SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBR* [2017] QCA 193
PARTIES:	**R** **v** **HBR** (appellant)
FILE NO/S:	CA No 334 of 2016 DC No 957 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 2 December 2016 (Butler SC DCJ)
DELIVERED ON:	5 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2017
JUDGES:	Gotterson and Morrison JJA and Mullins J
ORDERS:	**1. Application to adduce evidence refused.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after trial of four counts indecent treatment of a child under 16, one count using electronic communication to procure a child under 16, two counts indecent treatment of a child under 16, under care and two counts carnal knowledge with a child under 16, under care – where appellant was acquitted of one count of indecent treatment of a child and the jury was unable to agree on another count of indecent treatment of a child – whether the verdicts of guilty were unreasonable on the basis of a combination of aspects of the evidence at trial which the appellant submitted damaged the complainant's credibility – whether an independent assessment of the evidence supported the verdicts of guilty CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where the appellant applied to adduce new evidence in the form of an alibi in relation to count 1 on the basis it shows there was a miscarriage of justice – where the new evidence was available but not led at trial – where the new evidence provided an alibi for the date particularised in count 1 –

where the date of the offence was not an issue at trial – where the complainant's evidence of the circumstances in which the offence was committed was not challenged by the appellant – whether leave should be granted to adduce new evidence

BCM v The Queen (2013) 88 ALJR 101, [2013] HCA 48, considered
R v Jacobs [1993] 2 Qd R 541; [1991] CCA 205, considered
R v Katsidis; ex parte Attorney-General (Qld) [2005] QCA 229, followed
R v Spina [2012] QCA 179, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed

COUNSEL: S C Holt QC for the appellant
C W Heaton QC for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by Mullins J and with the reasons given by her Honour.

[2] **MORRISON JA:** I have read the reasons of Mullins J and agree with those reasons and the orders her Honour proposes.

[3] **MULLINS J:** The appellant was convicted after trial of four counts of indecent treatment of a child under 16 (counts 1, and 4 to 6), one count using electronic communication to procure a child under 16 (count 3), two counts indecent treatment of a child under 16, under care (counts 7 and 9) and two counts carnal knowledge with a child under 16, under care (counts 8 and 10). Each of these offences included the circumstance of aggravation of being a domestic violence offence. The guilty verdicts on counts 5 to 10 were majority verdicts. The appellant was found not guilty of one count of indecent treatment of a child under 16 (count 2). In respect of another count of indecent treatment of a child under 16 (count 11), the jury was unable to agree on a verdict and the prosecution discontinued any further proceedings in respect of that charge.

[4] The appellant appeals his conviction on two grounds: the first, that the verdicts of the jury were unreasonable or cannot be supported having regard to the evidence; and the second, as a result of evidence now available of an alibi in respect of count 1, there has been a miscarriage of justice that affects all guilty verdicts and not just the guilty verdict on count 1.

[5] In relation to the second ground, the appellant applies to adduce evidence on the appeal that was available, but was not led at trial. The respondent does not object to the court receiving the affidavits dealing with the new evidence for the purpose of considering the application to adduce the evidence on the appeal.

[6] The counts were particularised as occurring at various times between 26 December 2012 and mid-February 2013. During this period the complainant's mother was

married to the appellant's brother. In other words, the appellant was the complainant's stepfather's brother or stepuncle. The appellant was aged 48 to 49 years during the period covered by the counts.

[7] Evidence was adduced at the trial from the complainant, her mother, her stepfather and her mother's cousin (the cousin). The appellant neither called nor gave evidence. The critical issue at trial was whether or not the acts which the complainant attributed to the appellant occurred. More particularly, the appellant's case was the complainant had a crush on the appellant and was emotionally disturbed, possibly delusional about her relationship with the appellant, and highly jealous of his wife, so she manufactured an elaborate, complex story about numerous sexual contacts with the appellant. In addition, the complainant was under considerable pressure from her mother in the circumstances in which she made the complaints in response to her mother's persistent questioning.

[8] The appellant identified particular aspects of the evidence at trial and submitted the verdicts were unreasonable as a result of a combination of those aspects. In general terms, it was submitted the complainant's credibility was irretrievably damaged by the matters that were summarised in the *Robinson* direction given by the trial judge, but in particular that the events the subject of count 2 could not have occurred, the event the subject of count 11 did not happen, the preliminary complaint was elicited from the complainant under persistent and leading questioning from the complainant's mother and while the complainant was intoxicated, the complainant's evidence was significantly inconsistent with the preliminary complaint evidence, and there was evidence the complainant's mother physically assaulted and verbally abused the complainant in the period between the preliminary complaint and the complaint to the police. Although it is necessary in addressing the submissions to deal with the specific aspects of the evidence relied on by the appellant to assert the unreasonableness of the verdicts, the test to be applied is whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences which requires the court to make an independent assessment of the whole of the evidence to determine whether the verdicts of guilty could be supported: *SKA v The Queen* (2011) 243 CLR 400 at [21]-[22].

The complainant's evidence

[9] The complainant turned 15 years old during the period covered by the counts. Although she had made preliminary complaints to her mother and the cousin in February 2013, the complainant did not speak to the police until almost 11 months later on 2 January 2014. The complainant's s 93A video-recorded interview was played to the jury. As the complainant was 18 years old by the time of the trial, she also gave evidence in person before the jury.

[10] The complainant explained in her s 93A interview that she went to the police because the appellant had got "his wife and his mum and all his family to turn against me and he's made up all these things saying that I falsely accused him". The complainant further explained that she was not going to go to the police "because I was protecting him even though it's been really hard this year … trying to deal with it but I've just had enough and I'm not a liar".

[11] The complainant's statement about the relevant events was as follows. Halfway through 2012 the appellant showed an interest in her and was flirtatious and she

would flirt back, but it was not very serious, but then it started getting more serious in November/December. Her family lived next door to the appellant's mother (to whom she referred as "grandmother") who had surf skis under her house and the appellant started coming down a few weekends to go surf skiing and used to take the complainant with her brother and sister or sometimes with her brother only out into the ocean that was near the house. They would swim and the appellant would touch her legs or her bottom and started talking about himself, including his past relationships.

