SUPREME COURT OF QUEENSLAND

CITATION:	*R v Holbeck* [2017] QCA 319
PARTIES:	**R** **v** **HOLBECK, Michael Anthony** (appellant/applicant)
FILE NO/S:	CA No 106 of 2017 DC No 1384 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane: Date of Conviction: 20 April 2017 (Devereaux SC DCJ)
DELIVERED ON:	Orders delivered ex tempore on 17 October 2017 Reasons delivered 22 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2017
JUDGES:	Sofronoff P and McMurdo JA and Boddice J
ORDER:	**Orders delivered ex tempore 17 October 2017:** **1. The appeal against conviction is dismissed.** **2. Application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted by a jury of three counts of indecent treatment of a child under 16 years and two counts of carnal knowledge of a child under 16 years, and not guilty of one count of indecent treatment of a child under 16 years and one count of carnal knowledge of a child under 16 years – whether the appeal should succeed CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to an effective head sentence of 18 months imprisonment, suspended after serving six months imprisonment for an operational period of two years, imposed on the Counts of carnal knowledge of a child under 16 years – whether leave to appeal against sentence should be granted *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, cited

R v Carmichael & Armbruster [2009] QCA 41, considered
R v Clapham [2017] QCA 99, cited
R v GAW [2015] QCA 166, applied
R v Phillips [2009] 2 Qd R 263; [2009] QCA 57, considered

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

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

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J.

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

[3] **BODDICE J:** On 20 April 2017, a jury found the appellant guilty of three counts of indecent treatment of a child under 16 years and two counts of carnal knowledge of a child under 16 years, and not guilty of one count of indecent treatment of a child under 16 years and one count of carnal knowledge of a child under 16 years.

[4] The appellant was convicted and, in respect of the counts of carnal knowledge, sentenced to 18 months imprisonment, suspended after having served six months imprisonment for an operational period of two years. The appellant was sentenced to six months imprisonment and placed on probation for two years for the offences of indecent treatment of a child under 16 years. The sentences were ordered to be served concurrently.

[5] The appellant appealed his convictions. The stated grounds of appeal against conviction were that the verdicts were unreasonable and cannot be supported having regard to the evidence, and that the appellant's legal representatives failed to follow his instructions. The latter ground was not pursued at the hearing.

[6] The appellant also sought leave to appeal against his sentences. The sole ground, in the event that leave was granted, is that the sentences imposed were manifestly excessive.

[7] On 17 October 2017, the Court ordered that the appeal against conviction be dismissed and that leave to appeal the sentence be refused. These are my reasons for joining in those orders.

Background

[8] The appellant was born on 5 April 1986. He was aged 29 years at the date of the offences and 31 years at the date of sentence.

[9] All of the counts pertained to the one female complainant. She was born on 12 August 2001. She was aged 14 years at the time of the offences.

Crown case

[10] The offences of which the appellant was convicted all were committed on 31 December 2015. The Crown case was that on that date the appellant had engaged in sexual acts with the complainant and later taken an indecent photograph of her and exposed her to an indecent photograph of himself.

[11] Count 3 was that the appellant licked the complainant's vagina. Count 4 was that the appellant had penile intercourse with the complainant. Count 5 was that the appellant had penile intercourse with the complainant. Count 6 was that the appellant took a photograph of the complainant's backside and legs. Count 7 was that the appellant sent the complainant a photograph of his genitals.

[12] The two counts of which the appellant was found not guilty were alleged to have occurred on one occasion between 1 December 2015 and 20 December 2015. The Crown case was that the appellant had engaged in sexual acts with the complainant. Count one alleged the appellant licked her vagina. Count two alleged he had penile intercourse with the complainant.

[13] At trial, it was not in issue that sexual contact had occurred on each of the occasions in question. At issue was whether the Crown could exclude that the appellant believed on reasonable grounds that the complainant was of and above the age of 16 years at the time of the sexual contact.

Evidence

Complainant's evidence

[14] The complainant initially spoke to police on 22 January 2016 and subsequently on 3 February 2016. Those interviews were recorded and admitted pursuant to s 93A of the *Evidence Act*.

[15] In her initial interview, the complainant stated she first met the appellant through friends of her mother who lived near the appellant. That first meeting was about one month before the first alleged occasion of sexual contact. Over time, the complainant started to attend the appellant's residence.

