SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAY* [2017] QCA 185
PARTIES:	**R** **v** **PAY** (appellant)
FILE NO/S:	CA No 226 of 2016 DC No 647 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 27 July 2016 (Richards DCJ)
DELIVERED ON:	29 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2017
JUDGES:	Sofronoff P and McMurdo JA and Bowskill J
ORDERS:	**1. The appeal against the conviction on count 1 is allowed.** **2. The conviction on count 1 is quashed.** **3. Direct that a verdict of acquittal be entered on count 1.** **4. The appeal against the conviction on counts 3, 4 and 5 is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was found guilty by a jury of one count of maintaining an unlawful sexual relationship with a child, one count of indecent treatment of a child under 12 and two counts of rape – where the complainant was 10 - 11 years old at the time of the offences and 28 years at the time of trial – where the complainant gave evidence of the particular acts giving rise to the charges of indecent treatment and rape, but not of any further offending or an ongoing relationship – where the Crown relied on letters written by the child to the appellant to demonstrate the existence of an ongoing intimate relationship between the complainant and the appellant – whether the verdicts were unreasonable or not supported by the evidence *Criminal Code* (Qld), s 229B, s 668E(1) *Evidence Act* 1977 (Qld), s 93A

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Kemp (No 2) [1998] 2 Qd R 510; [1996] QCA 514, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
J A Wooldridge for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Bowskill J and with the orders her Honour proposes.

[2] **McMURDO JA:** I agree with Bowskill J.

[3] **BOWSKILL J:** After a trial in the District Court the appellant was found guilty by a jury of maintaining an unlawful sexual relationship with a child (count 1), indecent treatment of a child under 12 (count 3) and two counts of rape (counts 4 and 5). In each case the complainant was the same child, aged 10 or 11, who lived in the house next door to the appellant at the time.

[4] The appellant appeals against the convictions on the ground that, in all the circumstances, the jury's verdict is unreasonable or cannot be supported having regard to the evidence (s 668E(1) of the *Criminal Code*).[1]

[5] An appeal on that ground requires this Court to perform an independent examination of the whole of the evidence to determine whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of committing each of the four offences. The question is one of fact; not whether there is, as a matter of law, evidence to support the verdict.[2] In performing this task, particular regard must be had to the role of the jury as the constitutional tribunal for deciding issues of fact in a criminal trial, and to the advantage enjoyed by the jury over a court of appeal of seeing and hearing the witnesses called at trial.[3] Although, as observed in *M v The Queen* (1994) 181 CLR 487 at 494:

> "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."[4]

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1 In the appellant's outline of argument, the ground is articulated as "the evidence presented to the jury was unsafe and unsatisfactory to return a guilty verdict", which has been treated as equivalent to the statutory ground in s 668E(1): *SKA v The Queen* (2011) 243 CLR 400 at [12], [37] and [80]; *BCM v The Queen* (2013) 303 ALR 387 at [27].

2 *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14], [20]-[22], referring to *M v The Queen* (1994) 181 CLR 487 at 492-493, 494-405; *R v Baden-Clay* (2016) 258 CLR 308 at [66].

3 *R v Baden-Clay* (2016) 258 CLR 308 at [65].

4 See also *R v Clapham* [2017] QCA 99 at [4]-[5].

The offences charged

[6] Count 1 alleged that on a date unknown between 15 February 1999 and 30 April 2003, at Deception Bay, the appellant, being an adult, maintained an unlawful sexual relationship with the complainant, a child under 16. There were two circumstances of aggravation alleged in respect of count 1: firstly, that in the course of the relationship the appellant indecently dealt with the complainant, who was a child under 12 years and, secondly, that in the course of the relationship the appellant raped the complainant.

[7] In the form that it was at the time, s 229B of the *Criminal Code*[5] provided, relevantly:

> "(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the prescribed age[6] is guilty of a crime and is liable to imprisonment for 14 years.
>
> (2) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the accused person, as an adult, has, during the period in which it is alleged that he or she maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.
>
> (3) If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 14 years or more, the offender is liable in respect of maintaining the relationship to imprisonment for life. …"

[8] The two circumstances of aggravation arose because it was alleged that two of the particularised offences of a sexual nature were rape (counts 4 and 5) (the maximum penalty for which was then, as it is now, life imprisonment) and the third was indecent treatment of a child under 12 (count 3) (the maximum penalty for which was then 14 years). Consequently, the maximum penalty of life imprisonment was applicable for the maintaining offence.

[9] Each of count 3 (indecent treatment of a child under 12), count 4 and count 5 (rape) was alleged to have been committed on a date unknown between 15 February 1999 and 9 April 2001, at Deception Bay.

[10] Count 2 on the indictment was a further alleged offence of maintaining an unlawful sexual relationship with the same child, between 1 May 2003 and 10 April 2004. However, the Crown entered a *nolle prosequi* in respect of that count, in response to

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5 See Reprint 2B, as in force at 15 February 1999. Section 229B remained in this form until it was replaced under the *Sexual Offences (Protection of Children) Amendment Act* 2003 (Act No. 3 of 2003) with a new s 229B, which commenced on 1 May 2003.