[12] The complainant's stepfather and the appellant worked in a family business with their parents and the complainant who was looking after her younger siblings in the holidays would organise to go into their workplace, so the complainant could see the appellant. On Christmas Day the appellant and his wife were at his mother's house for breakfast and the complainant sat next to him at the dining table. He put his foot on hers and then said that they should go surf skiing the next day. On Boxing Day the complainant was waiting for the appellant to come down from his wife's parents' home that was further up the road. She went to the appellant's mother's house and the appellant's mother took the complainant and her brother and sister to where the appellant was staying. The appellant got dressed and walked back with the complainant and her siblings and they went swimming together. The appellant told her she was "so beautiful", he sympathised when her siblings were playing up, and told her he was "there for you". When they returned to the appellant's mother's house, the appellant was under the house with him and "he grabbed my arm and he pulled me towards me as if to kiss me and I said like No, no, no like hesitating, I went to pull away and then he grabbed my arm again so then I kissed him and I went to like walk away again and he grabbed my arm and he said No a proper one, so then I kissed him again and then I went out, I didn't say anything to him I went out straight up to my house". (That kiss was the subject of count 1.)

[13] A few days later the complainant went out on the appellant's parents' boat and the trip included the appellant's mother, and the complainant's stepfather and siblings. After they had been swimming, the appellant told the complainant that he "really enjoyed myself under the water watching you swim". When the complainant went to the workplace of the appellant and her stepfather, the appellant would flirt with her and try to touch her, but he then went away with his wife. The complainant obtained the appellant's telephone number from her stepfather's telephone and put it into her telephone and sent him a text to wish him Happy New Year and he responded to wish her the same.

[14] On one occasion when the complainant went to the workplace, the appellant left at 9 am to get a massage for his shoulder and he did not return until 12 noon. The appellant was at the back of the workplace where there was a toilet and shower and he said "Oh, I'm gonna go and have a shower um come out the back if you want to see something special". The complainant had to be out the back because her grandfather had asked her to help him with something. The complainant's description of what then happened (which formed the basis of count 2) was:

> "there's like windows at the back and the first window is the toilet window and it's the closest and it was wide open and the shower window is like, you have to like walk into a garden to get to it and that was shut and he, I was like near the window but I wasn't like so

> I couldn't see in it and he came up into the toilet window, stuck his head out and I said What are you doing and he's like Shhh sort of thing, and I stayed back and then he went and had a shower and then I went to the window and like waited and waited and then he came and then he stood in front of me like fully naked …"

[15] Later that day when the appellant was underneath a car in which the complainant was on the passenger seat and holding a torch for the appellant to see, the appellant said "… what do you think, have you ever seen one of them before" and the complainant said "Yes, but it, what was I, year 10 then, like we've seen them in F.U.P. … but I've never seen it in the flesh". The complainant was leaning over and a little bit of her bra was showing and the appellant said "Oh pull it down and show me". The complainant replied "No Dad's here" to which the appellant responded "Oh but I showed you that's not fair".

[16] After having left that day, the complainant sent a text to the appellant, saying "I have something you might like" and he did not answer. She sent another text "Oh you'd really like it" and he did not answer. The appellant subsequently explained to the complainant that he deleted the texts, so his wife would not see them. The appellant asked the complainant what he had missed out on. Either later that night or the next day the complainant took a photograph of her top half that included her breasts, and sent the photograph to the appellant, but he did not respond. When she saw him next at work, she inquired whether he had got the photo, he responded in the affirmative and in response to her question why he did not reply, he said "No I just sat back and enjoyed myself".

[17] The complainant was having a cocktail party for her birthday in January and the appellant and his wife were invited, but the appellant's wife did not attend. The appellant flirted with her at the party, trying to undo the decorative zips on her dress. On the next day, the appellant asked her whether she had sex before and she told him she was a virgin. He said "Oh really, you're a really horny virgin" and "Oh well, you're still beautiful and I still want you". They discussed having sex and the appellant told her "You know it's up to you, your choice".

[18] After that, the complainant sent the appellant more photographs of herself without clothes, including her bottom half and her vagina. (Count 3 related to the appellant using his telephone to procure the complainant to send him sexually explicit images.) The appellant sent the complainant one photograph of his penis (which was the subject of count 4). The appellant said he was going to come down to surf ski with the complainant and that he was "gonna do you in the water". The complainant was out shopping with her mother and sister when the appellant took her brother swimming. On her return from shopping, the complainant went in swimming with the appellant and her brother. She went close to the appellant and pulled down her top, and the appellant felt her breasts under the water (which was the subject of count 5). Back at the appellant's mother's house, after the complainant had changed into her pyjamas, she met up with the appellant under the house. The appellant took both straps off what she was wearing and there was nothing underneath. He kissed her mouth and her top half (which was the subject of count 6).

[19] The complainant visited the appellant's workplace the day before she went back to school. The appellant's stepfather permitted the complainant to go with the

appellant to another boat they were renovating. They drove to the boat in the appellant's vehicle. They went into the boat that was not yet finished and the appellant sat on the edge of a wooden bunk (that was not completely made) and pulled down the complainant's top and started kissing her on the chest and mouth (which was the subject of count 7). The appellant then stood up and took his penis out over the top of his pants, the complainant stood and the appellant pulled down her underpants and shorts in one go. The appellant then said "We'll give it a go" and the complainant turned round and "then he like thrust it into me once and then pulled out and then walked around the corner quickly he got a rag and he came into a rag and then he was all flustered …". (This act of sexual intercourse was the subject of count 8.)

[20] They left the boat and were driving away in the appellant's vehicle, when he realised he had not locked something. Then his mother rang him, he pulled over to the side of the road, and she asked him for something on the boat. He told her they were going back anyway.

[21] The complainant described what happened when they returned to the boat (which became the subject of counts 9 and 10):

> "And then we went back, drove back, went up the stairs and walked into the same room and he started kissing me again and then he didn't say anything, pulled his penis out over the top of his pants and he said Oh what about head, do you know how to give head and I said No, no, no I don't know how to do that, no, no, no I really don't want to, no, no, no. And he said Oh you know Come on sort of thing. So I just like knelt down and just tried I guess of what I thought it should be like and um and then I just stopped after like 20 seconds maybe and I stood up and then he kissed me again and I'm not sure if he pulled down my pants this time or I did and then he tried again and I turned around, bent over and he didn't say anything, this time for a bit longer like maybe 6 or 7 times and then he stopped and he said I can't do it anymore I'm going to come again, this never happens to me I never come twice sort of thing."

[22] The complainant told the interviewing police officer that "it was the first time" for her and "it wasn't very nice".

