

SUPREME COURT OF QUEENSLAND

CITATION: *R v FAQ* [2018] QCA 262

PARTIES: **R**
v
FAQ
(appellant)

FILE NO/S: CA No 2 of 2018
SC No 2260 of 2016

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction:
14 December 2017 (Reid DCJ)

DELIVERED ON: 9 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2018

JUDGES: Philippides and McMurdo JJA and Jackson J

ORDERS: **1. Appeal allowed.**
2. Set aside the convictions on counts 1, 2, 3 and 4 on the indictment.
3. Acquit the appellant on those counts.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant, an adult man, pleaded guilty to exposing the complainant, a 12 year old girl, to indecent written matter in the form of a text message – where the appellant was also convicted after a trial by jury of three counts of indecent dealing and one count of rape against the same complainant – where the appellant and the complainant had developed a close relationship demonstrated by the evidence of hundreds of text messages sent between them during the period of the alleged offending – where the complainant attended three police interviews – where, at the first police interview, the complainant denied that the appellant had committed any improper acts against her – where, at the second police interview, the complainant reported that the appellant had indecently dealt with her, but made no allegation of rape – where the complainant first complained that she had been raped in the third police interview – where, up until the second police interview, the complainant had repeatedly denied any improper conduct by the appellant towards her –

where the content of the text messages was difficult to reconcile with the complainant's ultimate version of events – where many of the text messages were affectionate and friendly – where some of the text messages, when considered with evidence of what the appellant had said to the complainant's mother and step-father, could be understood as indicating a sexual interest in the complainant – whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered

R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, considered

Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited

COUNSEL: S R Lewis, with K E McMahon, for the appellant
C N Marco for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **PHILIPPIDES JA:** I agree with the orders proposed by McMurdo JA for the reasons given by his Honour.
- [2] **McMURDO JA:** The appellant was charged with five offences of a sexual nature, each involving the same complainant who was a 12 year old girl. He pleaded guilty to one of those charges, which was that he exposed the girl to an indecent written matter in the form of a text message to her. After a four day trial by a jury, he was convicted of the other offences, which were three counts of indecent dealing and one count of rape.
- [3] He appeals against those four convictions upon the grounds that the verdict in each case was unreasonable and that there was a miscarriage of justice by the absence of certain directions from the trial judge. I have concluded that the verdicts were unreasonable so that the convictions should be set aside and the appellant should be acquitted of those charges.

The evidence

- [4] When the alleged events took place, in a period from 11 August 2015 to 18 September 2015, the appellant was aged 30 to 31 years. For some years he had been a friend of the man who was the partner of the complainant's mother. I will refer to him as the complainant's step-father. The appellant would often socialise with the complainant's mother and step-father, visiting each other's houses. By 2015, the appellant was visiting the house where the complainant lived nearly every day. In that house there were other children, a girl born in 2004, another girl born in 2007 and a boy born in 2014.

- [5] The appellant and the complainant developed a close relationship, as was demonstrated by the evidence of the content of hundreds of text messages sent between them in the fortnight ending on 18 September 2015. It was one of those text messages that was the subject of the charge to which the appellant pleaded guilty. The messages require some interpretation, for which the jury was assisted by evidence from the cross-examination of the complainant. As I will discuss, these messages showed an unusually close relationship between an adult man and a 12 year old girl, but they were difficult to reconcile with the complainant's ultimate version of events.

The mother's evidence

- [6] Before discussing the complainant's evidence and the text messages, it is convenient to discuss the evidence of the complainant's mother and her step-father.
- [7] The complainant's mother gave evidence that she witnessed the conduct that was the subject of one of the indecent dealing offences.¹ She described the appellant sitting next to the complainant in the lounge room as they watched television at her house one day. The mother said that she was concerned when she saw the appellant with "his arm around her thigh" as the complainant was "laying in him". She was asked, in evidence in chief, whether she said anything about this at the time, to which she answered "no, because I was flat out doing things". She explained that she had seen this "interaction" because the house was an open plan design, from which you could see into the lounge room from the kitchen.
- [8] There was no other interaction between the complainant and the appellant which had caused her any concern. But she said that she had been concerned also by a conversation she had with the appellant, in which he had said to her "don't take offence to this, but [the complainant] would make a perfect woman for me, as she is house trained and good with kids".
- [9] The mother recalled an occasion when the appellant asked if the complainant could go with him to an area outside town where the appellant was going to search for a mud guard lost from his car. The mother agreed and the appellant and the complainant were gone for a couple of hours. It was the complainant's evidence that it was during this car trip that she was raped. The mother was asked to relate the timing of that car trip to an occasion where the appellant injured his foot or ankle, and said that the injury was after the car trip. There was a formal admission of certain texts which the appellant had sent to his mother and another person which referred to this injury as having been suffered on 7 September 2015.
- [10] The offending text message came to light in this way. The mother said that the principal at the complainant's school telephoned her to say that the complainant was using her phone at school which was not permitted. This caused the mother and the step-father to look at the phone to see what activity there had been. The step-father used software on his computer by which he was able to retrieve her messages. When the offending text came to light, the complainant's mother took her to the police, who interviewed her on 20 September 2015 (the first interview). As I will discuss, in that interview, the complainant said that there had been no improper conduct by the appellant. It was not until she was interviewed again by police, on 7 April 2016, that she complained of any indecent dealing by him (the second