6 Relevantly, 16 years (see s 229B(9)).

a submission on behalf of the defendant at the close of the Crown's case that there was no evidence to support it, because the complainant's evidence was that, after the conduct the subject of counts 3, 4 and 5, of which she did give evidence, there was no other sexual activity.[7]

The evidence at trial

[11] The complainant gave evidence in the court room at the trial. An application that she be declared a special witness, and be permitted to give her evidence from a remote room, was refused at the start of the trial (although she was permitted to have a support person nearby). She was 28 at the time she gave her evidence, her date of birth being in April 1988. She gave evidence of living in a house in Deception Bay, and moving into that house when she was 10, with her parents and brother and sister. She described the appellant as a neighbour, living in the house next door, with his wife and two kids, A and J, who were a lot younger than the complainant.[8]

[12] The complainant gave the following evidence, when asked to "think back to the first time anything inappropriate happened between" her and the appellant:

> "Are you able to tell us how old you were at that point? --- I think I was 10 or 12.
>
> Yep. And how long after you had moved into the house at … was this? --- I think it was about a month, if I remember.
>
> About a month, did you say? --- Yeah.
>
> And where were you at the time? --- What was the question?
>
> Okay. What were you doing that day? --- In the pool with the kids.
>
> Who do you mean by the kids? ---A and J.
>
> And whose pool were you in? ---Their pool.
>
> Okay. So that's the [appellant's] pool, is it? --- Yes.
>
> Okay. And what were you wearing? Do you remember? --- Full-piece suit – swimsuit.
>
> And what happened, [complainant]? --- We were playing in the pool probably couple of – I didn't really know what time like – but I was pretty sure it was a couple of hours and then I got out and went to the toilet and then I come out of the toilet and I was starting to walk back to the pool and then before I got to the backdoor, [the appellant] grabbed my wrist and then pulled me back from the backdoor and then started touching my breasts and my vagina for about five, 10 minutes.
>
> What did he touch your breasts and vagina with? --- His hand.
>
> Okay. And was that contact made on your swimmers or your skin? --- Swimmers.

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7 AB 52.
8 AB 19.

> Okay. And you said that you had used the toilet. Whereabouts was that located in the house? --- Underneath the house.
>
> Okay. And before [the appellant] touched you, did he say anything to you? --- No.
>
> While he was touching you, did he say anything to you? --- No.
>
> Did he say anything to you after he touched you? --- No.
>
> Do you recall how it was that the touching came to an end? --- What's – not sure.
>
> Okay. So can you describe for us how he was touching you with his hand on your breasts? --- He was just rubbing them in a circle way.
>
> And was it both breasts or just - - -?--- I think it was just one.
>
> And what about your vagina? Are you able to describe for us - - -? --- He was just - - -
>
> - - - how he touched - - -? --- - - - rubbing the area.
>
> And did he only use one hand or two hands? --- One hand.
>
> Okay. And you said he touched you for a while. What do you recall occurring after that? --- I'm not sure.
>
> Okay. How did it come to an end? --- I just walked out, then started playing with the kids again.
>
> Okay. And did you say anything to [the appellant] at any point during this? --- No."[9]

[13] This was the evidence giving rise to count 3, indecent dealing.

[14] The complainant was then asked to think back to the next time that she recalled "something inappropriate occurring" between her and the appellant:

> "Are you able to tell us how old you were on that occasion? --- I think I was 10, 12 again.
>
> So when you say 10, 12, do you mean 10 to 12? --- Yeah.
>
> Okay. And do you remember how long it was after the first incident? --- About a month after.
>
> And how did that incident occur? --- L [the appellant's wife] asked me to baby-sit [A and J] for the night and – while they – they were going off to a concert and I was – I went over late that afternoon and we were watching movies most of the night and [A and J] fell asleep and then I waited for them to fall asleep and then I started watching movies and then I was – I waited for – wait, I fell asleep as well because they were coming – they were going to be home late and then they come home and then I was on one mattress, [A and J] was on the sofa bed and [the appellant] was on the other side of the sofa bed on the mattress.

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9 AB 20-21.

Okay. So you said that you fell asleep? --- Yep.

Where did you fall asleep? --- On the single mattress on – next to the sofa bed.

Okay. Whereabouts in the house was that located? --- Downstairs.

Was that where you had been watching movies? --- Yes.

And where was it, sorry, that you said [A and J] were? --- On the sofa bed.

Okay. So you all fell asleep in the same area? --- Yes.

And you mentioned [the appellant]. When was the first time you noticed that [the appellant] had come home? --- When – it was, like, that – that night. And everything was dark. And then I felt him taking my undies off and then – and then he took his pants off and then he put his penis in my vagina. And then he started - - -

It's all right. You just take your time? --- And then he took his pants off and then he got on top of me and then he put his penis in my vagina, started going in and out. And then it really hurt. And then – and then I – and then he [indistinct] ejaculated in me. And then after that, he got up and then went to the mattress and went to sleep. And then I got up, went to the – I stood up and then I felt in run out me.

What was running out of you? --- His ejaculated - - -

The ejaculate? ---Yeah. And then I went to the toilet and then I found this white stuff on my undies. And then I went back to bed and cried in my sleep.

So you said that it was dark - - -? --- Yes.

- - - when this happened. What could you see? --- A shadow.

And what was the shadow of? --- [the appellant].

So what parts of [the appellant] could you see? --- His face.

And what was it that woke you - - -? --- Him - - -

- - - that night? --- Him – he was pulling my undies off.

So your underpants? --- Yes.

Do you remember now what else you were wearing to bed, if anything? --- A nightie.

I beg your pardon? --- A nightie.

All right. And you said that it really hurt. When this was happening, what were you feeling? --- Scared and afraid and I just wanted to go home, but I fell asleep, crying.

And was that the first time that you had engaged in sexual activity of that particular nature? --- Yes.

> Now, prior to [the appellant] putting his penis in your vagina, did he say anything to you? --- No.
>
> Did you say anything to him? --- No.
>
> During the act, were any words exchanged between the pair of you? --- No.
>
> What about afterwards? --- Nope.
>
> You said that he then went to bed on – or went to sleep on a mattress. Where was the mattress that he went to sleep on? --- The other side of the sofa bed."[10]

[15] That evidence was the basis of count 4, rape.