[23] The complainant made her first disclosure to her mother about sending photographs of herself to the appellant. The complainant described the circumstances in which she disclosed to her mother before her mother's birthday party on 9 February 2013 that she had been sending photographs of herself to the appellant. (I will deal with the detail of that disclosure, when dealing with the preliminary complaint evidence.) The appellant and his wife were at the complainant's mother's birthday party and the complainant described that "he was like all over me", that he would touch her bottom when she bent down to get something out of the oven, and "he was just following me around" and at one stage said to her "all I want to do is kiss you". The complainant said that her mother was saying to him "Go back to your wife she's over there by herself" and that he would go over there for a short time and then come back to the complainant.

[24] The last time there was physical contact between them was on the birthday of the appellant's father (to whom the complainant referred as "grandfather") and they were at the appellant's parents' house. The appellant was avoiding the complainant and was leaving early. The appellant's mother asked him to take rubbish down before he left and the complainant said that she would take some. The complainant said to the appellant "You're going to get rid of me aren't you?" and the appellant replied "No I would never do that I'm just trying you know back off so um he doesn't find out, as in my step dad, cause that would be so bad for you …". The complainant asked the appellant to kiss her and he did so. As he stopped, the complainant's stepfather "put his like head, cause he has a little verandah, and he put his head there like looking" and the appellant then said "Oh look he's looking now you know I've got to go".

Count 1

[25] Apart from her s 93A evidence, the complainant in evidence-in-chief relating to count 1 described the first kiss with the appellant in these terms:

> "He asked me to kiss him and I said, 'No. No. I don't want to,' because I'd never kissed someone before, and then I did do it, though, and I kissed him on the lips and it was just a peck and then I went to walk away and he grabbed my arm and he said, 'No, a proper one,' and he kissed me and he put his tongue in my mouth for, like – probably, like eight to 10 seconds, I would say, and then after that I – I left."

[26] There was no cross-examination of the complainant challenging her recollection as to when this kiss occurred. The only possible relevant cross-examination was when it was put to the complainant that the appellant did not kiss her on the mouth on the two occasions in the way she had described. The complainant responded "Well, he did kiss me like that".

Count 2

[27] The only evidence-in-chief from the complainant in relation to count 2 (which was the allegation that at the appellant's invitation, the complainant looked through the toilet window and saw the appellant expose his naked body deliberately to her) was that contained in the s 93A recording. In cross-examination, the complainant agreed that three years ago she was the same height as her stepfather. The complainant described that it was the toilet window and not the shower window that was open and there was a garden bed and there was concrete that was not a driveway and she stood in the garden bed on her "tippy-toes" where it was "a bit scratchy and stuff on your legs". It was put to her that she was in plain view of anyone who drove around the back of the shed to which the complainant agreed, but observed "People don't commonly drive there".

[28] The complainant's stepfather described a driveway outside the toilet and shower facilities at the back of the shed where he and the appellant worked that was used as access by two tenants in the bottom shed. The shower and toilet windows were "just above" the stepfather's head and he could not look in them standing on "tippy-toes".

[29] The complainant's stepfather described a window ledge inside the toilet and shower windows that was 200 mm wide. Toilet cleaner and toilet paper was kept on the ledge in the toilet and shampoo was on the ledge in the shower. Anyone trying to look in the window and look down would have to get high enough to look over the ledge. The complainant was cross-examined on whether there was a windowsill inside the window of the toilet, but she did not remember.

Counts 3 and 4

[30] The complainant gave additional evidence on counts 3 and 4 during cross-examination. Her response to the suggestion that by January 2013 she had developed "an intense crush" on the appellant was that she thought she was "in love with him". It was suggested to her that it was in the context of her crush on the appellant that she sent him naked pictures of herself. The complainant agreed she would not have sent them to him, if she did not have feelings for him. When it was suggested that he did not ask her to do that, she responded "He didn't ask for the initial one, but he asked for others". She agreed that she had sent naked photographs of herself to the boy on whom she had a crush the previous year. The complainant disagreed with the suggestion put to her that the appellant did not ask her to send any photographs to him. She confirmed that he did send a photograph back to her.

[31] It was an admitted fact that on 20 April 2013 at 8:29 am the complainant's mother sent a text message to the appellant which read "Have you told [your wife] yet? She has a right to know". It was a further admitted fact that on the same day at 8:52 am the appellant sent a text message to the complainant's mother which read "If I have to tell [my wife] I will have to show her the texts and photos I have to defend myself – I don't want to do that to both". It is conceded by the appellant that his text message confirms the complainant's account that she had sent him sexual messages and images. It left open the question, however, in respect of count 3 as to whether the appellant procured the complainant to take and send the images that were the subject of count 3.

Counts 5 and 6

[32] Apart from general cross-examination of the complainant, the events the subject of counts 5 and 6 were not traversed specifically in the evidence. A kiss of a sexual nature was the subject of each of counts 1, 6 and 11, so that it was not clear which incidents were the subject of cross-examination of the complainant, when the following exchange occurred:

> "And I suggest to you that he did not kiss you on the mouth in the way in which you've described on the two occasions?—Well, he did kiss me like that."

Counts 7 to 10

[33] In evidence-in-chief, the complainant explained what she had meant when she said in her s 93A interview that the appellant "came into a rag". After the act of intercourse, he ran quickly away and came back with the rag covering his penis and used the rag to wipe semen away from her. The complainant was cross-examined extensively on differences between her s 93A interview on what happened on the boat and what her mother and the cousin recalled as the detail she had disclosed to them in the preliminary complaint. The complainant agreed that she told them she

had sex only once, because in her mind she did not see what happened on the boat as two sexual occasions and she was too embarrassed to give any detail. When she was asked did she remember telling the cousin that she had bled, her response was "No, because that didn't happen, so – no, I didn't say that". When it was suggested she told the cousin that she did not give the appellant a "blow job", she responded, "No, because that's not true".

[34] The complainant's stepfather estimated that the appellant and the complainant were away for about an hour when they went to the boat and it took 15 to 20 minutes to get to and from the boat. When they returned, they had lunch with the complainant's stepfather and the appellant's mother and the complainant seemed the same as she was before she left.

[35] The complainant's stepfather was asked about the temperature in the lower area of the front of the boat on a hot summer's day and described it as "very hot" and that he had seen it up to 53 degrees in there. In cross-examination, the complainant agreed it was hot in the boat.