[16] The complainant said the first occasion that sexual acts occurred was at the appellant's house. The appellant said he liked her and asked if she like him. The appellant asked her if she wanted to have sex. The complainant said she did not think it would be a good thing. The appellant kept talking about it and then said "let's go to the room". The appellant took the complainant into his bedroom, took off her clothes and started "licking me out".[1] The complainant said it felt nice and she went along with it.

[17] The complainant said the appellant then took off his pants and climbed on top of the complainant. The appellant put his penis into the complainant's vagina. After about 10 minutes, the appellant suggested they go into the shower and "do it".[2] The appellant turned the shower on and the complainant lay down in the shower. The appellant was on top. The complainant later described herself as not really lying down, just sitting down with one leg up.

[18] The appellant started having intercourse with the complainant in the shower. After another five or 10 minutes, the appellant said he "just came".[3] The appellant and the complainant returned to the bedroom where they were "just cuddling and stuff."[4]

---

1 AB 173/18.
2 AB 185/45.
3 AB 187/10.
4 AB 189/18.

[19] Whilst they were lying on the bed, the appellant asked if he could take a photo of them in bed together. The complainant said no, she did not want him to take photos of her because she was naked. The complainant eventually agreed to photographs being taken of her. The appellant used his mobile phone to take three photographs. The complainant then left and went home.

[20] The complainant said the appellant was aware of her age. She had told him she would be in Grade 10 next year. The appellant asked how old that would make her and the complainant replied "I'm like, 15".[5]

[21] The complainant said after that incident the appellant kept texting her. He asked the complainant to send naked pictures. The complainant did not answer the texts. At one point the appellant texted the complainant with a picture of his penis.[6]

[22] The complainant said one day she left her telephone with her mother's friend, WW. He saw one of the text messages from the appellant. The message asked if the appellant could have a nude photograph of the complainant and could she try to get nude photographs of people for him. The complainant did not answer back.

[23] WW, who was very protective of the complainant and treated her like a daughter, went and spoke to the appellant at his house. WW was a bit drunk and tried to bash the appellant. He was not happy with him for sending messages like that to the complainant. An altercation ensued later on that day between WW, the appellant and some neighbours.

[24] The complainant said when she recovered her telephone from WW, there were many text messages from the appellant. The appellant accused the complainant of being a "slut bag". He included an offensive photograph. The appellant threatened to have WW charged for assaulting him. The complainant told him she could have the appellant charged for other things like putting up photos of a child. The complainant told the appellant the photographs were horrible and gross. Despite this, the appellant kept sending her photographs.

[25] In her second interview, the complainant spoke of a second occasion of sexual contact. The complainant went to the appellant's house. She lay down next to him on his bed and watched television. The appellant put his arms around her and asked her if they could have sex. The complainant said no, not this time. The appellant asked why not. The complainant said I don't know. The appellant then pulled the complainant's pants down. The appellant licked her vagina the same as the first time and then put his penis inside her vagina. They had sex for about 20 minutes.

[26] The complainant said after they had sex the appellant started saying that he loved her and that he wanted to make babies. The complainant was getting creeped out and said she had to go. The complainant said the appellant told her he had ejaculated on that occasion.[7]

[27] In this interview, the complainant gave further details of having sex in the shower. The complainant said the shower had a "chair thing".[8] The appellant sat down and the complainant went on top. The shower sex occurred on the second time she went

---

5 AB 194/10-20.
6 AB 192/40.
7 AB 202/10.
8 AB 203/40.

over to the appellant's house, not the first time. She said she had forgotten to put in the shower part when talking about the second occasion she had sex with the appellant. The photographs she had discussed had been taken after they had had sex in the shower.

[28] The complainant said they went into the shower because the appellant said it feels better. The appellant sat down and took off his prosthetic leg. The appellant turned on the shower. The complainant jumped on top and they had sex in the shower.[9] The complainant stopped when she had a cramp in her leg. The appellant said it was okay because he was "done anyway". They dried themselves and went and lay down on the appellant's bed. It was the appellant's idea to take the photographs.