¹ Count 4 on the indictment.

interview). And it was not until she was interviewed yet again on 27 April 2016 (the third interview) that she complained that she had been raped.

[11] The mother testified that in April 2016, the complainant said that she needed to tell her something. The complainant said that the appellant had touched her. The mother asked where it was that this conduct had occurred, and the complainant said “out in the forestry when they were looking for the mud guard”. The mother asked her if he had had sex with her, to which the complainant said no. As a result of this conversation, the complainant was again taken to police, when the second interview occurred. By then, she was aged 13.

[12] About two weeks later, the mother was handed a note from a friend, a woman whom I will call M, who was living with her at the time. The note was written by the complainant to M and read as follows:

“You can tell mum that [the appellant] did rape me more than once.
I can’t say it. It’s too much.”

As a result of that note, the complainant was again taken to police, resulting in the third interview.

[13] In cross-examination, the mother was taken to her statement to police, which was given on 6 April 2016, in which she recalled seeing the complainant and the appellant sitting together watching television, but in which she had said nothing about his hand being on her thigh. In that statement she said that they were “sitting close together, and [he] had his arm around [her]”. She agreed in cross-examination that this is what she had seen. She also agreed that in that statement she had noticed that the appellant had sometimes been texting her other children, as well as the complainant.

[14] Again in cross-examination, she agreed that the appellant had lost the mud guard when he had been camping, by himself, on a night close to Father’s Day. She also agreed that the appellant had suggested that one of the complainant’s sisters go with them to search for the mud guard, but that she did not go because she had something else to do.

[15] The mother agreed that after the step-father had searched the complainant’s phone, the mother had asked the complainant whether the appellant had sent her “anything inappropriate” to which the complainant said “there was one thing”, referring to the offending text. This was before the complainant was aware that her phone had been searched.

[16] The mother said that there had been many times prior to the second interview when she had asked the complainant whether anything bad had occurred between her and the appellant, which the complainant denied many times before ultimately saying that she had been touched by him. At that time, the complainant was not living with her mother, and had moved to her uncle’s house, although she was coming to the mother’s house frequently. She agreed that there was conflict between her and the complainant at the time.

The step-father’s evidence

[17] In his evidence, the step-father described an incident at his house in which he saw the appellant and the complainant on a trampoline. He said that the appellant then

had his arm over the complainant's shoulder with his hand in her breast area. He said that on other occasions, he had seen the appellant with his hand near the complainant's inner thigh. He said that this caused him some concern, but not enough to say anything about it to the appellant.

- [18] In cross-examination, he agreed that the trampoline was in an open and visible place in the back yard, and that there were several people present. He agreed that in his statement to police, he had said that the appellant and the complainant were sitting close together on the trampoline "and there was some arm around, or some touching on the leg, or something like that". That statement was given to police in April 2016.
- [19] The step-father said that in about mid-August 2015, the complainant said words to him to the effect that six months ago, the complainant "had nothing" but that "all of a sudden, now she's got a full rack".
- [20] The step-father recalled a conversation with the appellant and the complainant one evening in which he said that the appellant would not allow the complainant to answer for herself. The subject matter of that conversation was not revealed.
- [21] In cross-examination, the step-father was asked about a conversation between him and the appellant, on a drive from Bribie Island, in September 2015, in which the two men discussed problems which the complainant was experiencing. In that context, the appellant told the step-father that he had been talking to and texting the complainant, even late at night, because he was worried about her due to problems in the house and, more specifically in the relationship between the mother and the step-father. He agreed that the appellant had then told him that he had suggested that the complainant see the guidance counsellor at school. It was in that conversation, he agreed, that the two men were talking about the complainant growing up and there was something said about the complainant's breasts. The step-father rejected the suggestion that he, and not the appellant, had referred to her breasts. The step-father said that he was angry at the time but did not reveal his anger to the appellant.

