

SUPREME COURT OF QUEENSLAND

CITATION: *R v FAR* [2018] QCA 317

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

FILE NO/S: CA No 257 of 2017
DC No 339 of 2015

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich – Date of Conviction: 10 May 2017
(Horneman-Wren SC DCJ)

DELIVERED ON: 16 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 25 July 2018

JUDGES: Philippides JA and Bond and Boddice JJ

ORDERS: **1. The appeal be allowed.**
2. The jury’s verdicts of guilty on Counts 1, 2, 5, 6, 9, 11 and 12 be set aside.
3. A new trial be ordered on each of those Counts.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was found guilty after trial of one count of maintaining an unlawful sexual relationship, one count of rape and other sexual offences against the same child, and was found not guilty of three further counts of rape and two counts of indecent treatment of a child under 16 – where in respect of each count in which verdicts of guilty were returned by the jury, the complainant had given consistent accounts, both in her interviews with police and in her evidence at trial, sufficient to support a conclusion that the appellant was guilty of each offence, beyond reasonable doubt – whether the verdicts of the jury were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where the evidence placed before the jury did not merely include evidence of acts which were uncharged acts – where that evidence included evidence of acts which had been the subject of acquittals at the

appellant's previous trial – where the direction from the trial judge did not expressly direct the jury that if the jury accepted the complainant's account in respect of those events, the jury could not use that account as evidence that those events had in fact occurred, thereby questioning or discounting the effect of those acquittals, bolstering the complainant's credibility – where there was good reason for the jury to closely scrutinize the complainant's evidence – where in circumstances where there was good reason for a jury to closely scrutinize the complainant's evidence, it cannot be said that the failure to direct the jury to the effect that the appellant had been acquitted of those offences and that they could not use that evidence in a manner inconsistent with the full benefit of those acquittals, did not deprive the appellant of a fair chance of acquittal on the counts he was ultimately found guilty on – whether there was a miscarriage of justice

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited

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

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

R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

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

R v SCS [2017] QCA 78, applied

R v Storey (1978) 140 CLR 364; [1978] HCA 39, cited

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M W C Harrison appeared for the appellant
 C N Marco for the respondent

SOLICITORS: Lawler Magill for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **PHILIPPIDES JA:** I agree with the orders proposed for the reasons given by Boddice J.
- [2] **BODDICE J:** On 10 May 2017, a jury found the appellant guilty of one count of maintaining an unlawful sexual relationship (Count 1), one count of rape (Count 11), four counts of indecent treatment of a child under 16 (Counts, 5, 6, 9 and 12) and one count of indecent treatment of a child under 16 under 12 (Count 2). The jury found the appellant not guilty of three further counts of rape (Counts 7, 13 and 14) and two counts of indecent treatment of a child under 16 (Counts 4 and 8).
- [3] That jury trial was a retrial of counts a previous jury had been unable to reach a verdict upon. On 7 December 2016, the jury at the first trial had found the appellant

not guilty of one count of indecent treatment of child under 16 (Count 10) and one count of indecent treatment of child under 16 under 12 (Count 3).

- [4] The appellant appeals his convictions. The grounds of appeal are that the verdicts are unreasonable and cannot be supported having regard to the evidence, and that the trial judge erred in giving an inadequate direction as to the use of evidence related to previous acquittals, thereby occasioning a miscarriage of justice.

Background

- [5] The offences were all committed between 30 November 2009 and 30 September 2013.
- [6] The complainant in each of the offences was a female child born on 4 March 1999. She lived with her mother and the appellant at various addresses during the period, the subject of the offences.
- [7] The appellant was born on 19 April 1975. At the time of the offences, he was in a relationship with the complainant's mother.