[29] In this interview, the complainant confirmed that on the first occasion she had sex with the appellant they had sex once in the bedroom. About a week later they had sex again, this time in the bedroom and the shower. It was on that occasion that the appellant took photographs.

[30] In cross-examination, the complainant agreed that on the first occasion she met the appellant she was well dressed, and wearing nice make-up. She denied she was trying to make herself look older. She agreed at the time she had a three year old girl with her and it looked like she was caring for that girl. She agreed she told the appellant she worked in an Asian take-away shop. During this conversation, she was speaking to others about what grade she was in at the time. She could not say the appellant heard that conversation.

[31] The complainant accepted she went to the appellant's house. She denied that was because she liked the appellant. She just wanted to say "hi". Whilst at the house the appellant told her he liked her. She told the appellant she liked him. They cuddled up and kissed and the complainant did not push the appellant away. She denied the appellant asked her how old she was and she said 16. She denied ever telling the appellant she was 16.

[32] The complainant agreed the appellant asked her if she wanted to have sex with him. They talked about contraception. She told the appellant she was on the pregnancy bar. She agreed to have sex with the appellant because she thought it would feel nice. She did not leave straight away after having sex with the appellant. She stayed in bed and cuddled him. The photographs were taken whilst she was in the appellant's bed. Before she left his residence they exchanged mobile telephone numbers.

[33] The complainant agreed that on the first occasion she spoke to police she did not tell them about having sex with the appellant on a second occasion. She accepted it was not because she had forgotten about that second occasion. She denied it was because she had told the appellant she was 16 and she was worried he would get into more trouble. The complainant accepted that when she told her mother what had happened her mother was upset. She did not tell her mother the appellant forced her to have sex. The complainant accepted she went to see the appellant on the second occasion. She had sex with him again of her own free will.

[34] The complainant accepted that after the first time she had sex with the appellant, the appellant and she would text a lot. The text messages were in general about the appellant dating her. She accepted the appellant, in the text messages, expressed concern about her mother's reaction to him. She agreed her mother would not

---

9 AB 204/60.

approve of anyone dating her daughter whilst under 21. She denied the text messages confirmed she was 16 years of age. Her response of "yeah" to a question "you know it's legal what we've been doing, right?" was given when she knew the appellant had said it was illegal.[10] Her response did not relate to the complainant's age.

Other evidence

[35] The complainant's mother, ML, gave evidence that she knew the appellant as a customer of the bottle shop in which she worked and as a friend of her ex-boyfriend, SW. She had known SW since the complainant was around five or six years of age. She had a good relationship with him as did the complainant.

[36] ML said there was an altercation between the appellant and ML's friend WW on 21 January 2016. ML asked the appellant to leave. Later that evening there was a discussion around the table involving the complainant, ML and WW. ML saw text messages between the appellant and the complainant. They contained very explicit details. ML asked the complainant if she had had sex with the appellant. The complainant replied "he forced me".[11] ML contacted police on 22 January 2016. Shortly thereafter, the complainant was interviewed by police.

[37] In cross-examination, ML accepted the physical altercation on 21 January 2016, together with learning of the relationship between the appellant and the complainant was very upsetting for her. She denied the complainant never said the appellant forced her. She agreed the complainant also said "I froze and just let him do it".[12]

[38] SC, the brother of SW, was living in the same area as the appellant in January 2016. The appellant regularly visited SW, who was living in an apartment upstairs in the same complex. By that stage SC had known the appellant for about 18 months. He would see him regularly as he cared for his brother each day. They would socialise and on occasions, drink together.

[39] SC also knew WW. In January 2016, WW was living with ML. They became friends. WW would regularly drop in to see SW. WW would bring his young daughter WT. There were occasions when the appellant and the complainant were both at his brother's residence.

[40] On one occasion around January 2016, SW was talking to the complainant about how quickly she had grown up. Present for that conversation was SC, his brother, WW, T, the complainant and the appellant. They discussed the complainant's age. SC did not recall the complainant saying her age at that time but she did say she was in Year 8 or 9.

[41] In cross-examination, SC accepted that at no time in that conversation did the complainant mention her age. The conversation was either in late December 2015 or January 2016. Everybody was involved in that conversation. The appellant "was definitely focused in on the conversation".[13] He denied the appellant was drunk at the time. SC accepted he had consumed some alcohol.