The complainant's evidence

- [22] The evidence of the complainant was constituted by the video recordings of her police interviews and her pre-recorded testimony at the trial.
- [23] In the first interview, she was asked to tell police why she had come to talk to them. She said that she had been talking to the appellant:

"... because he's been understanding me and stuff and I haven't noticed what he's been trying to do, by trying to touch me and stuff without me knowing. And mum's been real stressed and everything. And I didn't know ... he said to [the step-father] that, um, I kinda found it a bit disgusting that um he said that six months ago [I] didn't have boobs and all this and then now she does [the step-father] told me this morning and stuff. Quite disgusted. Like he's trying to pull me away from mum and stuff ... trying to take me out of the family and stuff".

- [24] But the complainant was adamant that she had not been mistreated by the appellant, despite what her mother had been saying. She told police in this first interview:

“Mum’s saying that he’s touched me and everything but he hasn’t like ... she’s saying he’s touched me but he hasn’t.”

When asked to describe the appellant, the complainant said:

“He’s nice, he’s funny ... he would do something for you if no one would do it ... like he promised me, ‘cause can’t wait until next year for my turtle licence, so I can get a turtle ... he said he’d get me the enclosure and stuff for it.”

She said that the appellant had not been “inappropriate at any stage” and again said that he had not touched her “and stuff”. When asked whether the appellant had ever said anything to her that he should not have said, the complainant answered “apart from that text message, that was about it.”

- [25] That was a reference to the offending text message. It was sent by the appellant to the complainant on 10 September 2015, at 22:19 and was as follows:

“If u where older id strip u of to ur undies and bra tie u up blind fold u [and] get a feather and prove my poing”.

The police officer asked the complainant whether she knew what the appellant had meant by that text and she said that she had told him that she “wasn’t ticklish” and “he’s like I bet you are and I’m like I bet I’m not”. She said that “he was [trying to] find out ... if us kids were ticklish ... and I wasn’t ticklish ‘cause [the step-father has] tickled me too many times ... and I’m not ticklish”.

- [26] Again in the first interview, she was asked whether she had ever met the appellant by herself without her mother and step-father being there, and she responded by referring to the time when they went to look for his lost mud guard. She told police that they had found the mud guard “but nothing happened” and that whilst they were looking for it, he had said nothing inappropriate to her.
- [27] In the second interview, she told police that the appellant had touched her when they went to the bush to look for the mud guard. She described an incident in which the appellant dropped his phone to the ground and asked her to pick it up, and that as she did so he leant to undo her bra. She asked him what he was doing and he said “I’m just undoing it for you” and she told him not to do so. A little later, she said, he leant over her and starting touching “my bits” and she told him that she would tell her mother. He replied “if you do I’ll hurt you”. After a period in which the two said nothing to each other, he asked her whether he had done anything wrong, to which she responded that he had touched her “in my places”. He said that it was “only a joke”, but she protested that “it’s my private bits that you touched.” She said that they then found the mud guard and went home.
- [28] She was asked to give more details of these events, and she described him putting his hands down her shirt, touching both her breasts with his hands inside her bra. She said that he also put his hands down her pants and rubbed his hand against her vagina, saying to her “if you say a word, I’ll hurt you”.
- [29] Again in the second interview, she said that the appellant had then told her to delete all the messages he had sent her so that her mother did not see them. She said that she had confronted the appellant about the offending text message and he had said that it was only a joke.

- [30] She described an occasion in which she was watching television with the appellant at home. She said he was trying to get his hands closer and closer to her breasts but did not actually touch her. That was the conduct that was the subject of a count on the indictment.
- [31] She also told police that on occasions, he would pick her up and lay her next to him when she and her sister were playing on the trampoline.
- [32] In the third interview, she told police that the appellant had raped her “after he all touched me and stuff”. She described this offence as follows:
- “When we found the mud guard. Um we stopped and um he, we got out of the car. And he told me to hop out of the way so I did. And then um he said he was grabbing something so he did. And then he grabbed it, I don’t know what it was. And he told me to sit back down. ... He leant over to me and um he stripped me down.”
- [33] She said that he told her that she was “a dirty slut” and “this is what I deserve”. When she said to him that she would tell her mother, he said “you do and I’ll kill or if I can’t ... I’ll send someone after you”.
- [34] A little further on in the third interview, she said that the appellant ripped her clothes from her when she was sitting in the car seat, after the appellant had lowered the seat back as far as it could go. He then moved on top of her and inserted his penis into her; she tried to push him off but he was too strong, she said. He was telling her that she “deserved everything I get” and she described herself as “screaming and stuff”. She said he put his hand over her mouth to stop the screaming and told her to “shut up or he would kill me”. She said the rape lasted about 20 minutes.
- [35] She then gave the police a copy of the note which she had written to M, whom she described as her aunty. She said that she had meant to say in the note “only once”, although she had written “more than once”.
- [36] In her pre-recorded evidence, she said that she had not told the truth when, in the first interview, she said that nothing inappropriate had happened, and nor had she done so in the second interview, when she said that nothing else inappropriate had happened apart from the touching which she then described. She said that she had told the truth in the third interview when she said that she had been raped. She said that she had not told the truth earlier because she “wasn’t ready to tell my full story”, and because “I was still scared”, having been told by him that he would hurt her.
- [37] She was asked about the second interview, and the incident which she then described as she and the appellant watching a movie. She said that she was then touched about five times, over her clothing.
- [38] In cross-examination, she admitted that she had said to the prosecutor in a conference that morning, that it was by a text message that the appellant had told her to delete all of his previous messages. The prosecutor conceded that there was nothing in the text messages which were in evidence, covering the period from 4 to 18 September 2015, in which he had told her to delete any messages.