[16] The complainant was then asked about the next occasion she recalled something inappropriate happening between her and the appellant:

> "Do you remember how old you were on that occasion? --- I think it was 10 or 11 – ten or 12 again.
>
> And how long after the occasion that you've just told us about where they had gone to the concert was this next time? --- I think it was a month after.
>
> And how did that one come about? --- I was out the back with [A and J], playing - - -
>
> Out the back of where? --- Their – their place.
>
> [the appellant's] house? --- Yes.
>
> Yep? --- That's – that's the first time I got my period.
>
> Yeah? --- And I was – I went to the downstairs toilet to change my pad and when I went to the toilet, [the appellant] and myself – [the appellant] locked my – myself and him in the toilet. And then he bent me over the toilet and got his hand and pushed my back in – down to make a arch. And then he put – he pulled my undies and my pad across and put his penis in my vagina and started going in and out. And he pulled out and ejaculated everywhere. And I saw it all over the – everywhere.
>
> So you mean all over the toilet - - -? ---Toilet. Yes.
>
> - - - area where you were? Yes? --- And then I went back outside to play with the kids.
>
> And did you see where [the appellant] went? --- He come out, I think, 10 minutes after outside.
>
> All right. So you've described [the appellant] bending you over? --- Yeah.
>
> Where was he standing relative to you when he put his penis into your vagina? --- He was standing behind me.

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10 AB 21-23.

> So did he penetrate you from behind? --- Yeah.
>
> Now, prior to doing that, did he say anything to you? --- No.
>
> Did you say anything to him? --- No.
>
> What about during the act? Were any words exchanged between you at that point? --- No.
>
> Or afterwards? --- No.
>
> Okay. And how did you feel when this was occurring? --- Scared. I – scared and afraid if I went home, I didn't know how he'd react or how he'd think something was up."[11]

[17] That was the basis of count 5, rape.

[18] The complainant gave the following evidence, when asked if the appellant had sexual intercourse with her on any other occasions:

> "Apart from the two occasions that you've told us about where he's had sexual intercourse with you, did he have sexual intercourse with you on other occasions? --- I think so.
>
> Okay. Well, can you tell us about that? --- Not sure, but I think it was underneath the house again. I don't know – and that was, I think, before my parents stopped me from going back over there.
>
> Okay. All right. So are you able to tell us how many times - - -? --- [indistinct] three times.
>
> Three other times that you had sex with him? --- No. The – I think – I'm not sure.
>
> Okay. How often did it happen? --- I think it's a couple – a couple of weekends that I think - - -
>
> What do you mean by that? --- After the second time.
>
> Yeah. So after the second time, how – you said that you had sexual intercourse again? --- Yes. I think so.
>
> You can't tell us how many times. So how frequently are you able to say? --- I think it was very – I think it was a couple of months after – before my Mum stopped me from going over there.
>
> What was a couple of months? --- Sorry. I can't – what was the question again?
>
> Okay. So I'm just trying to work out – you've told us about three particular incidents. What else of a sexual nature happened between you and [the appellant]? --- It was only them three times. That's three, I think.
>
> So – I beg your pardon? --- I think it was just them three times.
>
> Okay. So there were those three occasions? --- Yeah.

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11 AB 23-24.

> And no other sexual activity between you and [the appellant]? --- No.
>
> Okay. So you told us that your mum told you or wouldn't permit you to go over to his house? --- Yes.
>
> And when was that? --- I think that was when I was 15 or 16.
>
> And prior to your mum telling you that, how often were you going to [the appellant's] house? --- I think it's just the weekend.
>
> On the weekends? --- Yeah.
>
> Is that Saturday and Sunday? --- Yeah.
>
> And what were you going to [the appellant's] house for? ---To play with [A and J].
>
> Okay. And would you see [the appellant] on those occasions? --- Yes.
>
> And what, if anything, happened between you and [the appellant] on those occasions? --- I don't know. Yeah. Sorry. My thing not [indistinct]
>
> HER HONOUR: Sorry. What did you say? --- My brain's not - - -
>
> Do you want a bit of a break? --- Yes, please."[12]

[19] After the break, the complainant said that she thought she continued to visit the appellant's house every weekend, after the second time he had sex with her, up until her mother told her she could not visit any longer, which was when she was 15 or 16. When asked again if anything of a sexual nature occurred between her and the appellant on those other occasions that she visited, the complainant said "No, I don't think so".[13] So although, as the extract of her evidence just referred to shows, she was equivocal at first, her evidence ultimately was that there was no other sexual activity between her and the appellant, apart from the three specific incidents she had described.

[20] There was also evidence at the trial of letters that the complainant wrote to the appellant, which she gave to him through the fence between their neighbouring properties.[14] There were seventeen letters tendered at the trial. The complainant said she was "probably 10 or 12" when she wrote them, that she had written them over a period of "12 months" and that they were written at the same time as the incidents she had described.[15] She said the appellant did not write back.[16]

[21] By way of example, one of the letters reads:

> "I'm just writing a short note to let you know that are you stay up there for the rest of the week. I am going to miss you tonight. Will you miss me - ring me this morning and afternoon 3:00 or 3:15. I love you very very very much. Write back.
>
> Love your sexy girl

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12 AB 24-25.
13 AB 26.
14 Exhibit 1.
15 AB 27.
16 AB 28.