Count 11

[36] In addition to her s 93A evidence, the complainant's evidence-in-chief relating to count 11 was:

> "Whereabouts were you when this kiss occurred?---It was at my grandmother's house and we both went down the stairs. And she keeps her rubbish bin – she has, like, a backyard with a little gate. So we were kind of just in the gate and it was quite dark there as well and that's when we were talking and I told him to kiss me because this is when mum had found out and he basically just disappeared and I thought that he was just leaving me. So I said, 'Kiss me,' and he kissed me then and it was the same, but I reciprocated this time. Like, it was, like, about a 10-second kiss, but I wanted to kiss him this time and ---
>
> Can you describe the kiss, please?---Yeah. It was – we both were using our tongues, I – I guess you would say, and I – I wanted him to kiss me that time. I asked him to."

[37] In cross-examination, the complainant explained that the grandmother's house was on a cul-de-sac and it was she was standing with the appellant "a metre and a half before you turn left through the gate". They were both standing up. They were not out on the footpath. They were kissing "inside just before you leave the gate". In response to the suggestion that she had avoided being "sprung by [her] stepfather", the complainant said:

> "Yeah, because she has a little deck as well and he, like, stuck his head and looked and if you look, our pathway is, like, right there, but we were just inside the gate and it was dark."

[38] The complainant agreed that her stepfather yelled out for her to come upstairs, but denied the suggestion that when her stepfather looked out on that occasion, she was standing next to the appellant's car and the appellant was seated in his car at that time.

[39] The complainant's stepfather gave evidence-in-chief about watching the appellant leave on the night of their father's birthday party in these terms:

> "He – he said goodbye to everybody. He walked down – from the verandah – you walk from the verandah down to the front of the house. The house is in a cul-de-sac, so you got full view of the cul-de-sac and the road and – and all that. His car was parked next to the garage door. There's two garage doors at the front of the house with a glass sliding door in between. He was parked in front of the glass sliding doors, so basically just off to the left of the house – or towards the middle of it, and he hopped in his car, started his car and he left."

[40] The complainant's stepfather estimated the appellant was at his car for only a few minutes before he drove off. The complainant's stepfather had seen the complainant pick up a bag of rubbish on the verandah, saying "I'll put this in the bin", and go downstairs. His evidence-in-chief continued:

> "And you said that she was – you saw her at the car?---Yes. She – she put the rubbish in the bin and then she went back to [the appellant's] car and she was standing near the right-hand front mudguard, near the tyre, and [the appellant] had his window down. The lights were on the in car and I can't quite recall if the engine was running or not, but he was about to leave.
>
> And did you see him leave?---Yes, I did.
>
> And did he drive off – was he the only person in the vehicle when he drove off?---Yes, he was. Yeah.
>
> And where were you when you saw this?---I was standing on the verandah, waving at him, and there was other people on the verandah too, but I can't – I can't recall who was there."

Other evidence

[41] The cousin was present at the complainant's 15th birthday party and had observed the appellant walk up to the complainant and say "where do all the zips on this dress go?".

[42] In her s 93A interview, the complainant described that her mother was so angry after she had made the first disclosure to her about sending photographs of herself to the appellant and that she was present when her mother telephoned the workplace and asked to speak to the appellant and recalled that she heard her mother say "I need to talk to you about the photos that I found on [the complainant's] phone". She heard her mother say "Oh, she's threatening to kill herself".

[43] Although after the complainant's first disclosure about exchanging photographs and texts with the appellant the complainant's mother told the complainant she was going to call him and then she may have pretended to ring on the phone in her daughter's presence, the complainant's mother in evidence-in-chief thought it was after the second conversation she had with the complainant in which the complainant made the disclosure about having sexual intercourse with the appellant, that the complainant's mother called the appellant and left a message for him to ring

her and he telephoned her the next day. (In cross-examination, the complainant's mother thought that this conversation may have occurred the day after the complainant's first disclosure.)

[44] The complainant's mother said she told the appellant that she knew what had happened because the complainant had told her. She said to him "you're her uncle, how could you do that, or do you not see yourself as her uncle because … she's a stepchild" and the appellant said to her "No, I see myself as her uncle. … she didn't seem like a 14 year old. She was like an 18 year old …". The complainant's mother also recalled about this conversation:

> "He said to me that she was intoxicating, and he said to me that … he had feelings for [the complainant]."

[45] The complainant's mother was cross-examined as to why she did not include in the statement she made to the police the details of this conversation that she had with the appellant after the complainant's disclosure by way of preliminary complaints and, in particular, that the appellant had used the word "intoxicating" to describe the complainant. The complainant's mother could not explain why that detail was not in her statement. She thought she did provide that information to the police, but she did not know why she did not ensure that was recorded in her statement together with the statement she also attributed to the appellant that he said that the complainant seemed like an 18 year old. When it was suggested to the complainant's mother that she had invented the details of this conversation with the appellant, she denied that and confirmed that was what the appellant said to her.

[46] The complainant's stepfather had observed in January 2013 that the complainant had become obsessed with the appellant. The complainant's stepfather never saw the appellant flirting with the complainant, but did see the complainant being flirtatious towards the appellant.

[47] The cousin gave evidence that the complainant's disclosure of her relationship with the appellant caused problems between the complainant and her mother who was "constantly fighting and hitting [the complainant]" and one day the cousin intervened when she saw the mother "strangling" the complainant in the kitchen. The complainant accepted that her mother yelled at her "quite a bit", but denied the suggestions that her mother physically assaulted her or strangled her.

Preliminary complaint evidence

[48] The complainant set out in her s 93A interview her recollection of the first discussion with her mother when she disclosed sending photographs of herself to the appellant. This was before her mother's birthday party, when she asked for more phone credit. Her mother told her she was going to ring up Telstra and find out who the complainant had been texting. The complainant made up something about the boy she used to have a crush on and said he came over and they had sex downstairs. Her mother said she was going to ring up the boy's mother, and the complainant then recalled as follows:

> "And she said Tell me the truth and so I said um I stole [the appellant's] number from dad's phone and I've been texting him. And she said, I said I said like Happy New Years and stuff she said That's not it, tell me the truth and I said, and she was kinda like Did

> you like send him something and I said Yeah I sent him photos of myself and she said Well did he send anything back to you and I said No cause I wanted to protect him, I said No it was just me. And she said Well did he ask for them and I said No he didn't, it was just me."

[49] During cross-examination, the complainant could not remember that the cousin was present at the first discussion, as she recalled it was only her mother and herself who were present. (Although the complainant's mother thought the cousin was present for both discussions, the cousin did not suggest that she was present at the first discussion.) The complainant admitted in cross-examination that she had told a number of lies to her mother during the first discussion, including that the appellant had not sent her any photographs and that the complainant had sent photographs of herself to the appellant of her own volition. She confirmed that she wanted to protect him, because she loved him.