- [39] She agreed that after her mother had asked her whether the appellant was interfering with or touching her, she had told the appellant about that and asked him to keep it a secret. She also agreed that at this time she was upset from hearing that the appellant had passed this information on to her step-father. There are text messages that relate to that subject to which I will return.
- [40] She agreed that in the period of the alleged offending, her relationship with her mother was then problematical. She was challenged on her statement to police, in the first interview, that she had protested to the appellant about sending the text message about tickling her. She could not explain why there was no text message in evidence under which she had made that protest.
- [41] The cross-examiner took her through the text messages at some length, suggesting to her that after the time which, on her evidence, she had been violently raped and before the first interview, there had been very many humorous, affectionate and friendly texts between them. She was asked:

“See, if he had have raped you, you would have stopped texting him, wouldn’t you?”

To which she answered:

“Not necessarily”.

She was asked:

“Well, you wouldn’t have been nice in your texts, would you ...?”

To which she answered:

“I am a nice person.”

- [42] The complainant agreed that after she went to police on 20 September 2015, the appellant made no threats to her. She said that this was “because I had nothing to do with him after [then]”. She then conceded that not long after the first interview, when she was wanting to live away from her family, she telephoned the appellant’s mother asking for her assistance, knowing that the appellant lived with her. The complainant did leave the family home and went to live elsewhere with an uncle for some months.

The text messages

- [43] At the trial, the prosecutor tendered formal admissions which included the following:
- “1. That the 53 pages of text messages are text messages exchanged between the defendant and [the complainant].
 2. These text messages were deleted from [the complainant’s] inbox and had been recovered by police using a program on [the complainant’s] phone.”

It was further admitted that those 53 pages of transcribed messages accurately identified those which were sent by the complainant to the appellant and vice versa.

- [44] Before going to specific text messages, some general comments should be made. The first is that in many instances, the message requires some interpretation and needs to be understood in the context of facts for which there was other evidence.

Nevertheless, in nearly all cases it is possible to understand what was being said and, most importantly, to see the friendliness or otherwise of the communication. The second point is that, contrary to the complainant's testimony, most of the messages were sent from her to him. The third point is that the jury appears to have been presented with this evidence as a complete set of the messages between them over this period. There was no suggestion from the prosecutor in his address to the jury that there were some messages which were missing. Yet in this Court, it is submitted for the respondent that the wording and chronology of some of the messages gives rise to an inference that not all of the messages were recovered. That is not an inference which the jury was asked to consider.

[45] I will refer to the more important messages in chronological order. There were very many texts on the evening of Friday 4 September 2015, from which it appears that the appellant was then drinking heavily. He was expressing his sadness at his own situation of "having nothing left", with the hope that "none of u kids ever go through this". He said he was "drinking to forget to what Sunday is". Sunday 6 September was Father's Day, and the appellant was estranged from his own children. As the evening went on, he was reporting some of the effects of his drinking. At one point, he reported that he had just fallen out of his ute and he described his drinking in front of a fire "in forestry". That was an indication he was in the forest where he lost the mud guard.

[46] At 8:56 the next morning, she texted him saying "hello bush man", another indication that he had camped out on the previous night. There were texts from her to him, with relatively few the other way, throughout that day, the last of which was at 18:45.

[47] At 20:27 on 6 September, he texted:

"im so over my life i just wanted my too know my kid's sorry probably was no fun this weekend."

That was an apparent apology for his depressed mood, explained by his sorrow at being estranged from his children.

[48] At 20:56 on that evening he texted:

"Cool you kids got me through it all this weekend was so hard can't thank you enough love you all".

To which she replied:

"That's ok we love u too."

[49] There was then an exchange which indicated that there was discord between the complainant and her step-father, in which the appellant texted "hope alls ok with [the step-father] now", to which she replied:

"Yer hope so over all of this shit with him night night sleep tight xxx".

[50] On the morning of 7 September, he texted messages to the effect that he wished that he had a girlfriend, that he needed his "world to turn around", and that he needed fun. He added:

"Not the kind that you are thinking of lol adult fun lol"

and that:

“Playing around with you kids is still fun to[o.]”