> [appellant's name] too hotty for me
>
> Together for ever
>
> Miss you"[17]

[22] Another reads:

> "Hey Gorgeous. I'm just writing a short note to let you know that I missed you on the weekend. I love you so so so so so so so so much. Do you have any money could I got about $4 please if can. Better go know got to get ready for school. Love your sexy girl. PS I love you heaps and heaps."[18]

[23] A number of the letters ask "can I have some smokes" (or similar).[19]

[24] The complainant said that "smoke(s)" was a reference to cigarettes, and that the appellant would give her cigarettes. She also said that she had a mobile telephone when she wrote these letters, and that the appellant would ring her on her mobile at the time. She said she was "not sure" if he gave her money.[20]

[25] Another letter reads:

> "Sexy,
>
> I'm just writing a shor note to let you know that I can't take my phone to school anymore. Just because it doesn't have any money on it. Sorry you couldn't ring me the afternoon coz my phone went flat. Ok babe I love you so so so so so so much and I miss you so much… Love your gorgeous girl."[21]

[26] In a number of the letters the complainant refers to her older sister, for example, saying when she is going to be at home, or away from home.[22]

[27] Another reads:

> "Hey Gorgeous
>
> I'm just writing a short note to let you know that [M] asked me if I wanted to go back out. I said No cause I love you more then any one in the whole world. OK gorgeous I can't wait until tonight… ring me at 7:30".[23]

[28] The last two letters make reference to not being allowed to come over (to the appellant's house) any more. For example, one of the letters reads:

> "… I don't now if I will be aloud to go down the beach to go to the shop but I want to toach you and I want you really bad and I miss your hugs and kisses but the thing I really hate is I can't came over any more. I love you one hundred % that is true. I am not lieing ok

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17 AB 85.
18 AB 88.
19 AB 86, 90, 95, 103.
20 AB 28.
21 AB 93.
22 For example at AB 97, 98, 100, 109.
23 AB 108.

> better go now see you if I am aloud to go to the shop tomorrow. Love your sexy girl."[24]

[29] In her evidence, the complainant agreed she wrote that letter after her mother told her she couldn't visit anymore.[25]

[30] The appellant's ex-wife explained that the letters were discovered, after she and the appellant had separated, and he had left the home at Deception Bay. Another person was cleaning out the "side shed", which had cupboards along one wall, and when he went to pull an extension lead up from behind the cupboards, a big pile of letters came out.[26] She subsequently gave the letters to the police, in October 2012.[27]

[31] When asked a number of questions about the letters, in her evidence in chief, the complainant answered by saying that she did not know, or was not sure (for example, what she meant by being together forever; why she was telling him when her sister would or would not be home; why she called herself "sexy girl"; what she was referring to when she said "I miss your hugs and kisses" and "I want to toach you").[28]

[32] At that point, there was an application made, by the Crown, for the complainant to be declared hostile, and for leave to cross-examine her on a *voir dire*, on the basis that, the Crown submitted, it could be found she was not desirous of telling the truth, having regard to what she had previously said in her statement (about further incidents of sexual activity between her and the appellant). The learned trial judge refused the application, saying "I don't get the impression she's not desirous of telling the truth. I get the impression she's just drawing blanks or whatever".[29]

[33] The letters were relied upon, both in terms of their existence, but also as to the content of them, in reliance upon s 93A of the *Evidence Act* 1977, which permits the tender of a document containing statements made by a child (a person under 16), which would be admissible if given as direct oral evidence. The content of the letters was relied upon by the Crown to demonstrate the existence of an ongoing relationship of a romantic or intimate kind between the appellant and the complainant.[30] The jury were expressly alerted to the issue of the timing of the letters, including that they might think the last two of them must have been written at a later time, after the complainant had been told she could no longer go over to the appellant's house. The learned trial judge directed the jury that they could not use the evidence of the letters in support of the maintaining charge, unless they were satisfied they were written during the period of the offence, that is, prior to 30 April 2003, when the complainant was 15 or younger.[31]

[34] In cross-examination, the complainant was asked:

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24 AB 109.
25 AB 30.
26 AB 45.
27 AB 49.
28 AB 29-31.
29 AB 34.
30 Transcript of addresses at 1-5.
31 AB 69-70.

> "The three events that you have given evidence of – are you sure they happened when you were 10 or 11? --- Yes.
>
> Could they have happened later in time? --- No.
>
> You sure about that? --- Yes."[32]

[35] It was also put to the complainant that none of the incidents she described happened, which she rejected. The complainant accepted that, after these events, she was a frequent visitor to the appellant's house. She did not accept, when it was put to her, that during her teenage years, particularly when she was 15 or 16, she had "a bit of an infatuation" with the appellant, in the sense that she "had some feelings for" him. She also did not accept, when it was put to her, that she was lying about the allegations of the appellant having sex with her and touching her; nor that it was something she had imagined or dreamed.[33]

[36] The complainant's mother gave evidence, confirming that the complainant was born in April 1988; that the family had moved into the Deception Bay home in about 1999; and that the appellant and his wife and two children lived next door to them. Other evidence confirmed the home was purchased in February 1999,[34] making the complainant 10, almost 11 at the time. She described how the complainant would go over to play with the appellant's children, who were much younger, "pretty frequently. Probably at least four times a week". She also gave evidence of this coming to an end, in circumstances where there was a falling out with other neighbours, and that she stopped the complainant going over there when she was about 16. She said the appellant's response to that was to "become abusive", and "call us names, not very nice names, rock the house, break some palings of our fence". The complainant's family moved away from there about 12 months to two years after that.[35]

[37] The complainant's mother recalled receiving a phone call from the appellant's ex-wife in 2013, and then a phone call from a police officer in November 2014,[36] as a result of which she spoke to the complainant and asked if anything had happened between her and the appellant. The complainant's mother's evidence was that:

> "… at first, she denied it and then she broke down and said yes, that he'd touched her in her private parts. So I had to ring [the police officer] back to let her know."