[50] During the s 93A interview, the complainant said her mother found out about her sexual intercourse with the appellant on the day after her mother's birthday party. In her evidence-in-chief at the trial, the complainant described that the next day after the party, she was sitting on the verandah at home with her mother and the cousin and they were being "really friendly" towards her and they asked her whether she had sex with the appellant and she replied in the affirmative. They asked her where it happened and she replied "On the boat". The complainant explained that she did not tell them any more details about what happened, because she was embarrassed, but when they asked whether it was only on one occasion, she replied "No, just once".

[51] During cross-examination about this disclosure to her mother and the cousin, the complainant confirmed that both her mother and the cousin asked her directly whether she had sex with the appellant and that she said "No" to start with, and then finally said "Yes", but that it was more like a conversation than an interrogation. In response to whether questioning led to her disclosure, the complainant said:

> "They both did, but it wasn't in that way, hence the reason I had the sips of wine. They were being very friendly and giving me the impression that if I told them, then he wouldn't get in trouble and I wouldn't get in trouble, so they weren't being persistent at all. It was almost the opposite. They were trying to be very casual and friendly about it."

[52] The complainant's mother's evidence in respect of the first discussion she had with the complainant that was relied on as preliminary complaint evidence was as follows. Around the time of the complainant's mother's birthday on 9 February 2013, the complainant's mother was upstairs on the deck at home with the complainant and the cousin. The complainant wanted her mother to put more credit on her telephone. The complainant's mother inquired how the complainant had used up her credit and asked her whether she had been texting a boy she had previously had a crush on and the complainant's mother said she would get the complainant's telephone records. The complainant responded that she could not do that, got upset, and then said she had that boy over and they had sex. The complainant's mother got angry and the complainant told her that she had been messaging and talking to the appellant and that he had kissed her under the stairs of

the grandmother's house. The complainant's mother said it had to stop and was going to call the appellant and the complainant said to her "I'm in love with him and I hate you" and "you can't stop me seeing him, you're not going to ruin my life". It ended in a big argument. During cross-examination, the complainant's mother said the complainant had told her on this occasion that they had exchanged text messages and photos, that the complainant had sent the appellant photos and he had sent her a photo.

[53] Before the grandfather's birthday party, the complainant's mother and the cousin had a conversation with the complainant at home upstairs outside on the verandah. The complainant's mother was drinking wine and let the complainant drink three sips of her wine to relax. The complainant told her mother that she had sex with the appellant on the boat. In cross-examination, the complainant's mother denied that the complainant had three beers on this occasion, was affected by alcohol, or was giggling. The complainant's mother was cross-examined on the detail of what the complainant had told her about having sex with the appellant on the boat. The complainant's mother explained that it was not on that day that the complainant gave her all the information about that incident, notwithstanding that in her statement to the police she recorded that the complainant had told her that the complainant and the appellant had sex twice on the boat and that the appellant convinced her to perform oral sex on him and she complied. It was suggested in cross-examination that the complainant's mother had changed her evidence to conform with her daughter's evidence, which she denied. The complainant's mother was devastated about her daughter's disclosure that she had sex with the appellant and agreed in cross-examination that she had described herself as "furious" when she gave evidence on the same topic at the committal.

[54] The cousin lived with the complainant's family for three months from January 2013. She recalled a conversation with the complainant and her mother on the balcony at the front of the home on 10 February 2013 that was the first conversation she was involved in with the complainant and her mother about the complainant's relationship with the appellant. The complainant asked her mother for a beer which her mother gave her. The complainant asked for another couple of beers and the cousin thought she had about three beers in total and "was starting to get giggly". The complainant's mother then started to question the complainant. The cousin did not remember the exact words used by the complainant but, in response to questions from both the cousin and the complainant's mother, the complainant said she had slept with the appellant. The cousin's recollection of what the complainant then said was:

> "It was along the lines of she was at her stepfather's workshop, that [the appellant] had asked her to go and have a look at a boat that was on a separate boatyard, that she'd went down to go and have a look at the boat, that they had intercourse. At first, he – she wasn't sure if she was going to do anything and they were just kissing, but they'd had intercourse, that she was virgin so that when she'd finished, he'd given her a rag that she wiped the blood with, and that he'd asked her for a blowjob afterwards."

[55] During cross-examination, the cousin confirmed what was in her statement that the complainant's mother in questioning the complainant asked her directly whether she had slept with the appellant. The cousin stated the complainant had told her she did

not want to give the appellant a "blow job", because she did not know what she was doing, and that she did not give him a "blow job".

The appellant's submissions on ground 1

[56] The complainant's stepfather's evidence demonstrated positively that the window the complainant claimed to have looked through on the occasion that was the subject of count 2 was too high for her to look through, which must be the explanation for the acquittal on count 2. That should have had the effect of damaging profoundly the complainant's credibility more generally, as it was not a matter on which it was possible for her to be mistaken.

[57] The complainant's account of the appellant's kissing her downstairs when she took the rubbish down as the appellant was leaving was watched by the complainant's stepfather the entire time and he did not see a kiss. That must explain why the jury could not reach a verdict on count 11, but it is relevant to this ground of appeal that the complainant's credibility was damaged by her describing an event contradicted by an adult eyewitness.

[58] The cousin was an independent witness and there was no reason for rationally rejecting her evidence that the preliminary complaint from the complainant made to her mother and the cousin that she had sexual intercourse with the appellant occurred after the complainant had drunk three beers, was behaving as if she were intoxicated, and made the disclosure after being asked repeatedly by her mother and in a leading way, as to whether the appellant had sex with her. These circumstances relating to the disclosure created an extreme risk of false complaint.

[59] There was also the further evidence from the cousin that over the months that followed the complaint and before the complainant went to the police, the complainant's mother was "constantly fighting and hitting" the complainant including "strangling" her on one occasion. If the cousin's evidence were accepted on this topic, the complainant's credibility was further damaged.

[60] There were also significant aspects on which the complainant's evidence differed from what the cousin recalled as the complainant's description of what occurred on the boat when she made her preliminary complaint on 10 February 2013 and, in particular, that the complainant had wiped herself with a dirty rag handed to her by the appellant, because she was bleeding, and that, despite the appellant asking her to do so, she did not perform oral sex on him.

[61] The complainant's mother's credibility meant that the evidence of what she claimed the appellant said to her about his attraction to the complainant (which could be evidence of discreditable conduct) was incapable of acceptance beyond reasonable doubt and should not be considered in evaluating whether there was evidence to support the guilty verdicts.