---

10 AB 28/5.
11 AB 56/1.
12 AB 57/25.
13 AB 62/40.

[42] Kerry Lansley, the investigating officer in respect of the complainant's complaint, interviewed the appellant on 25 January 2016. In his interview, the appellant accepted he met the complainant before Christmas 2015 at SW's residence. The appellant was blind rotten drunk. The complainant followed him up to his own residence when he went to fix a play toy pram which WW's daughter had broken.

[43] The appellant said about a week or two later the complainant knocked on his door. The complainant needed to talk to someone. After a little while the complainant came on to the appellant. The complainant told him she was on "the bar" and 16.[14] They went into the bedroom and had sex. The appellant said it was a very quick exit by the complainant after "she got what she came for". The appellant thought she was just horny.[15]

[44] The appellant said a week or two later the complainant again knocked on his door. At that point they started a semi-relationship. The appellant said as far as he knew the complainant was 16. That was why he thought it was okay. Everything came crashing down the night before he was attacked at SW's residence. WW, the complainant, T and another girl about the complainant's age came into the residence with a dog. The complainant sat down beside the appellant who was on his phone. Suddenly WW jumped up and an altercation broke out. The appellant thinks WW thought he was filming him. The complainant and the girls took off.

[45] The next day the appellant was telephoned by WW who invited him to come over for drinks. Whilst the appellant was there WW grabbed the appellant by the throat, pushed him back into the chair and choked him like hell. WW then tried to whack the appellant with a cane. The appellant fled the residence. When the appellant went out later that evening for some cigarettes there was an altercation with some islander neighbours across the road.

[46] The appellant understood the complainant knew SW through his ex-partner, the complainant's mother. He described the complainant on the day he first met her as being very well dressed, nice make-up and very well spoken. She was small, tiny. At that stage he did not know the complainant's age. When the complainant followed him upstairs that day she played with a kitten outside. At one point she stopped at the door of the bedroom and commented on the appellant's bedspread. She then left to go downstairs.

[47] The appellant said on the first occasion the complainant knocked on his door he was just about to have a shower. The complainant was in hysterics. She needed to talk to somebody but did not want to talk outside. She came into the lounge room and started talking about some boyfriend that was stalking her. After she calmed down she became cuddly and came onto the appellant, "straight in the bedroom."

[48] The appellant estimated it was sometime between midday and 3.00 pm that day. He could not remember if it was a weekday or a weekend. They initially cuddled on the lounge chair. The complainant then kissed the appellant who said no. The complainant replied it was alright as she was 16, and on the bar. The appellant asked if she was sure. The complainant replied yes.[16] The appellant understood the reference to the bar meaning the "pill", "the implant thing". They then went into

---

14 AB 218/55.
15 AB 219/3.
16 AB 225/55.

the bedroom. There was no coercion. The complainant took his hand and led the appellant into the bedroom.

[49] The complainant hopped straight away onto the bed and took off her shoes. She was all over the appellant. The appellant wanted her to slow down a bit. He suggested they have a shower. They both took off their clothes and hopped into the shower. The appellant sat on the bench. The complainant straddled him. The appellant said "technically she screwed me … I didn't get on top of her".[17] After the appellant ejaculated, they left the shower. The complainant dried herself and left the residence.

[50] The appellant described the complainant's breasts as "bee stings".[18] They were not developed properly. The complainant had pubic hair which she shaved. He described the complainant as a stunner who literally knocked on his door. He honestly thought the complainant was 16 or 17. He thought she was a late bloomer. He had a cousin who was a late bloomer.

[51] The appellant said the next time the complainant came to his residence she had changed her hair colour from brown to blond. He had a text message dated 31 December 2015 in which the complainant is recorded as telling him she dyed her hair a different colour. It was blond. He thought that was the last text message from the complainant. He agreed other text messages recorded a discussion about the complainant coming over that day. He accepted the second occasion was probably in the early afternoon on 31 December 2015. He sent a text message back to the complainant about 4.30 pm that afternoon saying he had had a good time. The complainant was at his residence between 2.00 pm and 4.30 pm that afternoon.