[51] At about midday on 7 September, he texted that:

“You’re to[o] young to look up those naughty adult things on computer”

to which she responded:

“I’m not I was on cool math”.

[52] At 13:02 on that day, she texted:

“I’m not a scared chicken just remember you[’re] ticklelish and [I’m] not just remember that”.

[53] On 8 September she texted him asking if he was coming over, and threatening that she would not give him any more hugs if he did not reply to her messages. In response, at 22:45 that night, he texted:

“I know you are if you had a toy room I could sneak in give you a hug hehe”.

She replied:

“Ha ha u make me laugh lol”.

[54] On the morning of Wednesday 9 September, the appellant texted that he was heading to a doctor and that “worst case is its broken”. That was a reference to his ankle injury, about which he had texted someone else, at 3.30 am on 8 September, saying that he had injured his ankle “last night”. As I have discussed, it was the complainant’s mother’s evidence that this injury was suffered after the car trip on which the appellant and the complainant had gone looking for the mud guard.

[55] On the morning of 10 September, she texted that she was “on computers now”, to which he replied:

“Ok cool more you focus on your school work faster u can get a good job and move out lol”.

There were then a few friendly but inconsequential exchanges before the text message that was the subject of the specific offence was sent at 22:19 that night. She sent her next message at 22:27 saying:

“I bored”

and another one a few minutes later saying:

“U can’t just fall asleep that fast”.

There was no further message from him that night.

[56] On 11 September, the two exchanged further messages, of no particular consequence, including an inquiry about his injury and a response from him that it was “not broken”.

[57] There were exchanges on the evening of 12 September which are particularly important to this case. There were these exchanges:

- (at 19:39) the complainant: “I need to talk to you???”

- (at 19:40) the appellant: “What’s up was having shower”
- (at 19:52) the complainant: “Interesting night not”
- (at 19:53) the complainant: “I’m nearly home anyway so cold out here”
- (at 19:56) the complainant: “Don’t worry I’ll be fine if she yells at me which she won’t but if She does I will tell her to go away she said she won’t tell anyone about tonight if I go home but if she does she will be dead meat I reckon which she won’t tell anyone”
- (at 19:57) the appellant: “Ok look after yourself I rely [sic] want to say something to her but know that you will get in trouble for it”
- (at 19:59) the complainant: “Yep heaps of trouble home anyway but everyone is in bed watching a movie and [my youngest sister] is asleep and [my step-father] [my other sister] is watching a movie but none of them know about me and mum I’m so upset what she said again that’s what pissed me off”
- (at 20:00) the complainant: “your [sic] the only one I trust”
- (at 20:01) the appellant: “you are not the only one if it keeps going im thinking about seeing the cops over it”
- (at 20:02) the complainant: “How come but then I will be in the shit”
- (at 20:06) the appellant: “if word gets out of what she is accusing me of I will risk jail and never see my kids again”
- (at 20:07) the complainant: “it won’t tho because it’s only between me an [sic] her dw it will be all fine because you’re the only one that knows about it tho ...”
- (at 20:08) the appellant: “What about [the step-father]”
- (at 20:09) the complainant: “Nope no clue in the world I already asked about it”
- (at 20:10) the appellant: “Asked him or asked [the mother] if he new [sic]”
- (at 20:11) the complainant: “I already have asked mum about it she said no because he would never talk to you again that is what she said”
- (at 20:23) the appellant: “I am so angry about this its not funny [the mother has] lost the plot if she thinks id do anything to any of you girls”
- (at 20:25) the complainant: “yer I know it’s all because of what’s she is doing”
- (at 20:34) the complainant: “don’t tell her i told u u can ring me if you like”.

(Emphasis added.)

[58] On 13 September, there were several messages from the complainant saying that she was hated by her mother. At 19:21, she texted “need to talk to u about stuff” and he replied:

“[I’ll] let u know when”

adding that:

“im home with [your step-father]”.

At 21:24 on that evening, she texted:

“U told him great”

adding a minute later:

“Do u realise he will tell mum about this and so will [my uncle]”

The appellant replied:

“Its ok he wants to help we r sitting up town as he’s so angry with whats happened and wants to help”.

At 21:26 she texted:

“Yer I know but I thought u trusted u tho that’s the thing I said u would tell anyone at all”.

He immediately responded with texts as follows:

“No kido this is bigger we r all worried big time about u [your step-father] wants us to talk etc he wants me to help u as [does] he

I know things happened y we at [your uncle’s] home and we r all trying to work out how we can help u”.

