when he pulled her back to the work station his penis was still out, and she could feel it against her thigh; at that time his penis was hard and "dead straight';[42] and

(g) he said "finish the job or else"; she understood the "or else" to mean that "it was gonna be him starting on [Z's younger sister, Q]".[43]

[16] In her trial evidence, Z adhered to that account. She denied that she never worked in the shed for as long as six hours, and the longest period had been about two hours.[44]

[17] Z denied the suggestion that the appellant had never exposed his penis to her.[45]

Count 6 – attempted rape

[18] Z said at the police interview:

(a) she was in bed one night a few days after Valentine's Day in 2013, having that day broken up with a boyfriend;[46]

(b) the appellant came over and "he said that he wanted to have sex with me. I said no, F off. And he pinned my hands down. I kicked him in the nuts and told him to piss off 'cause I don't want this. And I kinda went out screaming to Mum, and just said I had a nightmare";[47]

(c) when she said no, he grabbed her wrists and pinned her on the bed; she kicked in the testicles and got away;[48]

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36 AB 272.
37 AB 275, 282.
38 AB 272, 276.
39 AB 277-278.
40 AB 279, 283.
41 AB 273, 280.
42 AB 280-281.
43 AB 279.
44 AB 39.
45 AB 44.
46 AB 310, 313.
47 AB 250, 310-311, 315.
48 AB 310-311, 315.

(d) he went on his knees, one knee either side of her legs, and "he went to pull out his penis"; he "got his hand down his pants and went to pull it out"; "he had moved his hand almost out of his pants when I kicked him"; his ankles were about where her knees were, and "the top of his penis [was] about my waist";[49]

(e) one of his hands was used to pin her hands behind her head, and the other to reach into his pants;[50]

(f) his penis came out of his pants "just a bit, but not a lot";[51] he was "just above me" and his penis was about 30cm from her;[52]

(g) she "kicked him in the balls"; he fell onto his right side; and she got out of bed and ran to her mother;[53] and

(h) she told her mother she had a nightmare because "he told me … there are consequences if I say things".[54]

(i) afterwards he took her to the shed and said that if Z told her mother he would get angry and "start on [Z's younger sister, Q]".[55]

[19] In cross-examination, Z denied the proposition that she did not tell Redcliffe Hospital staff that the appellant tried to have sex with her. In answering, Z repeated the same account.[56] She denied the suggestion that this event never happened.[57]

Counts 7 and 8 – watching a pornographic movie

[20] Z said at the police interview:

(a) two years before, when she was in Grade 9 and about 13 years old, her mother was away seeing relatives in Thailand, and Z was sleeping in her mother's bed;[58] she was watching episodes of a series called *Vampire Diaries*;[59]

(b) the appellant came in and said he had a movie for her;[60] they watched episodes three to seven of *Vampire Diaries* together;[61] they watched about seven episodes;[62]

(c) he put a USB stick in the TV;[63]

(d) he put a USB stick in the TV,[64] and turned on a porn movie called *Vampire Sex Diaries*; while it was on he was masturbating himself, and holding her

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49 AB 316.
50 AB 317.
51 AB 317.
52 AB 321.
53 AB 316.
54 AB 319.
55 AB 311-312.
56 AB 41-42.
57 AB 44.
58 AB 254, 262.
59 AB 261.
60 AB 254.
61 AB 254, 261.
62 AB 255.
63 AB 256.
64 AB 256.

wrist to prevent her leaving;[65] she "could feel him doing it through the bed", because the blanket or sheets were moving;[66] he had his hand on his penis, and was moving it up and down;[67] during this time (which she described as lasting the whole hour and a-half movie) he was masturbating and moaning;[68]

(e) she tried to get away by pulling her arm while she had her legs over the bed;[69]

(f) she described some of the details of what was shown in the movie; it showed groups of women "kissing and fingering", a couple having sex while on holidays or on honeymoon, a man "getting a blowjob", and a tour guide who had sex with a woman in a cave, when she was "bent over kinda like a dog";[70]

(g) she have a detailed description of how and where they were lying on the bed;[71] and

(h) when the movie ended she went to the toilet and vomited " … 'cause that stuff is sickening".[72]

[21] In her trial evidence, Z adhered to that account. She said her memory was that she was about 13 when it occurred, and denied that when she was 13, the appellant was still sharing a room with her mother.[73] Z denied the suggestion that the appellant had never shown her any pornographic videos.[74]

Counts 9 and 10 – masturbating in the lounge

[22] Z said at her police interview:

(a) she was having a party and the appellant bought Vodka cruisers for the party; her mother was away at the time;[75]

(b) the party was "last year"; while she and her friends were drinking, he "was in his room wanking himself and you could hear him moaning"; she told him to shut up as she had friends over;[76]

(c) the next day she was there with her ex-boyfriend (T) and another friend (S); the appellant was on the couch, masturbating; they could hear him moaning; she told her friends to wait where they were and she told the appellant that what he was doing was inappropriate, and he should do it in his room;[77]

(d) when they heard him moaning they turned up the music louder but they could still hear him over that;[78]

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65 AB 254, 257.
66 AB 257, 259.
67 AB 259.
68 AB 259-260.
69 AB 259.
70 AB 256-257.
71 AB 258-259.
72 AB 254, 260.
73 AB 39.
74 AB 43.
75 AB 322.
76 AB 251.
77 AB 251-252, 323.
78 AB 323.

(e) when she went in to him she could see his hand was in his pants; he was watching porn on his phone and his hand was moving up and down;[79]

(f) T went home, leaving Z and S; when they went into the kitchen to get some lunch he started doing it again; she went into him again and hit him, saying it was inappropriate;[80] and

(g) when she went in to him she "slammed [her] hand on the couch and told him to … F into his room if he's going to do that, and he got up, apologised and went into his room".

[23] In her trial evidence, Z adhered to that account.[81] She agreed that she could not see what he was doing but said "we could hear him moaning and the noise of his hand moving along his penis".[82] She denied the suggestion that the appellant had never masturbated in front of her.

General uncharged acts

[24] Z gave evidence in her police interview about other acts that were not the subject of charges. They included:

(a) the appellant showed her hundreds of porn movies over many years between when she was six and Grade 9;[83] the videos involved women performing lesbian and heterosexual acts; she was able to describe the details of some;[84]

(b) he paid her a dollar for each minute she watched, paid into her phone credit;[85]

(c) he used to tell her stories about his sex life; one was "him going to a girl's house every afternoon and … they would play a game, and if you didn't do the deed, you'd have to remove a piece of clothing. He said he'd always lose and … their Mum would come home and she would give him a blow";[86]

(d) on the same day as he told Z about putting a rubber band on his penis and Z and her friends using their moths to get it off, he said that Z could use vegetables on herself with her friends, naming cucumbers, carrots and eggplants; he suggested that they put them in each other's vaginas; he also bought vibrating toothbrushes for that purpose, which he left on her bed;[87] he said the vegetables could be put in their "vaginas, and bum holes if we wanted to";[88]

(e) many times when they were "going to gymnastics, and from gymnastics, he would pull out his penis and wank himself";[89] and

(f) she had seen him masturbating between 10 and 20 times.[90]

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79 AB 324, 326
80 AB 251-252, 323-324.
81 AB 37,
82 AB 37 line 44.
83 AB 249-250, 253, 329.
84 AB 253.
85 AB 328.
86 AB 250, 334-335.
87 AB 294-297, 300.
88 AB 300.
89 AB 249.
90 AB 330.