Counts

- [8] Count 1, alleged that between 30 November 2009 and 30 September 2013, the appellant carried on an unlawful sexual relationship with the complainant. The particularised acts were the acts relied upon as constituting Counts, 2, 4-9 and 11-14, as well as further sexual conduct.
- [9] Count 2, alleged that between 30 November 2009 and 17 September 2010, the appellant, whilst alone with the complainant in a vehicle, deliberately exposed his penis to the complainant. Count 4, alleged that between 17 August 2010 and 14 July 2012, the appellant lay with the complainant and rubbed his groin area against her groin area and told her he wanted to "fuck her". Count 5, alleged that between 8 January 2012 and 19 July 2012, the appellant put his hands on the complainant's bottom whilst she was on a treadmill. Count 6, alleged that between 18 July 2012 and 1 February 2013, the appellant rubbed a dildo against the complainant's bottom and between her legs.
- [10] Count 7, alleged that between 23 January 2013 and 6 July 2013, the appellant digitally penetrated the complainant's genitalia without her consent, after pulling the complainant into a shower with him. Count 8, alleged that on the same occasion as Count 7, the appellant masturbated in front of the complainant. Count 9, alleged that between 23 January 2013 and 6 July 2013, the appellant touched the complainant's breasts indecently. Count 11, alleged that between 30 November 2009 and 6 July 2013, the appellant digitally raped the complainant when they were both sitting on a couch.
- [11] Count 12, alleged that between 23 January 2013 and 6 July 2013, the appellant touched the complainant's breasts. Count 13, alleged the appellant put his penis in the mouth of the complainant without her consent, on the same occasion he touched the complainant's breasts, the subject of Count 12. Count 14, alleged the appellant, on the same occasion as the offences in Counts 12 and 13, digitally penetrated the complainant's vagina without her consent.

Evidence

Admissions

- [12] A number of admissions were read to the jury. Those admissions were that the complainant was born on 4 March 1999, that her biological parents are KDP, and RGN; that the complainant's mother held a lease at 30 GAT Road, NNT, between 29 April 2008 and 3 August 2009; at 83 CQT Street, MMP between 3 August 2009 and 10 March 2010; and at 79 CQT Street, MMP between 10 March 2010 and 17 September 2010, but moved to that address in about December 2009; that the complainant's mother and the appellant held a lease at 3 WSQ Street, HEV between 17 August 2010 and 14 January 2012 and at 8 SKN Street, BLN between 8 January 2012 and 19 July 2012; that the complainant's mother and the appellant resided at 303 BEN Street, IWC, the location at ZND's Diner between 18 July 2012 and 24 January 2013; that the complainant's mother and the appellant held a lease at 10 GLR Street, HEV between 23 January 2013 and 6 July 2013; and at 33 TNH Street, HPI between 1 July 2013 and 2 May 2014; and that the appellant had an uncircumcised penis with some dark pigmentation on multiple areas of the foreskin, visible to the naked eye.

Complainant

- [13] The complainant was interviewed by police on 18 May 2014 and on 6 November 2014. Those interviews, which were video recorded, were admitted pursuant to s 93A of the *Evidence Act*. In her initial interview, the complainant said she went to talk to police about a problem with her step-dad, the appellant, who had been sexually abusing her for quite a while. The complainant said she was no longer allowed to see her mother or go near her family. The appellant used to touch her in front of her mother but when she told her mother what was happening, she did not believe the complainant.
- [14] The complainant first told her mother when she was aged about 11. They were at Queen Mary Falls on the border of Queensland and New South Wales. The complainant wanted a drink, but the appellant said no. When her mother obtained a drink for the complainant's little sister, the complainant hit it out of her sister's hand. She was then smacked over the face by her mother, and also smacked by the appellant who tried to pick her up by the breasts. The complainant started screaming and said 'don't touch my boobs'. The appellant dropped the complainant and ran off.
- [15] The complainant said her mother asked what she had said and the complainant said he was touching her boobs; he had been doing so for ages, and she had been trying to tell her mother. The complainant's mother spoke to the appellant and told the complainant to get into the car. Her mother said "do you know, he wants to jump off that cliff right now?" The complainant said "good, I hope he does". When they got back home, her mother told the complainant's father. He did not believe the complainant. The complainant said the appellant would always do something whenever somebody wanted him to do it, but there was a really bad side to him.
- [16] The last occasion the appellant had ever done anything to the complainant was when the appellant took her for a drive to New South Wales. The complainant told the appellant she did not want him to touch her. The appellant promised, but during the trip reached over and put his hand down the complainant's shirt. Later that night, they stopped at a service station. The appellant said he would give the complainant some marijuana, if she gave him oral sex. The complainant said no. The appellant gave her some marijuana, laid the seat back and "just flopped it out"

and pretty much just pulled her head down.¹ In the morning, they went to McDonalds for breakfast. At a service station next to McDonalds, the appellant bought the complainant a teddy bear that said “Thank you”. The appellant said “this is for last night”. The complainant returned home and ripped it up.