[52] The appellant said when the complainant arrived on this second occasion they were fooling around. She was tickling him, just being a kid.[19] They then had sex. Initially, they started out in missionary position with the appellant on top of the complainant. It was not working as the appellant was having issues. They changed position to doggy style but the complainant then had issues. The appellant thinks it was the thrusting. The complainant was holding her hands really tight. She did not scream but he thought it was hurting her. At that point, the appellant got nervous. His instant worry was whether the complainant really was 16.[20] The appellant pushed himself away. They tried one more position. The complainant told him she was ready to come. The appellant did his best to finish. He ejaculated inside the complainant. The appellant said that the complainant's hair colour was blond on the occasion they tried the doggy position.

[53] The appellant said things went downhill thereafter. The appellant tried to call the complainant about the issues they had had in the bedroom. The complainant would not talk to him. She would not answer any of his questions. The appellant wanted to know what was going on. He wanted to talk to her to see whether they could break up, or find out what was going on. When asked if he had the impression they were in a relationship, the appellant said he thought "she was legal" and that it was legal to have a relationship with the complainant.[21]

---

17 AB 230/55.
18 AB 231/52.
19 AB 239/55.
20 AB 242/20.
21 AB 245/1.

[54] The appellant agreed the text messages suggested they had "doggy sex" before 31 December 2015. The appellant said that could not be right but accepted he may have got the different days mixed up. He was sure they had only had one sexual position in the shower. After reviewing the text messages, the appellant accepted the conversation about doggy sex occurred in the text messages sent before the complainant engaged in the second occasion of sexual contact. The doggy sex text message was sent the day after that act. He accepted that meant they had had sexual intercourse on 30 December 2015.

[55] The appellant accepted that on 29 December 2015 he had sent text messages in which he had asked the complainant how her mother would feel about them and whether they had to hide the relationship from others. The appellant thought he would have to hide it because she was still a minor in the eyes of the law up until the age of 18. However, her mother would not have wanted her daughter drinking or anything like that until she was 21.[22]

[56] The appellant once had a conversation with SW about the complainant's age. The conversation occurred after he had had sexual intercourse with the complainant. SW told him he thought she was older. He did not have any conversation with SW about her age prior to the acts of intercourse.

[57] The appellant accepted he had sent a text message on 30 December 2015 in which he asked the complainant whether she had been deleting his text messages. The appellant thought she was trying to hide his messages from others. He thought she was in a relationship WW. The appellant thought he was in a relationship with the complainant. He was concerned about the big age difference, since he was 29. He agreed he really liked the complainant. In the text messages, he had described her as his dream girl.

[58] The appellant accepted he had sent the complainant a picture of his penis. He did that after he had had sex with the complainant. He agreed he had asked the complainant to send pictures of herself to him. The appellant accepted he had sent the complainant a text message on 9 January 2016 in which he had said he would jerk off every day, up to 10 times a day. In that text message he had also asked if there was any chance he could get any pictures to work him up. He was wondering if the complainant had any nude pictures of girls or boys. The appellant accepted he had sent the complainant two pictures. One was of a female with a naked person.

[59] The appellant denied that on the first occasion they had sex he asked the complainant if she wanted to have sex. He accepted he did perform oral sex on the complainant on that first occasion. He then had sex in the shower. He accepted that. When they went back to bed, they had sex again, although he could not remember going back to the bedroom and having sex after the shower. The appellant accepted that whilst they were lying in bed he asked the complainant if he could take some photos of her with his mobile phone.

[60] The appellant denied the complainant gave him her telephone number. He texted her using Facebook. He agreed he told the complainant to delete the photograph of his penis. He was worried about her mother. He agreed he asked the complainant to send naked photos of herself. He denied the complainant ever told him she was 14 turning 15 or that she was in Grade 10. The appellant knew that if someone was

---

22 AB 252/4.

under the age of 16 it was against the law to engage in sexual intercourse with that person. He was not concerned initially when entering the relationship but he was after he found out she was 14, not 16.

Admissions

[61] During the trial the appellant made formal admissions that photograph number 6 tendered in evidence was a photograph of the complainant's backside and legs which had been taken by the appellant. Further, the appellant admitted he sent the complainant a photograph of his penis by text message on 31 December 2015 at approximately 10.12 pm. The photograph was accompanied by a message which read "delete".