[25] In cross-examination, Z denied that the toothbrushes were for all three children and not for the party.[91]

[26] Z denied the suggestion that the appellant had never shown her any pornographic videos, and had never paid her for that. She said she had been made to watch such videos too many times to count.[92] She also denied the suggestion that the appellant had never exposed his penis to her, ejaculated in her presence, or spoken about party games.[93]

[27] Z was asked about the police interview and her response that the appellant had masturbated between 10 and 20 times in front of her. Z said that answer was in respect of videos.[94]

[28] Z said she had a diary "with all the dates and everything" but the appellant saw her writing in it, and had "burned it and threw it out" about two or three years before. He said he "didn't want Mum to get angry and if I tried to stop him, he'd start on [Z's sister, Q]".[95] In cross-examination she denied the suggestion that the appellant did not burn the diary.[96]

[29] Z said she told her mother "at the end of last year", namely 2014.[97]

[30] In cross-examination, Z agreed that she had spoken to medical staff at Redcliffe Hospital in May 2015, telling them that the appellant had masturbated in front of her, and that he showed her things. But she denied that she told them that the appellant had touched her once on the leg; she said she could not remember that as she was on a high morphine dose at the time.[98]

Evidence of S

[31] S gave preliminary complaint evidence, that:

(a) Z told her "her dad was making her watch porn with him";[99] and

(b) on S's birthday she was with Z; they could hear the appellant masturbating and moaning; he had his hand down his pants and his phone with him on the lounge; while they were eating lunch he did it again.[100]

[32] In cross-examination, S denied that Z ever told her she had been raped by the appellant, that she had to suck him off, or that she had been made to have sex with a friend in front of him. But she reiterated that Z had told her that the appellant had touched her.[101] She said the appellant was behind a closed door on the occasion of her birthday, but she could hear moaning and general movement on the couch "that I now understand is that of a man masturbating".[102] She said her conclusions as to what he

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91 AB 38.
92 AB 43.
93 AB 44.
94 AB 44.
95 AB 273-275.
96 AB 44.
97 AB 250.
98 AB 40 lines 31-47.
99 AB 20.
100 AB 20.
101 AB 23.
102 AB 24.

was doing were from the noises she heard.[103] But when they walked to the kitchen she saw the appellant lying on the lounge with his hand down his pants and the phone on his chest.[104]

Evidence of M

[33] M was a school friend of Z. She gave preliminary complaint evidence:

(a) Z told her that the appellant masturbated in front of her in the car;[105]

(b) on one occasion Z said her dad raped her over the holidays;[106]

(c) Z said she had her tongue pierced because her father would resent it, and because "I have to suck my dad off";[107] and

(d) Z said the appellant had made her watch pornographic videos, and he had watched them himself.[108]

[34] In Z's cross-examination, she denied telling M that she (Z) had been raped by her father, saying that she said that he tried to rape her.[109] She also denied telling M that her father made her suck him off.

Evidence of D.

[35] D was Z's cousin. She was produced for cross-examination. She was asked if she had spoken to police, and she said she had. Then she was asked:[110]

> "And I suggest that what you told the police was that during that conversation, [Z] told you something like, "Dad made me have sex with a friend of mine in front of him"?---Yep."

[36] D was re-examined and said that Z had said other things as to what had occurred:[111]

> "And what, if anything, did she tell you?---From what I can remember that she – it had been happening for a while and she was scared to tell anyone."

[37] In cross-examination, Z agreed that she had told D that she (Z) had been made by the appellant to have sex with a friend, but denied that she said it was in front of him.[112] She said that the appellant made her do so by threatening her that he would "start on [Q] … the process that happened to me ... to [Q]".[113]

[38] In re-examination, Z was asked to explain, as best she could recall, what she told D:[114]

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103 AB 25.
104 AB 26.
105 AB 30.
106 AB 30.
107 AB 32.
108 AB 32.
109 AB 40 line 14.
110 AB 86 line 16.
111 AB 86 line 33.
112 AB 40.
113 AB 40 lines 27-29.
114 AB 46 lines 11-16.

> "And can you explain as best you recall what it was that you said to [D]?---I said to her that dad had made me go down on a girl at the party, otherwise he would start on [Q]. It didn't last long, and she stopped being friends with me after. I'd explained to her beforehand why … I was asking for it."

Evidence of Z's mother

[39] Z's mother gave evidence concerning the layout of the houses they lived in, identifying photographs, and when the family moved in. She also testified as to the shed and the business conducted there. Relevant parts of her evidence were:

(a) Z's gymnastics was on a Saturday, with training during the week; the times varied; Z continued it until she was about 13;[115]

(b) she went to Thailand to see a cousin in 2013 (for a month) and in 2014 (for 11 days);[116]

(c) just before Christmas 2014, Z told her that on the way home from gymnastics one time, "Dad was playing with my – with himself and he sprayed all over my shirt"; Z said she threw it out because she did not want to wear it again; Z said that sort of thing had happened on many occasions;[117]

(d) Z also "told me at one party that she was going to have when I wasn't there, she said that he had bought her toothbrushes and vegetables and told her to use it with herself and her friends";[118] and

(e) Z told her other things which she could not remember.

[40] In cross-examination,[119] the mother said that the two specific matters mentioned in her evidence were the only ones she could remember happening before the police interview. She agreed that Z's cat died in 2007. She denied that the gymnastics only started in 2013, saying it was much earlier. She said that the appellant and she shared a room until 2014.

Evidence of Z's uncle

[41] Z's uncle lived with the family from 2008 to 2014. He said he had a computer to which the appellant had access. On the computer was an intimate video of his ex-wife, using a purple dildo.[120] The computer was left with the appellant who used it for work.

The pretext call

[42] A recording of the pretext call made by Z to the appellant was played for the jury.[121] The text of that call included this passage:

> "**Z**: But why did you do that stuff to me?

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115 AB 94.
116 AB 95.
117 AB 96 lines 4-16.
118 AB 96 lines 22-24.
119 AB 98-99.
120 AB 101.
121 The recording became Exhibit 2.

Appellant: … I don't know darling. … look … to explain it best I can, I've probably been in depression for the last five years. Okay? You don't realise that you're in it when you're in it. And it, like, it's not until you see that there's a possibility that you're not, there's a chance that you may find some happiness instead of being depressed all the time. You know, and when you are depressed you put on a show to try and sort of, and you'll do anything … to try and find some happiness. Do you understand what I'm saying?

Z: Yeah.

Appellant: Look, I, I –

Z: But it doesn't give you an excuse to do what you done.

Appellant: No it doesn't darling, no it doesn't.

Z: You know I get nightmares.

Appellant: Y-, well --

Z: Because of what you've done.

Appellant: Mmhmm. And … the truth is that I'll never understand what, what you go through.

Z: I'm on --

Appellant: [INDISTINCT]

Z: Anti-depressants because of you.

Appellant: Mmhmm. I would never have expected … this to be the outcome of my actions, … [Z], I would never have expected it.

Z: I don't understand why you did it.

Appellant: I don't understand why I did it. I don't. I don't understand. I, I don't. I think [INDISTINCT], I don't [INDISTINCT]. I feel we … I certainly don't … hate you guys. I don't do anything to hurt you. But not intentionally. I do do things, I have done things that have hurt you … but never intentional. I don't want to hurt you.

Z: And you took my innocence.

Appellant: I may have taken it [INDISTINCT] the truth.

Z: I don't know how to believe you anymore.

Appellant: Hey?

Z: I don't know how to believe you anymore, the stories you've told me. The times you've pulled out your dick in front of me. Wanked in front of me. In front of my friends. In the same room as me and [S] while we were eating [INDISTINCT]. You were on the couch wanking yourself. Do you not regret that? Dad?

Appellant: [INDISTINCT].

Z: Yep.

Appellant: Can you … can you hear me now?

Z: Yep.

Appellant: Sorry, something just played up with the headphones. I don't know what I was thinking. And I, I really wish I could take it all back, but I know I can't. That's the truth of it. You know? I, I don't know what I was thinking … truly. Out of my mind, I don't know why. And it, the truth is I, I have been really depressed for a very long time. I struggle to get up every day just to do anything. You know, it's hard for me to actually even start work. And I, look, and it, like, this is no one's fault, it's something that happens to you, and it sneaks up on you. And you just don't even know. You know?

Z: Dad, I've been depressed for years. Nine years to be exact. From when you started to when it ended. And technically I still am.

Appellant: You know --

Z: And --

Appellant: The, the one thing that I am glad in a way is that … I won't have the opportunity to do anything else to you, you know.

Z: No, you won't. Alright.

Appellant: [INDISTINCT]

Z: I've got to go.

Appellant: I'm sorry darling. But, believe me, I, I don't hate you. And I, I don't, you know, hold anything against you for anything … that has happened. Do you understand that?

Z: Yeah. Whatever. I've got to go.

Appellant: It's not whatever, [Z], … even, ah, after all the things I've done, … I still love you guys. It's never going to change.

Z: Mmhmm. I'm going to go.

Appellant: I've done, I've done some stupid things and I really regret them. And I, I never thought that this would be an outcome. Okay?"

[43] The jury were instructed that the transcript was not the evidence of the call, but the recording was. The jury had the recording in the jury room.