- [17] On another occasion, when they were living at CQT Street, and her mother was going to work, the complainant’s mother gave the complainant a hand full of gold coins to take to the appellant. The appellant walked upstairs with the gold coins. She thought the appellant was having a shower. When she knocked on the door she heard snoring and saw that the appellant was lying on the bed naked. The complainant shut her eyes, walked back downstairs and placed the coins on the table. When the appellant woke up he asked the complainant whether she had seen his doodle.
- [18] There were other occasions when her mother was working night shift and her sister was in bed that the appellant would tell the complainant to go in and talk to him, or ask the complainant to come into the spa with him. The complainant said no. On one occasion, the appellant asked her to come for a shower. Again, she said no, but the appellant gave her some marijuana and hopped in the shower naked. The complainant had her clothes on whilst the appellant was touching her and playing with himself. The appellant ejaculated on the complainant’s leg. The appellant would try and get the complainant to do it for him, but she said no, she did not want to. The appellant would say, “please, just please”.
- [19] The appellant told the complainant her breasts were better than her mother’s. One day the appellant said “I’ll buy you a packet of 40s if you show me your boobs”. The complainant said “No, but I’ll have the packet of cigarettes”. The appellant always made the complainant promise not to tell anybody. When she did tell somebody it made her really upset because they did not believe her. Her mother and her sisters were no longer talking to her.
- [20] There were other times, but the complainant did not talk about it much to her family because they looked at it as a bad person saying something about someone they thought was a really good person. The complainant thought they would believe her, but her mother blamed the complainant for the breakdown in her engagement with the appellant, because the complainant told her mother what the appellant had been doing to her.
- [21] When the complainant’s mother and the appellant got engaged and made up invitations for their wedding, the complainant ripped up the invitation. She did not want her mother to marry the appellant. The complainant described the engagement as on and off. Her mother used to think the complainant was only saying these things because she wanted her parents to get back together. The complainant said she was not lying.
- [22] There was an occasion when the appellant telephoned her, after the complainant had moved out to live with her biological father. The appellant wanted the complainant to go for a drive with him. The complainant said “no”, but the appellant came around to the house anyway. The complainant knew straight away what the appellant wanted and said “no”. When the appellant found out that his friend, HGC was coming home with his friends, he left quickly and did a big skid out the front of the house.

¹ AB 363, [106].

- [23] There were other times when the appellant would put his hands down the complainant's pants in front of her mother, pretty much right next to her. The complainant would look at her mum and try to give her a sign. She never said to her mother, "he's touching me", because she did not want to get into trouble. The complainant found it hard to talk about. The complainant told the appellant "you're my step dad... you are not meant to be doing this to me".² The appellant told her he was going to stop, but did not stop.
- [24] The complainant told her sister, ELY, that she did not want the appellant to touch her anymore. Her sister said the complainant should tell the appellant in front of the sister, so that the sister could believe it was true. When the appellant came back, the complainant spoke to the appellant and said she had told others. He cried and said 'I'm going to go to jail now'. ELY was sitting on the verandah.
- [25] The complainant found it hard to trust people now. When she had worked at a diner with her family, the appellant would come up behind her and rub himself on her body and breathe in her ear and kiss her. The complainant had been waiting so long to talk to somebody about it. She did not want the appellant in her family. The complainant was quite upset that people did not believe her. The complainant hated the appellant.
- [26] The complainant had walked upstairs and seen her mother kissing the appellant. The next day, her mother kicked-out her biological father. That was the hardest thing the complainant had ever gone through, when her father left. The appellant tried to give her a cuddle. She told him to go away because he had destroyed her family and life. Thereafter, her mother threatened to send the complainant to boarding school. Instead, she sent her to her sister's house to live with the complainant's biological father. Her other sisters lived with the complainant's mother. Every fortnight the complainant could go to her mother's house for the weekend. Her mother would often send her home the first night, because the complainant was too naughty.
- [27] The complainant described the appellant as a big guy, pretty muscly, with a big belly who had tattoos. He was always talking about something disgusting, like having sex with the complainant's mother. He would also drive with his knee and whilst smoking a cigarette, use his iPhone to watch porn. He would play with himself and have the complainant steer. The complainant said the appellant could be a good guy, but when you were alone with him, it was a different story. There were times when the appellant would let the complainant drive her mother's XR6 motor vehicle. That was "cool", but when they would pull over, the appellant decided to touch himself again. He told the complainant to get a rag out of the boot and he wiped himself on it.
- [28] The only person who knew every bit of detail was her guardian, HGC. The complainant told her counsellor, her mother and biological father, pretty much her whole family. Her father brought her to the Yamanto Police Station, after the counsellor said the complainant should go straight to the police station. The complainant was about ten and half years of age. The station said they would ring the complainant back, but they never did.