[62] There was also evidence from the complainant's stepfather about the temperature inside the boat (making it an unlikely venue for sexual intercourse to take place) and the length of time that the appellant and the complainant were absent from the workplace, that makes it unlikely that the complainant's description of the conduct that was the subject of counts 7 to 10 was true.

[63] In summary, the combination of these matters relied on by the appellant affected the complainant's credibility and reliability to such a degree, that it was not open for the jury to accept her evidence generally about the conduct that was the subject of the counts of which the appellant was found guilty.

Were the verdicts of guilty supported by the evidence?

[64] The circumstances referred to by the trial judge in giving the *Robinson* direction as to why the complainant's evidence needed to be scrutinised with great care, before a conclusion of guilt beyond reasonable doubt could be reached, remain relevant for this court's task in assessing the capacity of the evidence to support the guilty verdicts. The circumstances were the subject of the comprehensive written and oral submissions made by Mr Holt of Queen's Counsel on behalf of the appellant in respect of ground 1.

[65] The account given by the complainant in her evidence revealed an escalation in the relationship between the appellant and her, commencing with flirting and touching, moving through to kissing, the complainant voluntarily sending a photograph of her breasts to the appellant, and the procuring by the appellant of indecent photographs taken by the complainant of her vagina and body and sent to the appellant and the sending by the appellant of a photograph of his penis in return, and ultimately to sexual intercourse on the boat. The delay in the complainant's making a complainant to the police about the appellant's conduct was explained. Even on the complainant's own evidence, she became obsessed about the appellant from the time she perceived he was paying attention to her in the latter part of 2012. The issue on which guilt depended for the counts of which the appellant was found guilty was whether the complainant's description of the sexual conduct between them from the first kiss of a sexual nature on Boxing Day 2012 to sexual intercourse on the boat was imagined or made up by her or was the natural progression of the appellant's response to the complainant's obvious interest in him (whether or not her interest in him had been generated by his interest in her).

[66] At the trial the prosecutor relied on the evidence the complainant gave of conversations with the appellant and other touching of her by the appellant (that was not the subject of specific charges) to show the appellant had a sexual interest in the complainant and was willing to give effect to that interest. In addition, the prosecutor relied on the cousin's evidence of the appellant's comment about the zips on the complainant's dress at her birthday party and the mother's evidence of the comments made by the appellant to her in response to her telephone call to him about the complainant's disclosure of the conduct between them. There is no doubt that the complainant's mother had a telephone conversation with the appellant about his conduct before the grandfather's birthday party, as that explained the distance the appellant kept from the complainant at that party. The texts exchanged between the complainant's mother and the appellant in April 2013 show that there had been some discussion between them. In order to rely on the mother's recollection of the statements she attributed to the appellant in that conversation as indicating a sexual interest in the complainant, it was necessary for the jury to be satisfied beyond reasonable doubt that those statements were made by the appellant and were true. In light of the omission of the details of those statements from her police statement, a reasonable doubt may be entertained about that aspect of the evidence of the complainant's mother. Even without that evidence, however, there was sufficient evidence from the cousin and the complainant's history of her conversations and

contacts with the appellant (that were not associated with or the subject of specific counts on the indictment) for the jury (if otherwise satisfied of the complainant's credibility and reliability on this history) to be satisfied beyond reasonable doubt that the appellant had a sexual interest in the complainant that he was willing to give effect to in considering the complainant's evidence relating to each of the counts.

[67] In evaluating the complainant's evidence, it is most relevant that the complainant made reasonable concessions during cross-examination, and did not hide her feelings for the appellant during the relevant period. She did not accede to any suggestion put to her in cross-examination which did not accord with her recollection. She gave plausible explanations when challenged about her evidence of the appellant's conduct that was the subject of the various counts and her reasons for the different version she had originally given first to her mother about the nature of their contact and then the less detailed account of the events on the boat given to her mother and the cousin. There was consistency between the account given by the complainant in the s 93A interview and the balance of her evidence at the trial.

[68] The appellant's assertion that the credibility of the complainant was "irretrievably damaged" is largely based on assumptions about the reliability of the stepfather's evidence and the cousin's evidence in comparison with the complainant's evidence on the same topics.

[69] The evidence of the complainant's stepfather was not universally accepted by the jury as being inconsistent with the complainant's evidence, so as to compel the conclusion that what the complainant described did not happen, as otherwise there would not have been guilty verdicts on counts 7 to 10. In any case, the stepfather's evidence of the amount of time that the appellant and the complainant were away from the workplace when they went to the boat was clearly an estimate only. Similarly, his estimate of the temperature inside the boat was an estimate that had to be considered in the context that the complainant agreed it was hot inside the boat, but that she and the appellant did not spend very long at all inside the boat on the two visits to the boat.

[70] In respect of count 2, the allegation that the appellant exposed himself deliberately to the complainant when he came out of the shower at the workplace occurred early in the relevant period. The jury had to be satisfied beyond reasonable doubt that the appellant deliberately exposed himself to the complainant when he came out of the shower. On the complainant's evidence, she had an expectation about what she was going to see from what she recalled the appellant said when he went to have the shower, inviting her to "come out the back if you want to see something special". On the complainant's own evidence, the complainant could not see into the shower window, but the appellant was obviously aware that the complainant was outside when he stuck his head out the toilet window and said "What are you doing" and then said "Shh". The complainant then went to some trouble, waiting and standing on her "tippy-toes" in the garden bed where it was "a bit scratchy and stuff on your legs" before she eventually saw the appellant naked.

[71] As was submitted by Mr Heaton of Queen's Counsel on behalf of the respondent, on one view of the complainant's description of the event in her evidence, there was not an emphasis on the deliberate nature of the conduct on the part of the appellant. The acquittal on count 2 demonstrated the jury had a reasonable doubt about the proof of all the elements of that offence. It does not necessarily mean that the jury

concluded that the complainant did not see the appellant naked when he came out of the shower or that the acquittal was due to the stepfather's evidence about not being able to see through the toilet window, even on "tippy-toes", particularly as it was not apparent that the stepfather had stood in the garden bed in the way the complainant described. In any case, count 2 was concerned with an indecent act that was of a different type to the other counts on the indictment of indecent treatment of a child under 16, where the conduct the subject of the charge involved physical contact between the complainant and the appellant. The allegation in count 2 was relatively minor in the context of the totality of the complainant's allegations against the appellant. It does not follow from the acquittal on count 2 that the complainant's credibility was damaged to such a degree (or at all) that it precluded the acceptance of her evidence on the counts on which the appellant was convicted.