[59] There were then these exchanges:

- (at 21:32) the complainant: “I do trust u but u said u wouldn’t tell anyone at all u even said it in the car tho that’s the thing”
- (at 21:32) the appellant: “No we r trying to get your mum help as she needs it so this will all stop”
- (at 21:33) the complainant: “Yer but I trusted u tho that’s the thing [the step-father] will probably tell mum tho”
- (at 21:35) the appellant: “I know kido I did say and mean[t] it but when [your step-father] opened up and i could see his concerns about everything I knew that he didn’t know what was going on. might be hard to see but this is the best thing to help you all”
- (at 21:36) the complainant: “I know that but it has taken me a lot to trust peopl[e]”
- (at 21:38) the appellant: “I know i understand ive hurt you tonight in time u will see ive done it for all of the right reasons and help you ...”

The exchanges continued, with the appellant continuing to say he would endeavour to help her. At one point he apparently referred to doing this in conjunction with her step-father when he texted (at 22:11) as follows:

“Ok good girl we both love you and are both going to help you”.

[60] On 14 September, their texts again related to the difficulties between the complainant and her mother. She texted (at 16:25): “dunno what I have [done] to upset mum because she is mad at me dunno why”. He replied “its just her ... u haven’t done anything”. She responded: “Ok seems like I have but ohh well think it’s because I didn’t clean the house”. Later that evening (at 20:24) he texted “its bs what she’s doing to u”.

[61] After a few texts on 15 September, she texted on 16 September (at 08:55): “Seeing school nurse now”. There was a text from her on that day (at 15:05): “Going to get yelled at yay” followed by further messages from her accusing him of ignoring her, asking for his help and asking for her to come to her house or to ring her. At 21:25 that evening, he texted “can msg me ... im nearly home now”.

[62] Twenty minutes later, she sent a longer message which it is necessary to set out in full:

“He said that u need to back off and I said u accusing him of some thing he said no but He said no and I said it seems like it he is only trying to help me sort shit out on what’s going on he is only one that gets what I’m going through ATM he said its fine if he is here to help its fine we’ll [the appellant] has been through enough shit mum accusing him of touching me. But it’s not true a lot of people know the he would not do such a thing at all he would not hurt a fly why would people think that u have touched me in any such way so stop accusing him of shit [the appellant] does not need to back off you all need to back off from him and trust him I trust him so what’s the harm in it all nothing so leave [the appellant] the fuck alone and mind you business”.

Evidently the complainant had been speaking with her step-father on the subject of the mother’s accusations that the appellant had been touching her.

[63] At 22:01 she texted:

“School nurse and mum and [my step-father] think im depressed going to go get checked out Monday”.

He replied:

“I think you may be to a degree but you’re [sic] mum has issues in a big way.”

[64] On 17 September she texted (at 07:14): “morning sunny jim xx” and asked him to ring her. A few hours later (at 16:41), apparently after they had spoken by phone, he texted “Thats bs.” At the same time she texted him about arguments she was having with her sisters and her mother.

[65] On that afternoon (at 17:38) she wrote:

“Now [my step-father] thinks u have touched me as well mum said the same thing”

which she followed with this message:

“We have to stop texting for a bit from now mum is Taking my phone off me tonight”.

[66] At 18:52 she texted: “can u ring [my step-father] and tell him why im pissed of[f] with everyone”.

[67] On the morning of 18 September (at 09:51) he sent this message: “Getting to the point I feel like having a go at [your mother] for what she’s telling people that i have supposedly done to you”. She replied a minute later: “yep i know u can do it if u like she know I told u”.

- [68] There were then some exchanges in which they discussed something of no consequence but in a friendly fashion. More relevantly at 10:31 he texted that “[your uncle is] going to be having a go at [your mother] this morning about everything”. She immediately responded:

“Ok so he understands that u haven’t touched me in anyway”.

(My emphasis.)

The appellant replied:

“Yes he’s extremely angry with [your mother] about that the [weird] way she’s treating you etc”.

- [69] The last of the exchanges was at 10:53 that morning.

Other evidence

- [70] Evidence was given in the prosecution case by M, who said that she lived with the complainant’s family for “a couple of months around March 2016”. Remarkably, at first she said that she knew the appellant from his visits to the house several times whilst she lived there.

- [71] She said that she developed a close relationship with the complainant who would call her Aunty. On 26 April 2016, she received a note from the complainant, who came into her bedroom, dropped the note on her bed and walked out. It was the note to which I have referred earlier in discussing the mother’s evidence. M then spoke to the complainant, asking if she wished to talk about it and the complainant said no. M asked the complainant whether she would like her to tell her mother, and the complainant said “Yes. I can’t. It’s too hard”. She then gave the note to the complainant’s mother.

- [72] In cross-examination, she corrected her earlier evidence that she had met the appellant whilst she was living at the complainant’s house. She agreed that she had told police that she had met the appellant a few times, perhaps as early as 2014, when she was visiting the complainant’s house. She agreed that whilst she was living there, she asked the complainant whether she wanted to tell her anything about the appellant, having been aware that the complainant’s mother and step-father had had concerns on the matter. The complainant denied that anything had taken place. The appellant did not call or give evidence.