[44] The learned trial judge directed the jury as to how they could use the evidence in the call:[122]

> "Now, I direct you that in order to rely on any statements made by the defendant during that telephone conversation tending to incriminate him, you must be satisfied the defendant heard what the complainant said to him about the masturbating in front of her and [S]. You must also be satisfied that what he said in respect – during

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122 AB 222 line 26 to AB 223 line 1.

> the phone call was a truthful implied admission by him of the alleged indecent act of masturbating in front of the complainant and [S].
>
> Now, there was also other things said by the defendant during that conversation which the prosecution relies on as, basically, admissions – we call them implied admissions – of general sexual misconduct towards the complainant over the years. You should act on what the defendant said in those answers only if satisfied beyond reasonable doubt that that misconduct occurred and that the defendant's answers were in fact in relation to that sexual misconduct. So if you are satisfied that the statements made during that call by the defendant were in fact made by him – and he accepts that they were – you must then consider whether those parts of the conversation that the prosecution relies on as indicating guilty are true and accurate.
>
> It is up to you to decide whether you're satisfied those things said by the defendant which would tend to indicate he is guilty of the offence, were true and were actually an admission by him of sexual misconduct. If you are not so satisfied you cannot rely on the answers given by the defendant as going to prove his guilt."

[45] There was no suggestion that the directions in this respect were inadequate.

The appellant's evidence as to the pretext call

[46] The appellant's evidence as to the pretext call was essentially that it was not about allegations of sexual conduct but about Z discussing her depression anxiety, with which he was trying to empathise.[123] However he accepted that well before the call he was made aware that Z had made complaints of sexual misbehaviour against him, and he had been asked to leave the home because of that.[124]

[47] Thus he said the pretext call occurred in circumstances where he believed that Z was upset and wished to discuss her depression and anxiety attack. He could not hear everything she said, particularly that part leading up to when he said "Can you hear me now?"[125] He was empathising with her distress,[126] and he did not hear her say "something about you pulling your dick out in front of her", "wanking in front of her", "wanking in the same room as me and [S]", or "on the couch wanking yourself".[127]

[48] When Z asked in the pretext call "whether you regret that", he explained his response:[128]

> "So I believe she … had the depression anxiety and the triggers that I believed that she had discussed with me is me hating her and concerns about things that I'd done to her to hurt her. These are things that I tried to discuss very briefly, but I thought the more important issue to deal with was … the depression that she experiences and … how I could empathise with her and help her through this."

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123 AB 158.
124 AB 159 lines 3-11, AB 179 line 43.
125 AB 155, 163, 164.
126 AB 156.
127 AB 157.
128 AB 158 line 30 to AB 159 line 24.

[49] Further, the appellant accepted that the recording reveals Z saying "And you took my innocence", to which he responded "I may have taken your innocence". He explained that in this way:[129]

> "I chose to answer this way to reflect on what [Z] had just said to me and to give her some concessional ground as to not to elevate her distress any further than what it already was. … I was referring to taking her innocence when I told her all the things that were going to happen when mum and dad were going to split up, well before the accusations come out from [Z's mother]."

[50] The appellant explained what he meant by the comment "I don't understand why I did it", as follows:[130]

> "The things that I was referring to in the phone call in my mind, what I was thinking about, were the things that I had done to hurt [Z] – the things that have contributed to her anxiety and depression."

[51] The appellant was asked about that part of the call where he said: "I really wish I could take it all back but I know I can't. I don't know what I was thinking." The question was whether that was a reference to sexual misconduct. He explained what he was referring to in these terms:[131]

> "I was referring to all the things that I've done that have hurt her and made her feel this great anxiety that she blames me for, which she mentions in that phone call."

[52] On the same basis he was asked about his response in the call: "The one thing that I am glad, in a way, is that I won't have the opportunity to do anything else, you know." He said it was not referring to sexual misconduct but his explanation was:[132]

> "What I was saying there – what I was – in my mind is I'm trying to express to [Z] that because I'm not going to be there anymore that the things that I have done that made her feel this way, I can't do that anymore because I'm not present. The things that would include the practical jokes that upset her sometimes, the insensitivities, and the addressing of the family situation, the major trauma in her life at this time when I told her that it's not possible she's not going to be coming to live with me. This was at some time before.
>
> … I was summing up everything that contributed towards what I felt was her anxiety and depression. I also wanted to give her a feeling that, you know, that tomorrow is going to be better, you know."

[53] He was then asked about his reference in that passage to the practical jokes, insensitivities and things like that. The appellant identified them as "the things that I considered caused [Z] anxiety in my experience with her".[133] He said that they were things that had not been raised by Z.[134]

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129 AB 162 lines 39-46.
130 AB 177 lines 24-27.
131 AB 177 lines 37-39.
132 AB 177 line 45 to AB 178 line 11.
133 AB 178 line 45.

Evidence of the appellant

[54] The appellant gave evidence in his own defence. He denied that any of the alleged events had taken place.[135] Then as to specific matters he said:

(a) Z had worked in his shed, but only for periods of between 30 minutes to an hour; she never worked up to six hours; the computer in that shed was not connected to the internet;[136]

(b) the gym classes only started in about late 2012 or 2013;[137]

(c) the cat died in 2007;[138]

(d) he threw Z's diary into the bin in 2015,[139] but did not destroy it;[140] and

(e) as to the occasion of counts 9 and 10, he was on the couch so he could be close to the toilet as he had severe abdominal pains.[141]

[55] Much of the appellant's cross-examination was taken up with his explanations concerning the pretext call. Those matters are dealt with above. Other relevant aspects of his cross-examination were as follows:

(a) as to the occasion of counts 9 and 10, while he was on the couch with severe abdominal pain, he had a hand in the top of his pants and he was massaging his lower stomach just above his groin area, massaging to his right side, and he was moaning;[142]

(b) he did watch one or two episodes of *Vampire Diaries* with Z "on the day that you're talking about";[143]

(c) there was a time when there was more than one computer in the shed and one of them was connected to the internet;[144]

(d) the diary he put in the bin had "kid's drawings on it. Nothing of significance";[145]

(e) he was sure the cat died in 2007 because it was pushed into the pool by the dog and:

> "Because the dog was not big enough in 2005 and she'd grown up to a considerable size, and at the time [Q] also used to play with this cat named Tabitha. [Q] was born in 2006 and it wasn't until [Q] was a – of a – an age where she could crawl and chase the cat that she actually got to play with it. So I say 2007 with confidence";

(f) he then accepted that if the cat died in 2005 that was before Q was born.[146]

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134 AB 179 line 2.
135 AB 148, 149, 150, 151, 153, 154, 158, 168, 171, 172, 173, 174, 175.
136 AB 148-149.
137 AB 150.
138 AB 153.
139 AB 153.
140 AB 154.
141 AB 154, 165, 168.
142 AB 168.
143 AB 172.
144 AB 174.
145 AB 176.
146 AB 176 line 34.

Discussion

[56] We have read the draft reasons of Philippides JA, which comprehensively sets out the competing contentions on each of the grounds advanced to challenge the convictions. We gratefully adopt what her Honour has said in that regard.

[57] As to the grounds of appeal themselves, our review of the whole of the evidence (set out in paragraphs [5] to [55] above), and having the benefit of the draft reasons of Philippides JA, enables us to state our reasons on each ground in shorter form that might otherwise be the case.

Unreasonable verdict

[58] In our view, Z's evidence contained a consistent core, notwithstanding the inevitable inconsistencies that are the product of human frailty and imperfect memory, such that it was open to the jury to accept her evidence as reliable and credible. Her account of what occurred was accompanied by a substantial level of detail, including as to surrounding matters concerning the locality of the events, the nature of the videos, and the physical descriptions of anatomy, such that the jury could have reasoned that it was genuine memory and not the product of invention.

[59] In particular, there was evidence that supported Z's account, and which the jury could have accepted as supporting her reliability and credibility. For example, her uncle's evidence was that there was a video of his ex-wife just as she described. The jury may well have reasoned that Z's knowledge of that video was hardly coincidence given its intensely personal nature. The appellant accepted that they watched *Vampire Diaries* together, on the day that Z referred to, and Z's mother said she was away in Thailand at the times to which Z had referred. And the preliminary complaint evidence largely supported her account. The evidence of S, as to the events that were the subject of counts 9 and 10, was very similar to that of Z. There was no credible suggestion that the evidence was the product of collaboration between Z and S.