[72] The appellant relies on the jury's failure to agree on a verdict on count 11, as an indication that the complainant's evidence of a kiss with the appellant of a sexual nature as he left the grandfather's party was not accepted, because it was contradicted by her stepfather's evidence. It is not apparent from the stepfather's evidence that he had the complainant under observation for the entire time between when she left upstairs to take the rubbish to the bin and when the appellant drove off in his vehicle. He did not say he could see the bin from the verandah. It is relevant that this incident occurred after the appellant had been avoiding the complainant at the party, presumably as a result of the complainant's mother's telephone conversation with him (which was made before the grandfather's birthday party, whether or not the call was made by the mother after the first or second disclosure by the complainant), and that the complainant admitted she was the one who sought the kiss. Again the nature of the conduct that was the subject of this count was far less serious than for counts 3 to 10 and the fact that there was the disagreement by the jury on count 11 does not have the dramatic impact upon the complainant's credibility that is contended for by the appellant.

[73] Where there is an inconsistency between a complainant's evidence and the version given by that complainant to another person by way of preliminary complaint, the inconsistency may reflect on the credibility or reliability of the complainant or may be due to the reliability of the preliminary complaint witness. The appellant's submissions made by reference to the cousin's evidence of what she recalled about the discussion on 10 February 2013 in which the complainant disclosed she had sexual intercourse with the appellant on the boat gives primacy to the cousin's evidence of preliminary complaint over the complainant's evidence of what she told her mother and the cousin and also the complainant's mother's evidence of the discussion on 10 February 2013. It does not necessarily follow from the cousin being a mature woman who was not as closely related to the complainant as her own mother that her evidence has an independence about it that makes her more reliable or have a better memory of what was discussed by the complainant with her mother and the cousin on 10 February 2013 than the complainant's mother or the complainant. There was no allegation of alcohol involved in the first disclosure by the complainant to her mother about the photographs. The responses of the complainant and her mother about the amount of alcohol that the complainant had at the time of the disclosure on 10 February 2013 were unequivocal and the disclosure of the occurrence of sexual intercourse on the boat was maintained by the complainant after that discussion. It is not to the point that the complainant's mother may have used leading questions.

[74] It is not surprising that the complainant was embarrassed when she made the disclosure on 10 February 2013 to her mother and the cousin about having sexual intercourse with the appellant that she kept the detail to a minimum, because she was embarrassed. That was confirmed by the complainant's mother's evidence of the preliminary complaint that all the complainant had told her in that disclosure was that she had sex with the appellant on the boat and did not go into the detail that sexual intercourse took place twice or that she performed oral sex on him. Although I have a reservation about the detail of the complainant's mother's recollection of what the appellant said in the telephone conversation with her about his relationship with the complainant, the balance of the complainant's mother's evidence which was mainly preliminary complaint evidence was a relatively straightforward account, despite vigorous cross-examination, and capable of being accepted as honest and reliable.

[75] I do not accept the proposition that the cousin's evidence about the relationship between the complainant and her mother after the disclosure by the complainant that she had sexual intercourse with the appellant on the boat damaged the complainant's credibility. First, the complainant denied that she was hit or strangled by her mother, but second, the subsequent tension between the complainant and her mother (which the complainant admitted in her evidence) did not change the facts of the disclosures that had been made by the complainant to her mother in February 2013. The reason given by the complainant for the delay in making the complaint to the police was plausible in the circumstances of the dynamics that she explained of the complainant's being criticised by the appellant's family for making the allegations.

[76] Close analysis of the evidence admissible to prove guilt of each of the counts of which the appellant was convicted, however, shows consistency in the complainant's evidence and her description of the development of the relationship with the appellant. Her credibility was bolstered by the consistency of her disclosures in material respects first to her mother and then to her mother and the cousin.

[77] It was not unreasonable for the jury to be satisfied beyond reasonable doubt that the appellant had a relevant sexual interest in the complainant and of the credibility and reliability of the complainant's evidence in respect of the counts for which guilty verdicts were returned. Those verdicts were well supported by the evidence. The appellant cannot succeed on ground 1.

New evidence

[78] The appellant seeks to have evidence admitted from himself, his wife, his mother-in-law, his sister-in-law and her husband and their son and daughter-in-law, his friends and his solicitor that would amount to alibi evidence in respect of count 1. The evidence is relied on as showing the appellant was not visiting his wife's parents' home on Boxing Day 2012.

[79] Count 1 had been particularised as occurring on Boxing Day 2012, as the complainant recalled that the incident occurred after Christmas Day 2012. In her s 93A statement, the complainant had first identified the date by saying "I think it was Boxing Day". In fact, the appellant's instructions to his solicitors in relation to count 1 was that he was at the home of his parents-in-law on Boxing Day and he did

not raise any issue with the allegation that something had occurred on Boxing Day 2012. The date on which the conduct the subject of count 1 occurred was therefore not in issue at the trial. It was after the appellant's conviction, when he was discussing the charges in detail with his wife that he came to realise that he did not spend Boxing Day 2012 at his wife's parents' home.

[80] The evidence from the other witnesses relied on as new evidence is to the following effect. The appellant's solicitor took over carriage of her firm's file on 31 March 2016. She reiterated advice provided previously to the appellant that he should not speak with his wife about the charges, because she was a prosecution witness. On 28 October 2016 she took instructions from the appellant in relation to count 1 that he did not think he was at his mother's house on Boxing Day 2012, but they went to his wife's parents' home on Boxing Day and he had no recollection of spending Boxing Day away from his wife's parents' home. After the appellant's conviction, the solicitor found a handwritten file note made by the solicitor who had previously had carriage of the matter, including the accompanying audio recording of that solicitor's interview with the appellant's wife. The file note and audio recording confirmed that the appellant's wife recalled that they spent Christmas 2012 at her parents' house, but she was "pretty sure" they went back home and went out for breakfast next day with friends at a local restaurant. The appellant's wife was asked to provide a receipt. When the solicitor took over the file, there was no relevant receipt on the file and the solicitor did not appreciate the significance of the file note dealing with Boxing Day 2012.