² AB 367/[165]-[167].

- [29] In about September 2016, the complainant asked her sister, TYN, if she believed the complainant. TYN said she had been abused by people from her own family too, but “you don’t go around telling anybody, it just makes you look like you are a liar.”³ TYN knew the appellant touched the complainant’s breasts. She had told her brother the appellant was a paedophile; the appellant touched her. She told her brother not to go near him. She had told her other sister not to go anywhere near the appellant.
- [30] At one stage, the complainant told her mother it did not happen. The complainant was sick and tired of being looked at as a liar. She was just a nobody and wanted to see her mother and sisters. Her mother was alone with the complainant, talking one night and asked the complainant, did the appellant do this and the complainant said “no”. The complainant knew she should not have said that, because the appellant did these things to her, but if she did say the appellant was doing these things to her, she would not be allowed over to see her mother.⁴ The complainant had also told some of her friends and her Aunty TDC. She told Aunty TDC the appellant touched her boobs.
- [31] The first time something happened was when they were going for a drive to get dinner, whilst they were living at CQT Street. The appellant asked if she wanted to see his “doodle”. The appellant said “just have one quick look. I will give you a smoke if you do”. The appellant pulled out his penis. The complainant said “don’t” and covered her face. The appellant said “just have a quick look”. When the complainant said no, the appellant said “I will give you a smack”. The complainant had a quick look.⁵ The appellant then started moving his hand around his penis. The appellant was making noises, breathing in and out really loudly.
- [32] The appellant made the complainant promise not to tell anybody.⁶ The appellant put his pinky up and the complainant pinky promised him. The appellant then said “let me have one quick feel before we go inside” and slipped his hand down the complainant’s top and started playing with the complainant’s breast. The complainant said “no” and pulled his arm out. His hand was under her bra, squeezing her left breast, and playing with her nipple with his fingers. The appellant was saying they were nice. The complainant said ‘I don’t want you to play with my boobs’.
- [33] When they were living at WSQ Street, the complainant was lying on a single mattress on the lounge room floor with her little sister. The appellant laid down behind the complainant and told the sister to go and put a load of washing on. The appellant lay on top of the complainant. He spread her legs and started humping her, for “like two seconds”. It really hurt her legs because he was fat. He was moving his waist backwards and forwards onto the complainant’s vagina. He told the complainant he wanted to fuck her.⁷ The complainant said “no”. The appellant then walked away.
- [34] There was another occasion when the complainant was running on a treadmill, wearing a skirt. They were living at SKN Street. The appellant told the complainant he liked to watch her boobs bounce when she was running on the

³ AB 400, [898].

⁴ AB 404, [981].

⁵ AB 384, [531].

⁶ AB 393, [747].