[60] In our view, the most compelling support came from the pretext call. The jury were entitled to reject the appellant's explanations as to what he understood the call to be about, and what he was intending to say in it. That explanation is difficult to accept when one has regard to certain of the answers he gave in that call. In particular, the jury may well have considered the following passage important:

> **Z**: I don't know how to believe you anymore, the stories you've told me. The times you've pulled out your dick in front of me. Wanked in front of me. In front of my friends. In the same room as me and [S] while we were eating [INDISTINCT]. You were on the couch wanking yourself. **[1]** Do you not regret that? Dad? **[2]**
>
> **Appellant**: [INDISTINCT].
>
> **Z**: Yep.
>
> **Appellant**: Can you … can you hear me now?
>
> **Z**: Yep.
>
> **Appellant**: Sorry, something just played up with the headphones. I don't know what I was thinking. And I, I really wish I could take it all back, but I know I can't. That's the truth of it. You know? I,

> I don't know what I was thinking … truly. Out of my mind, I don't know why."

[61] It is important to recall that the pretext call came after the allegations of sexual misconduct had been raised with the appellant by Z's mother.

[62] We have listened to the recording. In the passage above we have inserted the numbers 1 and 2. At each of those points there is a loud noise that might be something like the phone being put down or something hitting it. However, there is little doubt in our minds that the response starting "I don't know what I was thinking … I really wish I could take it all back …", was in respect of Z's recounting the events of exposing his penis and masturbating in the same room as Z and S. The jury could well have come to the same view. His explanation in evidence that he did not hear some of the exchange suffers from the fact that the only sounds consistent with some interference are **after** Z's question. If so, that evidence was a powerful reason to accept that of Z, and convict.

[63] Further, the jury could well have taken a similar view of the earlier parts of the passage in paragraph [42] above. In this respect we refer to those parts where Z asked why the appellant had done "that stuff" to her, and he responded that he did not know why, that he had never expected that to be the outcome of his actions, he had never intended to hurt her, and he had taken her innocence. In particular the jury could well have understood the opening paragraphs of that passage as the appellant's explanation that in his depressed state he found happiness in the sexual acts perpetrated against her. Z asked "why did you do that stuff to me?" He responded: "I've probably been in depression for the last five years … it's not until you see that there's a possibility that you're not, there's a chance that you may find some happiness … when you are depressed … you'll do anything … to try and find some happiness".

[64] The inconsistencies in the evidence of Z were raised with the jury and were the subject of appropriate directions by the learned trial judge. The consistent core of Z's evidence and supporting evidence were, nonetheless, sufficient for the jury to accept Z's evidence. In this respect one must bear in mind the statement in *MFA v The Queen*,[147] where McHugh, Gummow and Kirby JJ remarked that it was not uncommon in most trials for some aspect of the evidence to be less than wholly unsatisfactory. Their Honours then said:

> "Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention."

[65] We also agree with the reasons of Philippides JA on this ground. We are unpersuaded that the evidence reveals such conflicts or imperfections that it was not open to the jury to accept the evidence of Z, and convict. We have not come to the view that an innocent person has been convicted. We do not consider that a miscarriage of justice has occurred.

[66] This ground fails.

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147 (2002) 213 CLR 606, at 634.

Inconsistent verdicts

[67] The evidence as to count 6 could well have left the jury with a sufficient doubt as to whether the event happened or the intention of the appellant.

[68] According to Z, over the top of her express refusal to have sex with the appellant, he attempted to rape her, in her room while her mother was home and in her own room, not far away.

[69] Z's evidence was that the appellant was on his knees on the bed, one knee either side of her legs, when he "went to pull out his penis". He "got his hand down his pants and went to pull it out". He had "moved his hand almost out of his pants" when Z kicked him. At that time his ankles were about where her knees were, and the top of his penis was "about my waist".[148] She said that his penis came out of his pants "just a bit, but not a lot",[149] at which time he was "just above me" and his penis was about 30 cm from her.[150]

[70] Given the proximity of Z's mother, the jury may have felt a sufficient doubt as to the likelihood of the attempted rape, which was an act well beyond anything else that had been suggested by Z. To that point most of the alleged conduct consisted of showing her pornographic videos and masturbating.

[71] Further, given that the evidence was that when she kicked him off, his penis had not come fully out of his pants, and even at that point was about 30 cm from her, the jury may not have been satisfied to the requisite standard that there was, in fact, an intention to rape.

[72] That result may have been reached by the jury simply obeying the direction to consider each count by reference to the evidence relevant to that count. Thus the differing verdicts can be reconciled in the way referred to in *Mackenzie v The Queen*,[151] and are not an affront to logic and reasonableness.

[73] We also agree with the reasons of Philippides JA on this ground. We agree that this ground fails.

The hospital records

[74] The appellant's contention was that they would establish that Z suffered from a disease or abnormality of mind, reveal further inconsistencies in her account, and put the pretext call into context.

[75] We have read the records that the appellant sought to tender, and which were ruled inadmissible. In our view, they would have done none of those things. Absent the relevant medical practitioners being called to give the opinions that entries may have reflected as to Z's state of mind, the records could not establish what the appellant sought. Instead, their tender would have resulted in the jury seeing that multiple, and consistent, complaints were made by Z as to sexual assaults by the appellant.

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148 AB 316.
149 AB 317.
150 AB 321.
151 (1996) 190 CLR 348, at 366-368.

[76] The records were in the hands of the appellant's lawyers well before the trial, and in plenty of time to assess their content. We are unable to accept that defence counsel or solicitors, aware of their content, would have considered it a sensible move to tender them. They would have been largely, if not totally, destructive of the defence case that no such event occurred.

[77] We also agree with the reasons of Philippides JA on this ground. The ground fails.

Other grounds

[78] We agree with the conclusions reached by Philippides JA in respect of the remaining grounds.

Conclusion

[79] We agree with the orders proposed by Philippides JA.

[80] **PHILIPPIDES JA:** The appellant was convicted after a trial by jury of seven counts of indecent treatment of a child under 16 with the circumstance of aggravation that the child was a lineal descendant (counts 3-5 and 7-10) and two counts of indecent treatment of a child under 16 with the circumstances of aggravation that the child was under 12 and a lineal descendant (counts 1-2). The appellant was also charged with one count of attempted rape (count 6) but was acquitted of that charge.

[81] The appellant was granted leave to amend his notice of appeal to raise the following grounds:

1. The verdicts were unreasonable and cannot be supported having regard to the evidence.

2. There has been an error of law, or a miscarriage of justice, as a result of the trial judge ruling that documents from the Caboolture and Redcliffe Hospital records containing purported notes of conversations between the complainant and others were not admissible in evidence.

3. The trial judge erred in admitting a recording of a conversation between the appellant and complainant (the pretext call).

4. The acquittal on count 6 was so inconsistent with the convictions on the remaining counts as to suggest unreasonableness.

The evidence at trial

The complainant's evidence

[82] The appellant is the father of the complainant, who was born on 25 October 1999. The complainant's evidence was received by way of a s 93A interview recorded with police officers on 13 June 2015[152] and pre-recorded evidence before the trial on 13 October 2016. She told police that, starting when she was six years old, the appellant had shown her pornographic movies, masturbated in her presence, ejaculated on her and attempted sexual intercourse with her.[153]

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152 AB at 247 (the title page of the transcript of the interview has the correct date but the header on subsequent pages erroneously refers to 2016 instead of 2015).