[38] After speaking to the police officer, the complainant's mother said:

> "I spoke to [the complainant] again and asked her if there had been any sexual relations between her and [the appellant] and she said yes."

[39] In cross-examination, she expanded on this, saying:

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32 AB 36.
33 AB 36-37.
34 AB 50 and exhibit 2.
35 AB 39.
36 The police officer gave evidence explaining the delay between October 2012, when the appellant's ex-wife delivered the letters to the police, and November 2014, when she spoke to the complainant's mother, which included that the previous investigating officer went on maternity leave for about a year: AB 49.

> "I asked her if there'd been anything that went on between her and [the appellant] and she first denied it and then she admitted that there was – that he'd touched her in her private parts and then at a later – I asked her again and that's when she broke down and she said yes that they'd had sex."[37]

[40] The appellant's ex-wife also gave evidence. She referred to her daughter, A, being born in 1995 and her son, J, being born in 1997. She also confirmed the complainant's family lived next door, and recalled the complainant coming over to play with her kids "quite often", and that the complainant would baby-sit the kids when she and the appellant went to concerts. She gave evidence consistent with the complainant's account, of the complainant babysitting and, when they came home, she (the wife) would go upstairs and the appellant "would be downstairs with the kids and they'd have a sleepover", including with the complainant.[38] In relation to the concerts, there were questions directed to the appellant's ex-wife about which particular concerts she recalled attending,[39] and also evidence from the investigating officer about the dates (years) in which various concerts were held.[40]

[41] The appellant, as was his right, did not give or call evidence.

[42] The address to the jury by the Crown prosecutor referred to the complainant's evidence of when the events the subject of counts 3, 4 and 5 occurred, by reference to when the family moved into the Deception Bay home – that is, that count 3 occurred about a month after that, count 4 occurred about a month after that, and count 5 about a month after that again. On the basis of that, the Crown prosecutor argued that the jury would be persuaded she was probably 10 or 11.[41] Defence counsel, in his address, likewise, although putting the appellant's case that these things just did not happen at all, said the jury would proceed on the basis that the complainant's evidence was that these things happened when she was 10.[42]

[43] The learned trial judge gave appropriate directions to the jury, including as to the need to consider each count separately (consistent with *R v Markuleski* (2001) 52 NSWLR 82), as to the evidence in support of each of the charges, and the elements of them, emphasising that the essential question for their determination was whether the three incidents happened at all, which turned on their assessment of the complainant's evidence. The jury were directed in relation to the need to be satisfied, beyond reasonable doubt, for count 1, that there was some continuity or habituality of sexual conduct, not just isolated incidents; and in that regard, the learned trial judge directed the jury in relation to the relevance of the letters, as well as the arguments on behalf of the Crown and the appellant about them. Appropriate directions as to the use of the preliminary complaint evidence, and as to the cross-examination of the complainant about a motive to lie, were given. A direction in terms of *Longman v The Queen* (1989) 168 CLR 79 was also given, highlighting the difficulties the delay had caused the appellant, including, for example, in establishing an alibi; or for medical evidence, or DNA evidence (in relation to the ejaculate in the toilet or on sheets) to have been gathered. The jury were warned

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37 AB 41.
38 AB 44.
39 AB 44 and 46-47.
40 AB 51.
41 Transcript of addresses at 1-3.
42 Transcript of addresses at 1-10.

that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care and considering the circumstances relevant to its evaluation, they were satisfied beyond reasonable doubt of its truth and accuracy.

[44] No complaint is made by the appellant, on this appeal, about any aspect of the learned trial judge's summing up.

[45] It is necessary to set out one part of the learned trial judge's summing up, because of an issue raised on this appeal, as a matter of fairness, by the Crown. In dealing with the charges, the learned trial judge said:

> "So, turning to the actual charges, ladies and gentlemen. I'm just going to leave count 1 to one side, just for a minute, and we'll start with count 3. So count 2's gone. Count 3. That on a date unknown between the 15th day of February 1999 and the 9th day of April 2001 at Deception Bay in the State of Queensland, that the accused unlawfully and indecently dealt with [the complainant], a child under the age of 16 years, and [the complainant] was under 12 years. So, looking first at the dates, the Crown has to prove that on a date between those two dates that the offence occurred, and in relation to those dates, the complainant's date of birth was the 9th of April 1988, **so that the end date is her 12th birthday**. And the house that they moved into at Deception Bay, which is next door to the [appellant's], was purchased on the 16th of February 1999, so that's how you get that date spread there. Basically, from when they moved in, **till when she turned 12**. You've heard that [the street] was in Deception Bay.
>
> The next part of that is whether the accused dealt with the complainant, and the term "deals with" includes the touching of the child. It can be touching of the child by any part of the accused's body, but in this case it's said to be touching on the vagina and the breast by his hands. The dealing has to be indecent, and the word "indecent" just bears its ordinary everyday meaning, and that's what the community regards as indecent. It's what offends against currently accepted standards of decency, and it has to be judged in the light of time, place and circumstance. So if you're satisfied beyond reasonable doubt that there was, in fact, a dealing, which is denied, that is, that there was touching of the child on the vagina and the breast, **and she was 10/11**, you might not have any trouble finding that that was indecent by normal community standards.
>
> The dealing has to be unlawful, and unlawful just means not justified, authorised or excused by law, and in this case there's no suggestion that if there was touching, that there was any lawfulness about it. So you don't really have to worry about that. And then there's what we call a circumstance of aggravation, namely, that she was under 12, and that's just simple maths. You've got the date of birth, and the end date of that offence. So in relation to what she said about that, she said …"[43]

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43 AB 64-65. Emphasis added.