⁷ AB 410, [1109].

treadmill. For that reason, the complainant slowed the treadmill down to only walking. The appellant walked over, put his hand up her skirt and played with her bottom. He told the complainant to make the treadmill go faster. The complainant said she did not want to and the appellant vanished when he heard the complainant's sister coming from the kitchen. On another occasion at SKN Street, the complainant was sitting on the couch when the appellant had a quick grab of her breast. She pulled his hand away and said 'don't touch me'. The appellant told her "her boobs were better than her mum's".

- [35] The complainant said when her mother was working upstairs at a diner, the complainant would go downstairs and listen to music. She asked the appellant for a cigarette. The appellant walked into his bedroom and pulled out a big thing that looked like a big doodle. It was 30 cm long. It was like a rubber thing, but like jelly. He got it from the bedside drawer, on her mother's side of the bed. He put it on the complainant, on her bum and between her legs. The complainant said she just wanted a cigarette, she did not want it. On other occasions, when she was working at the diner the appellant would rub his body against her body and breathe in her ear. It made her feel very uncomfortable.
- [36] At GLR Street, the appellant gave her marijuana. On one occasion, the appellant asked the complainant to shower with him. The appellant took off his clothes and pulled the complainant into the shower. He told her to take her clothes off. The complainant said "no". The appellant then started playing with himself. He was putting his hands down on the complainant's vagina inside her pants. He put his fingers inside the complainant. She moved his hand away. The appellant told her if anybody asked why there were wet clothes, just say she went for a soak in the spa.⁸
- [37] On a separate occasion, at GLR Street, the complainant was getting something out of the freezer when the appellant walked up and started humping her from behind. He was holding her waist and moving back and forth on her bottom. The complainant stood up and the appellant was holding her around her breasts. The complainant thought her little sister was sitting on the couch just behind the wall.
- [38] On another occasion, at GLR Street, the complainant was sitting on the front verandah with her sister. The appellant indicated for the complainant to pull her shirt down and show him her breasts. Her sister looked up when the complainant said "no". On another occasion at GLR Street, when the appellant was working on his motor bike, the complainant pretended to ride it. The appellant sat on the back and started running his hands up her leg and thigh. The complainant hopped off the motor bike and was having a cigarette when the appellant told her to kiss him. When the complainant said "no, I don't want to kiss you", the appellant grabbed her face with both his hands and pulled her face close to his. He put his tongue in her mouth.
- [39] On other occasions the appellant would put his hands in the complainant's pants when she was sitting on the couch under a blanket. The appellant used his left hand to put his fingers in the complainant's vagina. He was playing with himself with his right hand. The complainant closed her legs, but the appellant slowly moved her legs apart. The appellant put his hand down her pants and under her undies before putting his fingers inside her vagina. He started moving his hand in and out. The

⁸ AB423, [1417].

complainant was freaking out because it was disgusting. He hurt her. The complainant said 'oww', but he kept going for a little bit longer. The complainant then grabbed his hand and ran to the toilet. She was bleeding. She started crying in the toilet. It felt like he had pinched the inside of her vagina.

- [40] On another occasion at GLR Street, the appellant made her give him oral sex. They were in the process of moving out. She was in the spare bedroom. The appellant started talking to her about what needed to be cleaned. He told her to sit on his lap. He grabbed her breasts and was rocking back in the chair. He then told the complainant to lay on the floor. She was lying on her back. The appellant, who was wearing footy shorts, a polo shirt and a singlet, took off his singlet and knelt down next to her head. The appellant pulled down the top of his pants and pulled his penis out. She described his penis as not circumcised. The penis was wobbly, but when it was in her mouth, she felt it get bigger and stronger.
- [41] The appellant pulled her head closer as he moved his penis towards her. He told her to open her mouth and put her lips on him. The complainant said "no" but the appellant said "just do it for five seconds". It hurt her throat when the appellant pushed his penis into her mouth. His right hand was holding the complainant's head and his left hand was down her pants with his fingers inside her vagina. When the complainant moved her head away, she tasted something funny. She felt something drip down her cheek. When she moved her head away the appellant used his hand to play with himself. She saw ejaculate on the floor. The appellant just left it there. The next day the complainant returned to GLR Street with her mother and sisters. She saw the ejaculate on the floor. She shut the door and went to her mother's bedroom. The complainant asked her mother if she could talk to her, but her mother said 'not at the moment'. The complainant turned around and walked outside.⁹
- [42] On another occasion when they lived under the shop, the appellant said he was going to 'fuck' the complainant on the front of her mother's car. It was about 8.30 in the night. The appellant bought her four red vodka cruises. He said if he took her lapping with some drinks, she needed to let him fuck her on the bonnet of the car.¹⁰ The appellant said she would have to give him oral sex. The complainant did not say anything. She drank the drinks and had fun while they were lapping. The appellant then went to a petrol station at Ebbvale. He bought condoms. They drove to the netball courts. The appellant walked around to the complainant's side, opened the door and said "are we going to do this?" The complainant said "no, I don't want to". The appellant got upset. He put the condoms in the boot and said the complainant had to go straight to bed because she was drunk. It was about 9.30 pm or 10.15 pm, when they arrived home.
- [43] The complainant said she had wanted to go on the road trip with the appellant to New South Wales. The complainant thought her father was going on the trip with the appellant. On the night they were leaving, the complainant found out her father was not going on the trip. She was quite upset. During the trip every time they saw a kangaroo, the appellant would touch rosary beads and put his hand down the complainant's shirt. He said it was for good luck. As soon as they came back, she told her friend, HGC and his wife, HGP what had been happening to her.