153 AB at 249.38-250.17.

[83] In respect of the specific allegations the subject of the indictment, the evidence given by the complainant may be summarised as follows:

Count 1

[84] The complainant's evidence was that some time when she was six years old, the same year that her cat died, the appellant asked her if she wanted to watch *The Little Mermaid*. He took her into the lounge room and played a video on a laptop computer. The video depicted a man and a woman having sex. It played for about an hour.[154]

[85] In cross-examination it was suggested, but not accepted by the complainant, that the cat died in 2007.[155] This differed from the evidence given by the complainant's mother that the cat died in 2007, which was also the evidence of the appellant.[156]

Count 2

[86] The complainant's evidence was that one Saturday, just before the complainant's birthday party when she was in grade six, the appellant was driving her home from gymnastics. He exposed his penis in the car and said they could play a game at the party where a rubber band was placed around the appellant's penis and the girls have to remove it with their mouths. The appellant handled his exposed penis and ejaculated onto her shirt.[157] In cross-examination it was suggested, but not accepted by the complainant, that she did not begin attending gymnastics until 2013.[158]

[87] This contrasted with evidence given by the appellant that the complainant did not attend Saturday lessons until late 2012 or early 2013.[159] The evidence of the complainant's mother was to the effect that the complainant did attend lessons on Saturdays for some time until she stopped gymnastics in 2012 when she was 13.[160]

Count 3

[88] The complainant's evidence was that the appellant showed her a video on a computer that depicted her maternal uncle's ex-wife, K, inserting a purple dildo into her vagina and anus.[161] The complainant's maternal uncle gave evidence that he lived with the family for some time after his separation. His evidence was that he brought a black Dell work computer to the house. On it was a video of his ex-wife, K, using a purple vibrator. He left the computer when he moved out in 2014.[162]

Counts 4 and 5

[89] The complainant's evidence was that during the June/July school holidays in 2012, the complainant worked with the appellant in a shed at Narangba. On one occasion while working in the shed, the complainant saw him use a computer to search the internet using the word "blowjob". She saw a results screen with images of women

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154 AB at 265.1-50; 266.25-37; 269.30-270.33.
155 AB at 36.28-36.
156 AB at 98.31; 153.27-29.
157 AB at 249.46-55; 298.46-299.58.
158 AB at 38.20.
159 AB at 150.13-16.
160 AB at 94.6-27.
161 AB at 284.53-285.14; 286.3-52.
162 AB at 101.5-102.3.

performing oral sex on men. She did not look at the videos, but could hear them being played and heard sounds of moaning and sucking noises. On that occasion, the appellant exposed his penis and masturbated in her presence.[163]

Count 6

[90] The complainant gave evidence that on an occasion just after Valentine's Day in 2013, she had broken up with a boyfriend and she was in her bedroom, upset. The appellant came in, sat on the bed and said he wanted to have sex. She said, "Fuck off" and he pinned her down on the bed by the wrists. The complainant struggled as the appellant exposed, or partially exposed, his penis.[164] When he was some 30 centimetres away from her body, the complainant kicked him in the genitals and left the room.[165] In cross-examination, the complainant said she was lying in bed listening to her iPod when the appellant came into her room and the incident occurred. She saw the door open and pretended to be asleep. The appellant asked if she was awake and when she said yes, he said he wanted to have sex with her.[166]

Counts 7 and 8

[91] The complainant gave evidence of an occasion when she was in grade 9 and her mother was away in Thailand, when she was watching a show called *Vampire Diaries*. She said that at about 7.00 pm, after watching episodes three to seven with the appellant, he changed the movie to a pornographic movie called *Vampire Sex Diaries*.[167] The complainant said that when this occurred the appellant held her wrist and would not let her leave. He masturbated under the sheets while the movie was playing and moaned as he did so.[168]

Counts 9 and 10

[92] The complainant gave evidence that when her mother was away in Thailand in June or July 2014, the appellant purchased alcoholic drinks for the complainant and her friends, who had a party at the house. The next day, the complainant was at the house with her friends S (S) and N. The appellant could be heard moaning from the lounge room. When the complainant went to see the appellant, he had his hands in his pants and was masturbating. She yelled at him to stop and he did. N left and later the complainant and S were in the kitchen getting lunch. The appellant could be heard moaning again. The complainant told S to go outside or to the theatre room. The complainant saw the appellant on the couch with a hand down his pants, masturbating while watching pornography on his phone.[169]

Other evidence given by the complainant

[93] The complainant described other occasions when the appellant would masturbate in her presence or have her watch pornographic videos. She also described sexually

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163 AB at 272.33-273.20; 275.9-58; 276.50-277.58; 279.1-29.
164 AB at 316.49-317.7.
165 AB at 321.25-39.
166 AB at 41.12-22.
167 AB at 255-256.
168 AB at 254.23-58; 256.39-257.47.
169 AB at 322.47-57; 326.19-59; 323.52-324.58.

suggestive statements made by the appellant after purchasing cucumbers and other vegetables and electric toothbrushes.[170]

[94] In cross-examination, the complainant was questioned briefly about her attendance at the Redcliffe Hospital in May 2015, prior to her complaint to police, which the complainant said occurred as a result of an anxiety attack at school. She agreed that she had told medical staff at the hospital about things that the appellant had done to her, including that the appellant had masturbated in front of her and had shown her "things". She denied telling staff that the appellant had touched her on the leg in the car on one occasion and said she was on a strong dose of morphine for her anxiety. She also disagreed with suggestions that she had not told staff about the appellant trying to have sex with her and ejaculating on her shirt.[171]

The pretext call

[95] At Christmas 2014, the complainant's mother had confronted the appellant about allegations of sexual offences raised with the mother by the complainant. In January 2015, the appellant was asked, or told, to leave the house.[172] In June 2015, the complainant telephoned that appellant and their short conversation (the pretext call) was recorded.[173]

[96] The following is an extract of the pretext call:

> "Complainant: But why did you do that stuff to me? (sounds of crying)
>
> Appellant: I don't know darling. I – look, to explain it best I can, I've probably been in depression for the last five years. Okay? You don't realise that you're in it when you're in it. And it, like, it's not until you see that there's a possibility that you're not, there's a chance that you may find some happiness instead of being depressed all the time. You know, and when you are depressed you put on a show to try and sort of, and you'll do anything to try and find some happiness. Do you understand what I'm saying?
>
> Complainant: Yeah.
>
> Appellant: Look I, I…
>
> Complainant: It doesn't give you an excuse to do what you done.
>
> Appellant: No it doesn't, darling. No it doesn't.
>
> Complainant: You know I get nightmares.
>
> Appellant: Y-, well…
>
> Complainant: From what you've done.

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170 This evidence was the subject of orthodox directions concerning uncharged discreditable conduct: AB at 213.32-214.32.

171 AB at 40.31-41.10.

172 AB at 159.15-27.

173 The recording of this conversation was Exhibit 2.

Appellant: Mmhmm. And n-, I'm, the truth is that I'll never understand what, what you go through.

…

Complainant: And you took my innocence.

Appellant: I may have taken your innocence.

Complainant: I don't know how to believe you anymore.

Appellant: Hey?

Complainant: I don't know how to believe you anymore, the stories you've told me, the times you've pulled out your dick out in front of me, wanked in front of me, in front of my friends, in the same room as me and S while we were eating [indistinct]. You were on the couch wanking yourself. Do you not regret that? [pause of 8 seconds] Dad?

…

Appellant: Can you hear me now?

Complainant: Yep.

Appellant: Sorry, something just played up with my headphones. I don't know what I was thinking and I really wish I could take it all back, but I know I can't. That's the truth of it. You know, I- I don't know what I was thinking, truly. Out of my mind, I don't know why. And th- the truth is I- I have been really depressed for a very long time. I struggle to get up every day, just to do anything. You know, it's hard for me to actually even start work …

Complainant: Dad, I've been depressed for years. Nine years to be exact. From when you started to when it ended. And technically I still am.

Appellant: You know…

Complainant: And…

Appellant: The, the one thing that I am glad in a way is that, ah, I won't have the opportunity to do anything else to you, you know."

Evidence of S

[97] S, a friend of the complainant's, gave evidence that she recalled having been at the complainant's house around June 2014. She recalled being with the complainant in her bedroom and hearing the appellant in the lounge room outside the door "masturbating, because we could hear him moaning and stuff like that". They left the bedroom and S saw the appellant on the lounge with a hand down his pants and later, as she ate lunch, she heard him moaning again.

[98] She also gave evidence of an occasion in grade 7 when the complainant told her that the appellant made her watch porn with him.[174]

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174 AB at 20.3-42.

Evidence of M

[99] M gave evidence that she had been best friends with the complainant. She said that the complainant told her that her father "wanked" in front of her in the front seat of the car. She recalled a conversation when the complainant said the appellant had "raped [her] again, kind of thing". At the time the complainant was staying with her a lot. She thought the conversation was in October 2015.