An unreasonable verdict

- [73] This ground of appeal requires the Court to undertake an independent review of the record to determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant’s guilt, allowing special respect and legitimacy for the jury’s verdict.² In *R v Baden-Clay*, the High Court said that setting aside a jury’s verdict on the ground that it is unreasonable is “a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial”.³

² *MFA v The Queen* (2002) 213 CLR 606 at [59]; [2002] HCA 53.

³ (2016) 258 CLR 308 at 329; [2016] HCA 35.

- [74] In this case, the Court has all of the complainant's evidence in video recordings. There was no advantage enjoyed by the jury over this Court in assessing her evidence. We were urged by the appellant's counsel to study her demeanour in the recordings of her police interviews, which I have done, although without finding that it significantly advanced the appellant's case.
- [75] The prosecution case was largely dependent upon the complainant's evidence in the third interview and her pre-recorded trial testimony. It was supported, to an extent, by the evidence of the complainant's mother and step-father. The mother could recall the incident in front of the television, about which she had given a somewhat different version in her police statement. The step-father's evidence about what he had seen on the trampoline was of little weight. The evidence of the mother and the step-father as to things which were said by the appellant provided more significant support for the prosecution case. But ultimately, the prosecution case depended upon the jury being persuaded that the complainant's evidence was credible and reliable.
- [76] The remarkable feature of this case is the fact that by reference to the text messages between the complainant and the appellant within the critical period, the jury had reliable and revealing evidence of the relationship between them. As should appear from some of the messages which I have set out above, the appellant at times sent her messages which were quite inappropriate between an adult man and a 12 year old girl. By far the most serious of them was that the subject of the charge to which he pleaded guilty. But even then, it was not a message which was easily reconciled with the fact of a violent rape. That message was sent on 10 September 2015, so that it was possible that the trip in search for the mud guard occurred afterwards. But the mother's evidence was to the contrary.
- [77] Some of the appellant's text messages could be understood, when considered with evidence of what the appellant had said to the complainant's mother and step-father, as indicating a sexual interest in the complainant. But the questions for the jury were whether he acted upon such an interest, and in particular by raping her as she described in her evidence. It is at that point that the prosecution case had to overcome the evidence of the relationship between the girl and the appellant that was clearly revealed by their frequent communications throughout the critical period.
- [78] There was the one occasion, evidenced by the text messages, on which she showed some anger or resentment towards him. That was when she was protesting that he had breached her confidence, by speaking to her step-father about things the complainant had said about her mother. Otherwise the mood of their communications was very friendly. It is difficult to understand how she could have communicated with him as she did over this period, if she had been raped as she described and she was in such fear of him. Her failure to make any complaint in the first interview could be put down to a fear of him. But the text messages from her could not be so readily explained.
- [79] Her messages were not only friendly: they reveal that she saw the appellant as someone whom she could trust for advice and assistance with her difficulties at home. It is clear also that he was giving her advice, including advice that she should see the school counsellor. These were not the exchanges which would be expected between a rapist and his victim.

- [80] Perhaps most significantly, there were the exchanges between them, very late in the period and necessarily after their trip to the bush, which are in terms that there had been no sexual activity between them. It could not be thought that by this stage, each of them was falsifying the position in these messages in anticipation that the messages would be retrieved. Conduct of that kind, on her part at least, would be difficult to understand if she had been violently raped and threatened. At no time did she seek to explain the text messages in that way.
- [81] There was further cause for doubt about her testimony from the fact that she made no complaint at all in the first interview and no complaint beyond that about touching in the second interview. She was unable to offer a likely explanation for not complaining of rape in the second interview. By then she had felt sufficiently confident to go back to the police and make complaints of serious sexual misconduct by him.
- [82] There was also the fact that in her note given to M, she claimed to have been raped more than once. Her explanation that this was a mistake, and that she had meant to say that she had been raped once, was unpersuasive.
- [83] The evidence suggested that the complainant, after being repeatedly asked by her mother about whether she had been assaulted by him, sought to gain her mother's approval and sympathy by agreeing that something had occurred.
- [84] It is likely that the jury was too influenced by the evidence which indicated a sexual interest by the appellant, of which the offending text message was the strongest indication. But as I have said, the task for the jury was to consider whether the prosecution had proved that each of the offences, most importantly the rape, had been committed.
- [85] The conclusion which I have reached is that upon the whole of this evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of these offences. I do not see how the jury could reconcile the indisputable evidence of what the complainant and the appellant were saying to each other at relevant times with her account of a violent rape and a fear for her safety. Absent her complaint of a rape, it may have been less difficult to reconcile the evidence of the text messages with the complaints she made in the second interview, although still there would have been substantial tension between those two pieces of evidence. But if the text messages could not be reconciled with her complaint of rape, her claim about the rape sufficiently affected her other evidence as to make it unreasonable to act upon it.
- [86] Consequently the first ground of appeal is made out. I would allow the appeal, set aside the convictions and order that the appellant be acquitted on each of counts 1, 2, 3 and 4 on the indictment.