[46] The learned trial judge at this point referred to the complainant's evidence that she thought she was "10 or 12" when this happened, and that she thought it happened about a month after her family moved into their house, and the complainant's evidence of what happened, giving rise to count 3, and then continued:

> "So that's the allegation. The allegation is denied. So the essential question in relation to that charge is whether it actually happened. That are you satisfied beyond reasonable doubt about whether it happened, rather than whether it was indecent or unlawful, and that's really a matter for you for the assessment of the evidence."[44]

[47] The first part of the passage quoted in [45] contains a factual misstatement, in that the end date of the time period specified in the indictment for count 1 was not the complainant's 12th birthday, but rather her 13th birthday.

Were the verdicts unreasonable, or not supported by the evidence?

[48] The complainant gave clear evidence of the three occasions on which the appellant had committed sexual offences against her, the subject of counts 3, 4 and 5, each about a month apart, not long after her family moved into the home. She was not shaken from that evidence in cross-examination. The jury's verdict is consistent with them accepting that the complainant was a truthful and reliable witness. Although there were some respects in which the complainant's evidence of her age at the time ("10 or 12") was at variance with her evidence of when these events occurred (within one or two months of moving into the house, and then a month apart, meaning she would have been 10 or 11), her evidence of the actual incidents was clear, and, particularly in respect of counts 4 and 5, detailed. In any event, the evidence of when, in terms of temporal proximity to moving in to the house, these things occurred, may be expected to be more reliable, than a general reference to age. It is apparent that both the Crown, and defence counsel, proceeded on the basis that the complainant's evidence was to be understood, in terms of timing, by reference to what she said in the former respect, not the latter.

[49] There were also respects in which the complainant's evidence was supported, for example, that she did babysit for the appellant's children, when the appellant and his wife attended a concert; that the complainant would sleep downstairs with the children; and that when they came home, the appellant would sleep down there as well, while his wife remained upstairs – which was the circumstance in which the offence the subject of count 4 was committed.

[50] Having reviewed the whole of the evidence, in my view it was comfortably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 3, 4 and 5. The argument that the verdicts on these counts were unreasonable, or not supported by the evidence, must fail.

[51] In relation to count 1, the maintaining charge, it was necessary for the jury to be satisfied both that there were at least three acts of a sexual nature, committed during the period over which it was alleged the sexual relationship was maintained (which was said to be from February 1999 to April 2003) and that there was such a continuity, or habituality, of conduct, that it could be said a relationship was

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44 AB 66.

maintained, with the sexual element being a particular character of the relationship.[45]

[52] The jury could be satisfied there were three acts of a sexual nature – being the acts the subject of counts 3, 4 and 5. The complainant's evidence, which the jury must be taken to have accepted, was that these three acts happened within about a month of each other, shortly after her family moved into the home in Deception Bay. The complainant's evidence, although initially equivocal, was ultimately that, in terms of sexual activity between her and the appellant, "I think it was just them three times", and there was no other sexual activity between them.

[53] In the absence of the letters, it would not have been open to the jury to conclude that there was the kind of connection between the appellant and the complainant, having sufficient habituality, to be described as a relationship for the purposes of s 229B. Absent the letters, there was only evidence from the complainant of three incidents of sexual offending against her.

[54] But the question is, whether the existence and content of the letters supported a finding, beyond reasonable doubt, that the additional element of count 1 was established.

[55] The complainant's evidence was that she wrote the letters over about a 12 month period, which included the time when these three incidents occurred. Although it was apparent, and made clear to the jury, that at least two of them must have been written later on (around the time her mother told her she could no longer go over to the appellant's house).

[56] The content of the letters could support an inference that there was a "relationship" between the appellant and the complainant, in the sense of a "continuity of contact in which both parties are involved". But the letters are otherwise vague, indeed silent, on any sexual aspect being a particular character of the relationship.[46] There is no reference, for example, to the acts the subject of counts 3, 4 and 5. In the letters, the complainant repeatedly professes her love for the appellant; describes herself as "your sexy girl" and "your gorgeous girl"; refers to arrangements for him to call her at particular times (which she said, in her evidence, he did); makes reference to occasions when he is away, and she misses him; or when there are opportunities for them to meet, because, for example, her sister is away from home; asks him for cigarettes and money (the former, she said, he provided to her). It is reasonable to infer, from the content of the letters, that they were not merely one-sided demonstrations of purely imaginatory infatuation. It is also reasonable to infer that, in their immature and child-like way, they reflect an ongoing connection between the complainant and the appellant. The fact that the appellant kept them, hidden in the shed, also supports the drawing of that inference.

[57] But there is a disconnection, between the three particular incidents detailed by the complainant, and the "relationship" that is to be inferred from the letters. The complainant described feeling "scared and afraid" after both the first and second incidents of sexual intercourse. The letters are not consistent with that. The combination of the complainant's evidence, and the content of the letters, could tend to suggest that, when the letters were being written, there was something else, of an intimate or sexual nature, going on between the appellant and the complainant. But

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45 *R v Kemp (No 2)* [1998] 2 Qd R 510 at 511 per Macrossan CJ and at 518 per MacKenzie J (with whom Pincus JA agreed).

46 *R v Kemp (No 2)* [1998] 2 Qd R 510 at 511 per Macrossan CJ.

that was not her evidence. Her evidence was that there was no other sexual activity between her and the appellant, after these three incidents.