[100] She also recalled a conversation in late 2015 or early 2016, when the complainant mentioned she had "to suck her dad off". The complainant also told her some time before the complainant's mother went to Thailand that her father made her watch pornographic movies.[175]

Evidence of D

[101] D gave evidence that she was the complainant's cousin and that, towards the end of 2015 or the beginning of 2016, the complainant told her that the appellant had made her have sex with a friend in his presence.[176]

[102] When cross-examined prior to the trial, the complainant agreed she had said this to D and went on to say an event of that general kind occurred the night before the events constituting counts 9 and 10.[177]

The appellant's evidence

[103] The appellant gave evidence. He denied any sexual contact with the complainant and specifically denied the allegations in the indictment. He denied exposing his penis or knowing of the existence of the video of K using a purple vibrator.[178]

[104] The appellant also gave evidence about the telephone conversation with the complainant in June 2015 (the pretext call). His evidence was that it related to the complainant's depression rather than any sexual misconduct on his part. He said that, at one point in the conversation, he could not hear her and said he did not hear the complainant talk about the appellant exposing his penis or "wanking" in front of her as he was having trouble with his headphones.[179] In cross-examination, the appellant said that in relation to his statement made during the conversation, "I may have taken your innocence", it was his way of reflecting on what the complainant had said "and to give her some concessional ground as to not to elevate her distress". He denied it was a reference to taking her sexual innocence but rather was about the breakup of his relationship with his wife, the complainant's mother, and leaving the family home.[180] He also said the reference to not having the opportunity to hurt the complainant again related to matters other than sexual misconduct.[181]

Application for leave to adduce evidence

[105] The appellant brought an application for leave to adduce evidence, being medical notes from the Caboolture and Redcliffe Hospitals. The appellant submitted that

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175 AB at 29.34-32.23.
176 AB at 85-86.
177 AB at 40.18-29.
178 AB at 148-149.
179 AB at 155-157.
180 AB at 162.26-46.
181 AB at 164.45-165.7.

these show that the complainant suffered from a "disease of the mind" and give context to the pretext call.

[106] The relevant principles concerning further evidence are as set out in *R v Spina*.[182] Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been discovered.[183] On the other hand, new or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence have then been discovered.

[107] The test for determining whether to allow an appeal against conviction based on fresh evidence is whether it is established that there is a significant possibility (or that it is likely) that, in light of all the admissible evidence, both the fresh evidence and the evidence at trial, a jury acting reasonably would have acquitted.[184]

[108] The evidence the subject of the application was not fresh evidence. It was available to the appellant at the time of the hearing if had been sought. Accordingly, the relevant approach is as set out in *Spina*[185] – that is, the Court must consider whether it should receive the evidence and whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice.

[109] The matters relied upon by the appellant in relation to why leave should be granted to adduce the evidence were substantially the same as those relied on by the appellant in respect of the ground of appeal that the trial miscarried and it is convenient to deal with this matter under that ground.

Grounds of appeal

Unreasonable verdict

Relevant principles

[110] A complaint that a verdict is unreasonable or cannot be supported by the evidence requires this Court to review the appeal record and determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt. A review of this kind "involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials".[186] The relevant principles may be summarised as follows:[187]

> "In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty.[188] In most cases, a doubt experienced by an

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182 [2012] QCA 179 at [32]-[33] per McMurdo P, Fraser JA and Margaret Wilson AJA agreeing.

183 *Ratten v The Queen* (1974) 131 CLR 510 at 516–517; *Lawless v The Queen* (1979) 142 CLR 659 at 674-676; and *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229 at [2], [10]–[19].

184 *Gallagher v The Queen* (1986) 160 CLR 392, 397, 407; *Mickelberg v The Queen* (1989) 167 CLR 259, 273, 292, 301–302.

185 [2012] QCA 179 at [34] per McMurdo P, Fraser JA and Margaret Wilson AJA agreeing.

186 *MFA v The Queen* (2002) 213 CLR 606 at 624[59] per McHugh, Gummow and Kirby JJ.

187 See *R v SCH* [2015] QCA 38 at [7]–[8].

188 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615 [26].

> appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred.[189] However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court 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.[190]"

[111] This Court must, therefore, undertake "an independent assessment of the evidence, both as to its sufficiency and its quality"[191] in accordance with these principles and always mindful of the primacy of the jury in criminal trials as recently reiterated in *R v Baden-Clay*.[192]

Appellant's submissions

[112] The appellant submitted that there were inconsistencies in the complainant's evidence that affected the complainant's credibility and rendered her evidence unreliable such that it was not open to the jury to be satisfied of his guilt on any of the counts of which he was convicted. The appellant pointed, in particular, to the following inconsistencies in relation to those counts.

[113] As to count 1, the complainant placed the events concerning that count time wise to the death of the family cat. However, there was evidence to support the appellant's evidence that the cat died in 2007, while the events of count 1 were alleged to have occurred in 2005. The appellant further submitted that the complainant's evidence in relation to what she saw in the videos changed during her s 93A statement and attributed this to the complainant's evidence not being from her memory. Further, the association of moaning with masturbation was a "peculiarity" of association made by the complainant.

[114] As to count 2, the complainant attached the events of that count to a trip home in the car from gymnastics via Woolworths on a Saturday afternoon in October 2010. There was evidence that "they all did gymnastics on Saturday". The appellant referred to evidence that the complainant having previously done gymnastics on weekdays. The appellant submitted that he did not know about the party that he had supposedly purchased alcohol for and that the complainant's evidence in relation to what certain items (carrots and toothbrushes) had been bought for changed. The appellant referred to different particulars of the extent of the ejaculation described by the complainant.

[115] As to count 3, the appellant submitted that he was at a significant disadvantage in that K died before being able to give evidence regarding what was said about her in relation to that count. Further, the appellant contended that the complainant's evidence that her uncle (who was a childcare worker) made his computer available

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189 *MFA v The Queen* (2002) 213 CLR 606 at 623 [56].

190 *M v The Queen* (1994) 181 CLR 487 at 494-494; *MFA v The Queen* (2002) 213 CLR 606 at 623.

191 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at 406.

192 (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

to the appellant's children with "home movies" of his ex-wife on it was implausible. The appellant asserted that there was no need for a computer to be left for the appellant's children to use as the appellant had six computers of his own. The appellant submitted there was cause to doubt the complainant's credibility given that, although she had told her mother about "all this stuff", the complainant's mother did not remember being told about K. The appellant referred to evidence as to the date of the incident alleged by the complainant changing from 2009 to 2010, then to 2011 and 2012.

[116] As to counts 4 and 5, the complainant's evidence involved an account that she was working in the appellant's shed for six hours from 6.00 am until noon.[193] The appellant submitted that this was first said to be so that the complainant could pay for phone credit of $30 per month[194] but was later said to be to pay for the phone that she had received for her 12th birthday.[195] The appellant submitted that the complainant's mother's evidence contradicted the complainant's, as the mother said that the complainant only worked in the shed for five minutes to a couple of hours. The appellant also pointed to a change in the complainant's evidence as to the number of times she had witnessed the appellant sucking and moaning and watching movies and masturbating. The appellant further suggested that the complainant's evidence was not credible on the basis that there was no internet in the shed and that the computer was part of specialised equipment.

[117] The appellant submitted that there were a number of changes in the complainant's account concerning counts 7 and 8. The complainant said that the appellant was in the uncle's bedroom; however, the appellant submitted that at that time the uncle had not yet moved out of the house. The appellant referred to differences in the complainant's evidence as to the events. In that regard, the appellant referred to evidence of the complainant that the appellant came into mum's bed and said he had a movie for the complainant, which he submitted was inconsistent with her evidence that the appellant "just changed [the movie], I wouldn't have noticed, I didn't want to be there."[196] This was said to be inconsistent with other evidence given by the complainant as to how long the complainant watched movies before the appellant held the complainant's wrist and masturbated and moaned beside her and how long that incident continued for.

[118] The appellant referred to the prosecution's statement that "when you look at the detail that she went into, into what was on some of those videos, that it would be extraordinary for her to be able to successfully weave all of those details in the version she gave to police".[197] This detail included that, after the incident, the complainant "went and vomited in the toilet next to our laundry, which is close to [her] bedroom".[198] The appellant submitted that it would be extraordinary indeed for the complainant to be able to provide the level of detail she did if she had watched the video for seven and a half hours in a distressed condition as she claimed. The appellant submitted that the only logical conclusion was that the video in fact belonged to the complainant who had watched it many times.

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193 AB at 282.13-33.
194 AB at 328.57-58.
195 AB at 39.1-3.
196 AB at 256.
197 AB at 229.22-24.
198 AB at 260.