Other grounds of appeal

- [87] The remaining grounds of appeal complain about the summing up. I will say something about them although the outcome of this appeal, in my opinion, should be determined by my conclusion that the verdicts were unreasonable.
- [88] The first of these grounds is that the trial judge did not direct the jury as to how they should treat evidence of discreditable conduct by the appellant. The trial judge did

direct the jury that the prosecution relied upon the text messages, or more precisely some of them, as demonstrating a sexual interest and he directed the jury to be careful in leaping from that evidence to a conclusion of guilt. The complaint is that a similar warning was not given about the evidence of what the appellant said to the complainant's mother and to her step-father and the step-father's evidence of what he had seen on the trampoline. In the summing up, the judge referred to that evidence but only in summarising the prosecutor's argument to the jury.

[89] I would accept the appellant's argument that the relevance of each of these pieces of evidence was that it demonstrated a sexual interest in the complainant and that the jury should have been given a similar direction to that which the judge gave about the text messages. No re-direction was sought by the appellant's trial counsel, but there was no apparent forensic advantage in not doing so.

[90] The next ground of appeal was that the trial judge gave a direction generally in accordance with *Robinson v The Queen*,⁴ but one which was inadequate. The judge directed the jury as follows:

“So I warn you of the danger of convicting upon the complainant's testimony alone or principally unless after scrutinising it very carefully and considering the circumstances relevant to its evaluation and paying heed to this warning you're satisfied beyond reasonable doubt of the truth and accuracy of [the complainant's] evidence.”

That passage was preceded by what was effectively a *Longman*⁵ direction. After the *Robinson* direction, the judge referred to the fact that it was suggested to the complainant in cross-examination that she had “a motive to lie even if only a subliminal motive to lie.” The judge continued:

“She was asked questions concerning the relationship she had with her mother, and it was suggested she had either a deliberate or subliminal intention to repair the relationship with her mother by making these complaints especially in circumstances where her mother and stepfather, certainly her mother, constantly asked her about the possibility of the defendant touching her inappropriately. It's said, effectively, that the complaints that [she] made were to appease her mother and to cause her mother to be more caring and loving towards her.”

[91] The appellant's complaint is that the judge did not make it clear that these were matters which, in the view of the Court, presented a particular danger of convicting upon the complainant's testimony. As I have said earlier, that argument provided a specific explanation for the complainant's testimony being false. But I found this ground of appeal to be unpersuasive. The judge properly informed the jury of the defence argument in this respect. The judge did not have to effectively endorse that argument, and to direct the jury that the complainant's evidence required particular scrutiny for the fact that she did have a motive to lie.

[92] The last of the grounds of appeal is related to that argument about a motive to lie. It is said that the direction was deficient because the judge did not tell the jury that if

⁴ (1999) 197 CLR 162; [1999] HCA 42.

⁵ *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.

they rejected the argument for the defendant in that respect, that did not mean that the complainant was telling the truth.

- [93] Again in my respectful opinion, that argument should be accepted. There was a sufficient risk that if the jury did reject that argument about the complainant's motive, that they would conclude that they should accept the complainant's evidence without further scrutinising it.

Orders

- [94] I would order as follows:

1. Appeal allowed.
2. Set aside the convictions on counts 1, 2, 3 and 4 on the indictment.
3. Acquit the appellant on those counts.

- [95] **JACKSON J:** I agree with McMurdo JA. There is incontrovertible evidence of the closeness of the complainant and the appellant in the contemporaneous frequent friendly text messages between them throughout September 2015, in particular those that she sent. The texts clearly supported an inference of an inappropriate relationship between them. But they are irreconcilable with the complainant's ultimate version of events, brought forth more than six months afterwards, that during the trip they made in his car to search for the missing mudguard in the early days of September 2015, the appellant had violently raped her.

- [96] The complainant's stated reason for not disclosing the alleged rape over the prior months in response to questioning from her family and in two prior police interviews was not that she was embarrassed by what had happened but that she was frightened or intimidated into not telling the truth, because the appellant had threatened to kill her or send someone after her if she told her mother. The complainant's response when asked about the friendliness of her many texts to the appellant did nothing to remove the doubt that they necessarily raised as to the alleged rape.

- [97] Accordingly, in my view, for the reasons given by McMurdo JA, the appeal must be allowed and the orders proposed by his Honour should be made.