Text message

[62] At trial, print-outs of text messages between the appellant and the complainant spanning the period 29 December 2015 to 15 January 2016 were admitted into evidence. The text messages supported findings that the first occasion of sexual contact between the complainant and the appellant was before 29 December 2015. That initial sexual contact included both oral sex and sexual intercourse "doggy style".

[63] The text messages contained the following exchange on 29 December 2015:

4008: 29 December 2015 Appellant to complainant	Ok well what's the go with your mum. Will she kill me and do we have to hide it from her n ppl.
4012: 29 December 2015 Appellant to complainant	U know it's legal what we been doing right?
4015: 29 December 2015 Appellant to complainant	I'd love to marry u when you're 18 if y would like to be my wife?
4016: 29 December 2015 Complainant to appellant	Idk arm years to come
4017: 29 December 2015 Appellant to complainant	I know it is but it's good to be best friends first before marriage to make shure we fit
4038: 30 December 2015 Appellant to complainant	Have you been deleting them straight away
4125: 31 December 2015 Appellant to complainant	That's why I think we need to sit down n have grown up conversation and talk about our feelings and everything
4176: 31 December 2015 Appellant to complainant	Does your mum go thru your phone?
4177: 31 December 2015 Complainant to Appellant	Yea
4178: 31 December 2015 Complainant to appellant	What's my number under?
4179: 31 December 2015 Complainant to appellant	Bro

4366: 9 January 2016 Appellant to complainant	Would u get some n send them to me. All u have to say to guys your age show me your cock or even older guys n chicks.

Appellant's submissions

Conviction

[64] The appellant submits his convictions amounted to a miscarriage of justice. He had no knowledge the complainant was under the age of 16. He believed she was 16. The complainant and the other Crown witnesses gave false evidence at trial.

[65] The appellant submits the jury's verdicts of guilty of counts 3, 4, 5, 6 and 7 were logically inconsistent with verdicts of not guilty on counts 1 and 2. All counts relied on the complainant's evidence. There is no reasonable basis for the jury to draw a distinction between those counts.

Sentence

[66] The appellant submits the sentences of imprisonment were manifestly excessive. He ought not to have been required to serve actual time in custody.

Respondent's submissions

Conviction

[67] The respondent submits the jury verdict was not unreasonable. Having heard the complainant's evidence and the appellant's account to police it was open to the jury to conclude that the appellant's version of events was improbable and inconsistent with the tenor of the text messages.

[68] Further, it was open to the jury to be satisfied beyond reasonable doubt that the appellant did not have a belief on reasonable grounds that the complainant was 16 years of age at the time of the commission of counts 3, 4, 5, 6 and 7. The occasion of intercourse doggy style occurred prior to those offences. On the appellant's own account, it was during that act he had an "instant worry about is she really 16". This circumstance provided a rational basis for the jury's acquittal of the appellant of counts 1 and 2 but conviction of the remaining counts.

Sentence

[69] The respondent submits the sentences imposed were not manifestly excessive. Whilst the respondent's criminal history did not include being previously sentenced to imprisonment, he had prior criminal offences, including convictions for taking and distributing indecent images, although he was sentenced for that offending after he was charged with these offences. Against that background and notwithstanding the contents of the psychologist's report, there was no basis to conclude that there were exceptional circumstances justifying an order that the appellant not serve a period of actual custody.

[70] A consideration of the relevant authorities supports the conclusion that the sentence imposed was well within a proper exercise of the sentencing discretion. The appellant's own counsel at sentence conceded a head sentence of two years' imprisonment

would be appropriate. The appellant's counsel also accepted that exceptional circumstances had not been demonstrated to support a sentence that did not require the appellant to serve a period in actual custody.

Consideration

Conviction

[71] There was no dispute at trial that the acts of sexual intercourse took place on the occasions set out in the indictment. There was also no dispute that the images had been sent by the appellant to the complainant. At issue was whether the prosecution had excluded that the appellant had a reasonable belief that the complainant was aged 16 years at the time of the acts of intercourse.

[72] On this issue, it was open to the jury to draw a distinction as to the appellant's state of knowledge at the time of the first occasion of sexual interaction (counts 1 and 2) and the second occasion (counts 3, 4, 5, 6 and 7). That distinction arose because on the appellant's own version to police he became concerned that the complainant was under the age of 16 years at the time he engaged in the act of sexual intercourse "doggy style". A consideration of the text messages supported a conclusion that that position was adopted on the first occasion of sexual interaction, not the second occasion, as the complainant stated in evidence.