[119] As to counts 9 and 10, the appellant referred to evidence given by him that at the time of the events, he was lying on the couch, suffering from stomach pains, which explained the moaning sounds heard by the complainant. The appellant asserted that the complainant manipulated what had occurred and colluded with her friend S about the event. The appellant submitted that at first the complainant accepted that she had spoken to S after the incident, then later avoided saying that she had, and later again denied having done so. The appellant submitted that S's version of events was consistent with his, other than the part about him masturbating, which was what the complainant had told her. The appellant also submitted that the complainant's version of events was hard to follow. The appellant asserted the complainant's evidence that S stopped being her friend after these events[199] was inconsistent with evidence that S went to the complainant's party weeks later.

Consideration

[120] In disputing the proposition that the guilty verdicts were unreasonable, the respondent submitted that the complainant's evidence was plausible and was not marred by significant inconsistencies and that her account derived substantial support from three pieces of evidence. In that regard, the respondent referred to the evidence of the complainant's maternal uncle, C, about the video of his ex-wife using a purple vibrator, submitting that it was highly improbable that the complainant could have described a video so similar by chance, which supported the conclusion that she had seen the video on the computer in the house. It was submitted that, while various possibilities existed to explain how the complainant might have seen the video other than as she alleged, it was certainly open to the jury to consider this evidence supported her account. Secondly, a further piece of evidence in support of the complainant's evidence related to counts 9 and 10 and concerned S's evidence which supported the complainant's account of the appellant masturbating in the house on that occasion. Absent collusion, the evidence of S could only be seen as making it more likely the events occurred as described by the complainant. Thirdly, the pretext call contained statements by the appellant that were able to be viewed as admissions. In particular, the references to depression being no excuse, taking her innocence and not having the opportunity to hurt her again were all capable of being seen by the jury as acknowledgments by the appellant of sexual interference.

[121] The matters raised by the respondent provide compelling reasons for accepting the complainant as a credible and reliable witness, particularly, in the context of the telephone call coming after the appellant left the house once allegations of sexual misconduct were raised. Against these pieces of evidence, the inconsistencies raised by the appellant were not such that they could have so undermined the complainant that the jury could not rely on her account. Matters such as the inconsistency in the evidence concerning when the family cat died (relevant to count 1) were trivial. Furthermore, apparent inconsistencies between the allegations of the complainant and the recollections of the witness M were, as the respondent submitted, able to be understood by reference to failings of memory on her part rather than mendaciousness by the complainant. Moreover, the appellant's submissions in relation to counts 7 and 8 incorrectly stated the effect of the complainant's evidence. The complainant's evidence was not that she had been

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199 AB at 40.6-8.

watching the pornographic movie for about seven and a half hours, but that she had been watching about seven episodes of *Vampire Diaries* before the appellant changed the movie and that she watched the pornographic movie for about an hour and a half.[200] Likewise, as to counts 9 and 10, there is no inconsistency arising from the complainant's evidence that S ceased being her friend after the events the subject of those counts given the party occurred the day before, not weeks later.[201]

[122] As was remarked in *MFA v The Queen*,[202] it is "not uncommon in most trials" for "some aspects of the evidence [to be] less than wholly satisfactory". The evaluation of such conflicts is a matter for the jury. The appellate court's task is to determine whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention.[203]

[123] The matters raised by the appellant, especially when viewed in light of the evidence that supported the complainant's account, are not such as to have compelled doubt in the minds of the jury. I am satisfied on the basis of my own independent assessment of the evidence as a whole that the verdicts of guilty were open to the jury.

Are the verdicts impermissibly inconsistent (in terms of the acquittal on count 6)?

Appellant's submissions

[124] The appellant submitted that his convictions on counts 1-5 and 7-10 were inconsistent with his acquittal on count 6. The appellant argued that the quality or strength of the evidence in relation to count 6 was no weaker than that in relation to the remaining counts. Further, he asserted that there are striking similarities between count 6 and the other counts and it followed that there would also be reasonable doubt in relation to his guilt on the other counts.

Relevant principles

[125] The principles concerning inconsistent verdicts are well-established.[204] They were summarised in *R v GAW* as follows:[205]

> "Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of "logic and reasonableness"; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because "no reasonable jury, who had applied their mind properly to the facts in the case could have arrived" at them.[206]

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200 AB at 257.

201 There was, however, evidence that the lunch incident and the "party" occurred in the same week. S stopped being friends after the lunch incident: AB 322.38-323.30.

202 (2002) 213 CLR 606.

203 *MFA v The Queen* (2002) 213 CLR 606 at 634 per McHugh, Gummow and Kirby JJ.

204 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368 per Gaudron, Gummow & Kirby JJ.

205 [2015] QCA 166 at [19]-[23].

206 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 per Gaudron, Gummow & Kirby JJ, quoting *R v Stone* (unreported, 13 December 1954) per Devlin J.

However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:[207]

> "... if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."

In that regard, "the view may be taken that the jury simply 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".[208] Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.[209]

It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside.[210] While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency;[211] where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable, and strongly suggests a compromise in the performance of the jury's duty, or which suggests 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."

[126] In *R v CX*,[212] Jerrard JA, referring to *Osland v The Queen*,[213] stated:

> "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."

Consideration

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207 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ (citations omitted).

208 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ (citations omitted).

209 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ.

210 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

211 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

212 [2006] QCA 409 at [33].

213 (1998) 197 CLR 316 at 356-357 per McHugh J.

[127] In the present case, a rational explanation exists for the acquittal on count 6. As the respondent submitted, the trial judge directed the jury, correctly, that the prosecution was required to prove that the appellant *intended* to penetrate the vagina of the complainant with his penis against her wishes.

[128] The complainant's account was that he was some 30 centimetres away with his penis perhaps partially exposed when she kicked him and he desisted. She was at the time fully dressed. This was evidence that could understandably have left the jury with a doubt as to his intention. There is no merit in this ground of appeal.

The Redcliffe Hospital and Caboolture Hospital documents

Appellant's submissions

[129] The appellant submitted that the verdict was unsafe because the whole of the evidence was not before the jury. In particular, medical notes from the Redcliffe and Caboolture Hospitals were not admitted into evidence. The appellant submitted that that evidence would have demonstrated inconsistencies between the complainant's statements recorded in those records and her s 93A evidence and cross-examination evidence. The evidence was therefore relevant and should have been admitted pursuant to s 93(1)(b)(iii) and s 93(2) of the *Evidence Act* 1977 (Qld). The appellant asserted that, due to inadvertence, there was no time to raise the evidence in a pre-trial hearing.

[130] The appellant submitted that the evidence was also admissible to show that the complainant had a "disease or defect or abnormality of mind" which affected the reliability of her evidence. This would not only demonstrate a general opinion that the complainant had a disease of the mind but would show the foundation and reasons for the complainant's diagnosis and would affect her credibility in relation to the complaint.

[131] The appellant also submitted that the medical notes were necessary to give context to the pretext phone call and that he lost an opportunity to put to the jury the whole of the circumstances in which he found himself at the time of the pretext phone call. However, although the appellant gave evidence, he was unable to explain to the jury why he responded in the way that he did during the phone call and how he was restricted in the evidence he could give. The appellant submitted that the records would have revealed that, before the pretext phone call, the complainant had been found waiting in the dark with a knife with intent to kill on 21 May 2015. On a later occasion, the complainant told the appellant "in a cold and decisive tone" that she was "going to kill mum, then K, then Q, then myself". The appellant submitted that these matters would have been revealed by the medical notes.

Consideration

[132] The crux of the appellant's submissions as to the admissibility of the medical records was not only that they would have revealed inconsistency in the complainant's evidence but also that they would have provided a context as to why the appellant said what he said in the pretext call. There are a number of fundamental difficulties with the appellant's submission.

[133] Importantly, there was no dispute that the medical notes were made available to the appellant's lawyers on 6 October 2016, a week before the complainant's

cross-examination was recorded. The only basis on which the records were tendered was a quite narrow one.[214] It was to prove the potential inconsistency in the complainant's account because of the absence of any record consistent with her complaint.

[134] While the contents of those records are not known other than the extent to which they were referred in the course of argument, it is apparent, as the respondent pointed out, that in the cross-examination of the complainant, five matters were put to her seemingly arising from them.