[81] The appellant's mother-in-law recalls hosting the appellant and his wife with other members of her family on 25 December 2012, but none of the guests stayed over on Christmas night and the only family members who visited on Boxing Day 2012 were one of the appellant's wife's sisters, with her husband, son and daughter-in-law. That is confirmed by affidavits from the sister and these members of her family. The couple who are friends of the appellant and his wife have provided affidavits in which they set out their recollection of spending about an hour and a half with the appellant and his wife at brunch at a local café on Boxing Day 2012, starting with coffee, eating and then ending with another coffee. The exhibited credit card statement shows $22.20 spent at that café which is likely to have been incurred on 26 December 2012. It is difficult to attribute the amount of $22.20 to any particular share of the cost of the brunch described by the friend.

[82] At its highest, the new evidence is directed to whether it was possible for the conduct that is the subject of count 1 to have occurred on the date particularised in the indictment and which date was not challenged in any way at the trial.

[83] The significance of investigating the appellant's wife's belief that she and the appellant were not at her parents' house on Boxing Day 2012 was overlooked by the appellant and his lawyers prior to the trial, so that no investigations such as those which have been undertaken since the trial and have resulted in the new evidence were carried out. The failure to do so was not attributable to any forensic decision. The evidence that is now sought to be adduced is therefore evidence that did exist at the time of trial and could have been discovered with reasonable diligence. On that basis, the appellant needs the court to exercise the residual discretion that an appellate court has in an exceptional case to receive new or further evidence, where to refuse to do so would result in a miscarriage of justice, in the sense that it can be shown there was a significant possibility that a jury hearing the new evidence would

have reached a different verdict on count 1: *R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229 at [3] and [19] and *R v Spina* [2012] QCA 179 at [34] and [42].

[84] In the normal course the date on which an alleged offence is committed that is particularised in the count on the indictment is not a material element of the charge. The particulars of the alleged time and place of committing the offence must be included on the indictment pursuant to s 564(1) of the *Criminal Code* (Qld) in order to ensure the defendant has sufficient information of the nature of the charge to be able to meet the charge and understand the case against him or her: *BCM v The Queen* (2013) 88 ALJR 101 at [43]. It is submitted on behalf of the appellant, however, that the prosecution case was conducted on the basis the conduct that is the subject of count 1 took place on the date particularised in the count, so that the date became a material element of the offence. Reliance is placed on *R v Jacobs* [1993] 2 Qd R 541.

[85] Mr Jacobs was convicted of a number of drug offences, most of which depended on the evidence of two 16 year old boys who claimed Mr Jacobs provided them with cannabis sativa which they onsold. Count 1 was a charge of trafficking that was particularised as being conducted between 1 December 1989 and 19 June 1990. Counts 2 and 3 were counts of supply of cannabis sativa to the two boys each of which was particularised as occurring between 1 December 1989 and 31 January 1990. The evidence of the boys was not precise on the various dates on which they dealt with the appellant, but the preponderance of the evidence from both of them at the committal hearing was that they met the appellant around or a "bit before" Christmas 1989, when they got cannabis sativa from him, and continued to do so until around late January 1990. Counts 2 and 3 on the indictment were particularised accordingly. The evidence of these witnesses at trial was inconsistent with each other and with what they had said before, as to when they commenced to obtain cannabis sativa from Mr Jacobs and for how long.

[86] After analysing the various dates that the witnesses had given for their first meeting with Mr Jacobs, Dowsett J concluded at 561 that it was impossible from the evidence to fix the date of the supplies alleged in counts 2 and 3 with any confidence and there was no basis upon which the jury could have been satisfied that the first two counts of supply occurred on or prior to 31 January 1990. Mr Jacobs gave and called alibi evidence, as a result of which it was indisputable he was overseas between 18 December 1989 and 20 January 1990. Although that left 11 days between Mr Jacobs' return from overseas and 31 January 1990, to conclude that these supplies occurred in that period would imply acceptance of the assertion made by the Crown in the particulars in the indictment which would, in effect, be placing the onus of proof upon Mr Jacobs to show he had not supplied after he returned from overseas. In the light of the way the Crown conducted its case in reliance on these two witnesses, it therefore failed to prove the two offences of supply within the particularised period. Dowsett J stated at 567:

> "The case was conducted in such a way that it would be unjust to allow a conviction for an offence when the offences alleged in the indictment can clearly not have occurred. It is not to the point to say that he may have supplied on other occasions outside of that time frame. Such supplies were not the offences for which he was being tried."

[87] Ambrose J, the other member of the court in *Jacobs* who allowed the appeal in relation to counts 2 and 3, concluded at 549 that it would be unsafe and unsatisfactory to permit the convictions on counts 2 and 3 to stand, because the Crown case was to be gleaned from the evidence actually led before the jury and the inferences that might properly be drawn from that evidence resulted in a conclusion that the events sworn to by the Crown witnesses would have occurred within the period that coincided with the appellant's alibi. (Ambrose J's analysis of the evidence differed from that of Dowsett J.)

[88] Derrington J was the other member of the court in *Jacobs* and dissented on whether a new trial should be ordered in respect of counts 2 and 3. Derrington J analysed the evidence as allowing the jury to conclude that the evidence of the two boys as to dates was imprecise, but not destructive of their other evidence about the supplies made to them by Mr Jacobs. Derrington J accepted at 544 that "the nature of the allegations in the Crown case may be such that the prosecution is fixed to a certain date and it would be wrong to countenance any departure from that point when it is especially relevant to proof, alibi and the like", but concluded that was not the position in this particular case.

[89] The statements of principle made in *Jacobs* must be understood in the context of that case where the defence was conducted on the basis of the defendant's alibi.

[90] The date in count 1 was fixed by reference to the complainant's recollection that the first kiss took place on Boxing Day 2012. The complainant's evidence, however, placed the first kiss in the context of the day on which the appellant went swimming with the complainant and her siblings and then returned to the appellant's mother's house. There was no challenge to the complainant's evidence that there was such an occasion when the appellant went swimming with the complainant and her siblings. This was not a case where the appellant was under any misapprehension as to the circumstances and time of year in which the complainant described the first kiss as taking place and the case he therefore had to meet. The new evidence only focuses on the particular date that the complainant identified that the swim took place and not the fact that there was a swimming outing involving the appellant, the complainant and her siblings. It could not be concluded from the new evidence that there was a significant possibility that a jury hearing the new evidence would have reached a different verdict on count 1. The new evidence does not meet the threshold test that would allow the discretion to admit the evidence to be exercised.

[91] The application to adduce evidence on the appeal should be refused. It follows that the appellant does not succeed on ground 2. The proposal of the appellant to use the "proved alibi" on count 1 as another aspect in his favour in relation to ground 1 of the appeal has not come to fruition.

Orders

[92] The orders which should be made are:

1. Application to adduce evidence refused.
2. Appeal dismissed.