[73] Once the jury accepted that the appellant had concerns as to the complainant's age at the time of the first sexual contact, it was open to the jury to draw a distinction as to the appellant's state of knowledge on the second occasion of sexual contact. The verdicts of not guilty of counts 1 and 2 but guilty of count 3, 4, 5, 6 and 7 on the indictment are entirely consistent with the drawing of such a distinction.

[74] That distinction provides a logical, rational, basis for the verdicts of not guilty of counts 1 and 2 but guilty of counts 3, 4 and 5 in respect of the counts of sexual intercourse. The verdicts of the jury are not inconsistent.[23] The verdicts of not guilty of counts 1 and 2 do not support a finding of a miscarriage of justice in respect of the convictions for counts 3, 4, 5, 6 and 7.

[75] The verdicts of the jury are also not unreasonable. The principles for determining whether a verdict is unreasonable were recently restated in *R v Clapham*:[24]

> "… The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if 'it would be dangerous in all the circumstances to allow the verdict of guilty to stand'. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

[76] In undertaking this assessment proper regard must be given for what the High Court in *R v Baden-Clay*[25] emphasised was the jury's role as "the constitutional tribunal

---

23 *R v GAW* [2015] QCA 166 at [19]-[23].
24 [2017] QCA 99 at [4]-[5].
25 (2016) 258 CLR 308; [2016] HCA 35 at [65].

for deciding issues of fact" and the need to ensure that the Appeal Court does not substitute trial by appeal for trial by jury.

[77] Here, the jury had clear, unequivocal evidence from the complainant that the appellant had engaged in sexual intercourse with her on two occasions on 31 December 2015, following which he had taken a naked photograph of her and sent the images the subject of counts 6 and 7 on the indictment. Whilst the appellant did not give evidence at trial, his interview with police, placed before the jury did not dispute the complainant's account of those acts or of his actions.

[78] Whilst the appellant maintained he engaged in the acts of sexual intercourse or sent those images when he honestly and reasonably believed the complainant was 16 years of age, the appellant's own account was that once he had engaged in sexual intercourse with the complainant doggy style, he had instant concerns as to whether she was under the age of 16 years.

[79] That evidence provided ample support for the jury's conclusion that the prosecution had excluded that the appellant reasonably believed the complainant was aged 16 years at the time of the commission of the offence in counts 3, 4, 5, 6 and 7. There was nothing in the evidence which required the jury to continue to have a reasonable doubt in relation to that matter.

[80] Having considered the evidence as a whole, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each of the offences in counts 3, 4, 5, 6 and 7 on the indictment.

Sentence

[81] The appellant was a mature man who engaged in sexual conduct with a 14 year old minor. Whilst that contact was consensual and the appellant had no relevant criminal history of a like nature, there was a need for the sentence to act as a deterrent to others and to indicate the community's denunciation for that conduct.

[82] A consideration of the comparable authorities supports a conclusion that a sentence of 18 months' imprisonment for the acts of sexual intercourse was well within an appropriate exercise of the sentencing discretion. Conduct of a similar nature has, in comparable cases,[26] resulted in a sentence of imprisonment for longer periods.

[83] There was also nothing in the appellant's circumstances which justified a conclusion that he fell into an exceptional category such as to not require him to serve actual time in custody. The appellant's counsel properly conceded that fact at sentence. Nothing advanced by the appellant on appeal altered that position.

[84] Once that conclusion was reached there is no basis to conclude that a requirement that the appellant serve six months in actual custody rendered the sentence manifestly excessive. The appellant did not have the mitigating factor of co-operation shown by an early plea of guilty. Despite that circumstance, the appellant was only required to serve one third of the sentence of imprisonment.

Conclusions

---

26 *R v Carmichael* [2009] QCA 41; *R v Phillips* [2009] QCA 57.

[85] The appellant did not establish any basis for setting aside the jury's verdicts of guilty on counts 3, 4, 5, 6 and 7 on the indictment.

[86] The appellant also did not establish that the sentences imposed were manifestly excessive.