[58] Although the complainant said the letters were written in the space of about 12 months, at the same time as the incidents, the timing of them is not completely clear, as the content of the last two letters plainly shows. Taken with the three particularised (and only) incidents of sexual offending, the disconnection referred to is such as to cause reasonable doubt as to whether the element of maintaining a relationship, for the purposes of s 229B, was established on the evidence.

[59] The conclusion that this element of the maintaining offence was established, beyond reasonable doubt, depended on the drawing of an inference, from the existence and content of the letters. That there was an unlawful sexual relationship, as opposed to three isolated unlawful sexual acts, between the appellant and the complainant, at the time the incidents the subject of counts 3, 4 and 5 were committed, was not the only rational inference that could be drawn from the letters.[47] It was also reasonably open to infer that, after the three particularised incidents, a relationship of some other kind developed between the appellant and the complainant. But in that regard, there was no evidence at the trial that, after the three particularised incidents, there were further acts of a sexual nature by the appellant towards the complainant.

[60] In so far as count 1 is concerned, the appellant was entitled to the benefit of that reasonable doubt. In my view, for this reason, the verdict on count 1 was not supported by the evidence.

[61] The doubt I express about satisfaction of this element of the maintaining charge is one which does not call into question the credibility or reliability of the complainant – whose evidence was clearly accepted by the jury. The complainant herself did not give any evidence of an ongoing relationship between the appellant and her. The Crown's case in this respect rested entirely on the letters. Accordingly, the conclusion that I have reached about count 1 does not impugn the jury's verdicts on counts 3, 4 and 5 which are plainly supported by the evidence.

[62] It follows that, in so far as count 1 is concerned, I would allow the appeal, on the ground that the verdict was not supported by the evidence. I would quash the conviction on count 1, and direct that a verdict of acquittal be entered.

[63] In so far as counts 3, 4 and 5 are concerned, the appeal on the ground that the verdicts were unreasonable or cannot be supported by the evidence ought to be dismissed.

Factual error in trial judge's direction concerning count 3

[64] As noted above, in directing the jury about count 3, the learned trial judge made a factual misstatement in describing the end date of the time period specified in the indictment as the complainant's 12th birthday. The Crown raised this, as a matter of fairness, in circumstances where the appellant represented himself on this appeal.

[65] The question is whether it is reasonably possible the jury would not have returned the verdict of guilty on count 3, including with the circumstance of aggravation (that the complainant was under 12), had the incorrect factual statement not been made.[48]

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47 *R v Baden-Clay* (2016) 258 CLR 308 at [46]-[47].

48 *Simic v The Queen* (1980) 144 CLR 319 at 332.

[66] In my view, given:

(a) the evidence of the complainant;

(b) the approach taken in argument, by both the Crown and defence counsel, which was that the effect of the complainant's evidence was that the incidents she described occurred when she was 10 or 11, shortly after moving into the Deception Bay house; and

(c) that the learned trial judge, in the summing up, identified the issue for the jury (after the reference to the date range in the indictment) in terms of whether "you're satisfied beyond reasonable doubt that there was, in fact, a dealing, which is denied, that is, that there was touching of the child on the vagina and the breast, and she was 10/11…" and also referred to the complainant's evidence, of the first incident happening about a month after moving into the house (other evidence showing that was in February 1999, which was just before the complainant turned 11);

it is not reasonably possible that the earlier factual misstatement, that the end date in the indictment was her 12th birthday, affected the verdict. There cannot be said to have been any miscarriage of justice as a result of this factual misstatement.

Other arguments relied on by the appellant

[67] In his written outline of argument, and oral submissions at the hearing of the appeal, the appellant makes a number of points, further to the main ground of the appeal, which has been addressed above.

[68] *Intellectual impairment.* The appellant argues that the prosecution claimed the complainant suffers from an intellectual impairment, but no evidence was produced to defence counsel concerning this matter. It is not clear what is sought to be made of this. There was reference, in the context of the application for the complainant to be declared a special witness, to the complainant suffering from a mild intellectual impairment.[49] That application was refused. There was no mention, before the jury, of any such impairment; save that defence counsel made the submission, in his closing argument to the jury, that "she's a woman with problems. I would say to you that the tie to combine the two of them together – those two parts of the evidence, the letters and what she says happened to her, must result in some cognitive dissonance".[50] Defence counsel did not seek "a Robinson type direction";[51] and nor was there material before the court, in relation to any form of mental disability, which would warrant some kind of specific comment or warning from the trial judge.

[69] *Complainant's evidence inconsistent and vague.* The appellant argues that the complainant's evidence was "inconsistent and very vague", referring for example to her evidence that the offences occurred about two months after moving in to the house, when she would have been 10, and her evidence that she was 10 to 12 when they happened. I have already addressed, under the primary ground, the evidence at the trial, leading to the conclusion that the jury's verdict was reasonable, and is capable of being supported by the evidence at the trial. It has been observed that it is not uncommon in most trials for some aspects of the evidence to be "less than

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49 AB 9, 10.

50 Transcript of addresses at 1-11.

51 AB 57. A reference to *Robinson v The Queen* (1999) 197 CLR 162.

wholly satisfactory", but that juries, properly instructed on the law, as they were in this case, are usually well able to evaluate conflicts and imperfections of evidence.[52] In my view, although there was some inconsistency, in terms of the timing issue identified by the appellant, looked at as a whole, that was a matter readily reconcileable on her evidence; and otherwise, her evidence of the three incidents was clear and not affected by inconsistencies.