[135] The first concerned that the complainant told medical staff that the appellant masturbated in front of her (which the complainant agreed that she had).[215] The second was that the complainant told staff that the appellant had shown her "things", with which she also agreed.[216] As the respondent submitted, the complainant agreed with the first and second propositions so no question of inconsistency arose. The third matter put to the complainant was that she told medical staff that the appellant touched her on the leg in the car on one occasion, which the complainant denied telling staff.[217] This was dealt with by way of an admission to the effect that the complainant did tell a staff member at the Redcliffe hospital that the appellant touched her on one occasion in the car on the leg.[218]

[136] As to the fourth matter, it was that the complainant did not tell the medical staff that the appellant tried to have sex with her, which the complainant also denied.[219] The fifth matter was that the complainant did not tell staff that the appellant ejaculated on her shirt. She also denied that proposition.[220] It appears from the cross-examination that the notes were silent as to the fourth and fifth matters. The absence of a note of these matters could not, as the respondent submitted, amount to proof that the complainant did not make complaints to medical staff that the appellant tried to have sex with her and that he had ejaculated on her shirt. Section 93 of the *Evidence Act* permits the admission, in certain circumstances, of documents tending to establish facts that would themselves be admissible in oral testimony. The notes themselves were irrelevant in this regard as they could not rationally affect the assessment of whether the complainant's testimony on this point was true. In those circumstances, s 93 was of no assistance to the appellant. The trial judge was therefore correct to reject the proposed tender of documents.

[137] The records were not sought or able to be admitted for the purpose of proving the complainant's mental state. They were, therefore, as the respondent argued, of no value in relation to any contention that the appellant's statements in the pretext call were to be understood in the context of the appellant's fragile mental state. Other topics said by the appellant to be referred to in the medical notes were not raised at the trial and, there being no ruling about the admissibility of these matters, the appellant must demonstrate that the fact that the evidence was not received has led to a miscarriage of justice.

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214 AB at 143.
215 AB at 40.38.
216 AB at 40.40.
217 AB at 40.41-44.
218 AB at 241.
219 AB at 41.1-3; 41.7-10.
220 AB at 41.5-6.

[138] At no stage did the appellant's counsel seek to lead evidence of, or even cross-examine the complainant on, her mental state or other topics now raised by the appellant. There are obvious reasons for not so doing. An exploration of the mental state of the complainant with a view to establishing that she was depressed, suicidal or even homicidal would have led the jury to question what exactly it was that induced this mental state. Consideration of such a question would not only have been unlikely to have operated in the appellant's favour, it would have been likely to be highly prejudicial.

[139] While the documentation may have brought out some issues as to the complainant's fragility, the overwhelming effect of the documents would have been to bolster the complainant's credibility by revealing evidence of complaint consistent with the sexual offending by the appellant. The effect of such evidence was likely to have been highly prejudicial to the defence case and it is for that reason, no doubt, that the appellant's counsel did not seek more than quite limited tender of the material.

[140] Indeed, it is difficult to see that any competent counsel would have sought admission of all the records on the latter ground. The effect of such as approach would have been deleterious to the appellant's case. There would certainly have been a failure to suggest that the appellant was not guilty of the offences he was convicted of.

[141] There was no miscarriage of justice in not admitting the records. For the same reasons, the application for leave to adduce it now should be refused.

Admissibility of the pretext phone call

Appellant's submissions

[142] The appellant alleged that his implied admissions were obtained "in the shadows of the threats made by the complainant" and that he was not speaking on "even terms". The appellant submitted that the threats conveyed to the appellant of harm to others and of self-harm made reflected an unstable mind before the phone call and would have raised serious concerns about his voluntariness and the reliability of his implied admissions, as they were influenced by his prevailing concerns as to the complainant's mental stability. Citing *R v Samuels*[221] and *R v Te One*,[222] the appellant argued that the absence of the medical records resulted in the appellant's statements in the pretext call being misinterpreted. The appellant submitted that, if the medical notes had been admitted into evidence, it would have been determined on a *voir dire* that the pretext phone call was inadmissible.

Consideration

[143] There was no challenge to the admission of the pretext call. In those circumstances, the appellant was required to demonstrate that a miscarriage of justice has resulted from the evidence being admitted at the trial. As already stated, the matters now raised by the appellant as the basis for an application to exclude the evidence were known to him in October 2016 before the cross-examination of the complainant. In any event, they are not matters that would have determined the admissibility of the pretext call. At best they provided, as the respondent submitted, an explanation as

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221 [1962] NZLR 1036.
222 [1976] 2 NZLR 510.

to why apparently inculpatory statements by him were capable of innocent explanation. However, the possibility of an innocent explanation for the evidence did not render the pretext call irrelevant and therefore inadmissible. I note the authorities referred to by the appellant; however, the following statement relied upon by the respondent of Heydon J in *BBH v The Queen* is more pertinent:[223]

> "In assessing questions of relevance in relation to admissibility, it is not for judges to speculate about possible constructions of evidence which are adverse to the interests of the tendering party.
>
> …
>
> Hence factors which might affect the weight of the evidence given in chief, perhaps preventing it from in the end proving beyond reasonable doubt the fact which it is tendered to prove, are not relevant to admissibility."

[144] Moreover, the only basis for complaint made by the appellant before this Court was that the trial judge erred in admitting the pretext call because of its unreliability and the statements of the appellant recorded in it having been involuntary. The appellant's submissions concerning the involuntariness of any implied admissions have no substance.

[145] As the respondent submitted, the obvious answer to the appellant's assertion as to the unreliability of his statements and his being "overborne" by a "threat of harm" by the complainant to herself and others are undermined by the fact that he gave no such evidence at the trial.

[146] As to the issue of the unreliability of the pretext call, the only matters referred to by the appellant were assertions contained in his submissions in respect of which no evidence was given. These matters were that the appellant thought it was incumbent on him to offer words of "counselling" in the form of empathy in relation to the complainant's recent behaviour in order to keep her from harming herself or others. Further, the appellant asserted he had done the same in the past when the complainant had made claims of bullying and abuse by others, including students, gym coaches, other family members and her former close friends. There is no merit in this submission which seeks to, in effect, put forward a new case for which there is no evidential basis.

[147] As to the issue of the statements in the pretext call being "involuntary", the appellant, as mentioned, gave no evidence of being overborne when making the implied admissions because he perceived the complainant to be a "person in authority". In addition to the absence of evidence that the appellant was so overborne as to constitute "basal involuntariness". Furthermore, s 10 of the *Criminal Law Amendment Act* 1894 had no application in this case, as the complainant was not a "person in authority". The appellant's submission that the complainant was a person in authority was premised on remarks of White J in *Re Burt*[224] that a complainant in a sexual prosecution may be so characterised. However, the proposition that a child complaining of sexual offences was a person

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223 (2012) 245 CLR 499 at 532 [99] – [100].

224 [2000] 1 Qd R 28 at 42 [45] (McPherson J concurring).

in authority has been criticised in authorities,[225] as observed by the High Court in *Tofilau v The Queen*.[226] In the circumstances of this case, there could be no basis for concluding that the complainant was a person in authority in respect of the appellant for the purposes of s 10.

Complaint against legal representatives

[148] During the course of the hearing of this appeal, the appellant sought leave to amend the grounds of appeal to include a complaint against his legal counsel at trial "not doing what should be required of him".[227] In support of this complaint, the appellant relied on the failure to obtain medical records from the Royal Brisbane Hospital (RBH);[228] the failure to obtain statements from the doctors of that hospital;[229] the fact that witness statements were not taken from N, B or A;[230] and that, because of these things, the appellant went to trial unprepared.

[149] It was pointed out to the appellant that counsel took a considered course of action in not pursuing the medical records or statements from the doctors at RBH that would, on any reasonable view, have been detrimental, if not devastating, to the appellant's case at trial.

[150] In relation to the witness statements that were not obtained, the evidence indicated that the Crown contacted all three and they all declined to give statements. In fact, defence counsel, at the commencement of the trial, also attempted to contact the three, without success.[231] There is no apparent basis to fault the approach of the legal representatives.

[151] There is no substance to this complaint and leave to amend the grounds of appeal should be refused.

Orders

[152] The orders I propose are:

1. The application to adduce evidence is refused.
2. The appeal is dismissed.

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225 *Re Burt* [2000] 1 Qd R 28 at 32-33 [7]-[8] per Thomas JA and in *R v Tofilau (No 2)* (2006) 13 VR 28 at 66 [166] per Vincent JA (Callaway and Buchanan JJA concurring).
226 (2007) 231 CLR 396 at 481.
227 TR 1-25.45-1-26.2.
228 TR 1-12.36-37.
229 TR 1-12.37-38.
230 TR 1-26.20; 1-26.43.
231 AB at 111.19-35.