[70] *Hostile witness application.* The appellant complains that the jury were not made aware of the application to declare the complainant a hostile witness. That was appropriate. What the jury were told, when being informed after the close of the Crown's case that the Crown had withdrawn count 2, was that the complainant had not given evidence of continuing sexual acts during the period described in count 2 (contrary to the Crown's opening), and for that reason, they did not have to concern themselves further with that.[53] So it was made clear to the jury that, in some respects, the complainant had not given evidence which the Crown was expecting her to give.

[71] *Obstruction of justice.* The appellant referred to evidence given by his ex-wife about a conversation she had with the investigating police officer, after making her statement, in which she was told that the concert dates for a particular concert she had mentioned, did not match up with the actual dates discovered by the police officer. He argues that this is "an obstruction of justice". The substance of the ex-wife's evidence was that the things she and the appellant would do when the complainant looked after their children were "mainly concerts", and she named "quite a few" concerts they had been to. She said she couldn't recall "any specific ones" where the appellant had arranged for the complainant to babysit, but thought "around that time it possibly could've been AC/DC".[54] In cross-examination, she said she had previously thought it was Marilyn Manson, but the dates did not match up with the age the complainant was at the time alleged (as she was told by the police).[55] It seems that the reference to Marilyn Manson had also been prompted by a question from the police. The investigating police officer gave evidence of the dates of various concerts.[56]

[72] The probative force of the ex-wife's evidence was the support that it gave, in a general sense, for the complainant's evidence of the circumstance in which count 4, in particular, occurred – that is, when she had been babysitting, at the appellant's house, when he and his wife went to a concert. The ex-wife's evidence could not be relied on as establishing what concert they may have attended. The jury were alerted to this, in the context of the *Longman* direction given by the learned trial judge – that is, that because of the delay, and the breadth of the time period for counts 3, 4 and 5, among other things, the appellant had lost the opportunity to explore "[w]hich concert had been gone to on the particular night that the rape is alleged to have occurred". As the learned trial judge said, that "now – seems to be lost in the mists of time".[57] In all the circumstances, there is no basis to consider there was any obstruction, or miscarriage, of justice, as a result of the police officer speaking to the ex-wife about the concerts and dates.

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52 *MFA v The Queen* (2002) 213 CLR 606 at 634.
53 AB 54.
54 AB 44.
55 AB 46-47.
56 AB 51.
57 AB 71.

[73] *Conduct of defence counsel.* The appellant complains that his defence counsel "neglected to ask important questions as directed by myself". One example, given on page 1 of the outline of argument, is "who lets a 10 year old baby sit on her own after only living there for a couple of months". It is correct that was not directly put to any of the witnesses; but the evidence of the appellant's ex-wife was that there were occasions when the complainant would baby-sit for her kids. She also said the appellant would organise that.[58] Another, alluded to on page 2 of the outline of argument relates to the complainant continuing to play with the appellant's children, for another five to six years, after the incidents. But that matter was put to the complainant, and she agreed with it.[59] There are no other "important questions" referred to in the appellant's outline.

[74] There is also a complaint of a "failure by Defence to call witnesses on my behalf (Daughter)". However, there is no material before the court to indicate whether those instructions were given by the appellant at the time; or as to what the daughter's evidence would have been in any event (noting that, the evidence being that she was born in 1995, she would have been aged about four or five at the time of the offences, and the complainant's evidence did not suggest anyone else was present at the time of the offences).

[75] As Gleeson CJ observed in *Nudd v The Queen* (2006) 80 ALJR 614 at [9], since a criminal trial is adversarial in nature, "subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue."[60]

[76] Objectively, there is nothing in the complaints now made by the appellant, about the conduct of the case by his counsel at the trial, which would support a conclusion that the trial was unfair, or that any aspect of its conduct resulted in a miscarriage of justice.

[77] None of these additional matters raised by the appellant in his outline support a conclusion that there was any miscarriage of justice at the trial.

Sentence

[78] The appellant did not appeal from the sentences imposed. He was sentenced, in relation to counts 1, 4 and 5 to nine years' imprisonment; and on count 3 to two years' imprisonment; with each of those sentences to be concurrent.

[79] There is no basis to conclude that the sentences imposed on each of counts 4 and 5 were affected by, in the sense of being aggravated by, the conviction of count 1. The factors the learned trial judge took into account in sentencing the appellant were that he was on parole at the time of the offending (in respect of a murder conviction); that the complainant was very young, aged 10 or 11 at the time; that although no violence was involved in the rapes, they were performed in a very perfunctory way on a very young girl with a slight intellectual disability, who was scared and frightened; that she had been significantly affected by the offending; that the appellant was in a position of trust, being the next door neighbour, and her parents were happy for her to go and play at his home; that he used no protection

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58 AB 44.
59 AB 36.
60 See also *R v Baden-Clay* (2016) 258 CLR 308 at [48].

when he raped her on two occasions; and that he had shown no remorse. As her Honour observed, the comparable cases indicated a sentence of eight years as appropriate; but the fact that he was on parole at the time made this more serious, resulting in the sentence of nine years. In so far as count 1 was concerned, her Honour accepted, for the purpose of sentencing, that "the maintaining is really just over that period of the offending, which was about two months, as the complainant has said that nothing else occurred after that time".[61] In the circumstances, had the jury returned a verdict of not guilty on count 1, it is clear the sentence on counts 4 and 5 would have been the same.

[80] The conclusion that the appeal against conviction on count 1 ought to be allowed does not, therefore, raise any issues with respect to sentence.

Orders on the appeal against conviction

[81] I would order:

1. The appeal against the conviction on count 1 is allowed.
2. The conviction on count 1 is quashed.
3. Direct that a verdict of acquittal be entered on count 1.
4. The appeal against the conviction on counts 3, 4 and 5 is dismissed.

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61 AB 81.