⁹ AB 432, [1609].

¹⁰ AB 446, [1907].

- [44] In a subsequent interview, on 6 November 2014, the complainant said the appellant's penis was circumcised, that is the skin had been taken off the top. He also had a shaved pubic area. The complainant also gave further details of the car trip to New South Wales. The appellant had pulled over near a closed service station. He had asked the complainant if she wanted some marijuana. The appellant had given her three cones. The complainant was "pretty whacked".¹¹ The appellant started playing with the complainant's breasts. The complainant asked him not to, but he kept doing it. The complainant said her mother was ringing, but the appellant let the telephone ring out.
- [45] At one point the complainant was lying down. The appellant put his penis in her mouth. The appellant's testicles were on her nose. The rest of his body was above the complainant. The appellant's penis was erect. The appellant tried to put his hands down her pants. The complainant closed her legs really tight. He tried to undo her button. The complainant sat up and said "no". The appellant moved his hand on his penis. The appellant said he was going to come. He was making weird sounds. The complainant saw sperm come out of the penis. He wiped it on something and threw it out of the car. The appellant kept telling her she was beautiful and that that was good.
- [46] In her pre-recorded evidence, given when the complainant was aged 16, the complainant said on the trip to New South Wales, when the appellant was putting his hand down her shirt each time they saw a kangaroo, his hands were touching her breasts on the inside of her bra.¹² The complainant also clarified that on the occasion she told her sister, ELY, that she did not want the appellant to touch her any more, the complainant was sitting in a car in the driveway when she spoke to the appellant. ELY was on the verandah at the back of the shop. ELY would have been able to see what was being said by them. She could not be sure if she could hear them. During that conversation, the appellant admitted doing things to the complainant.
- [47] The complainant had been diagnosed with ADHD when aged four. She was taking dexamphetamine for that condition until about grade 6. She was put on other medication but took herself off that medication before she had finished grade 7. That medication caused her to sleep for up to 20 hours straight. The complainant started consuming cannabis when she was in grade 8. She had continued to consume cannabis, on and off, up until a month before the pre-record of evidence. There were numerous occasions when the appellant gave her cigarettes, if she would let him see her breasts. At no time did she consent to sexual contact with the appellant.
- [48] In cross-examination, the complainant said the appellant hired a land cruiser for the trip to New South Wales. The rosary beads generally hung in her mother's car. The appellant put them in the hire car for good luck. The appellant put his hand down the complainant's shirt; whether or not they saw a kangaroo. Whenever the appellant wanted to put his hand down her shirt, he did so. The appellant also kept touching his penis. There was a time when the appellant was watching porn on his telephone and driving with his knees whilst playing with himself. He watched porn for only a short period of time.

¹¹ AB 470, [110].

¹² AB 31/5.

- [49] On the occasion the appellant caused bleeding to her vagina, she suffered bleeding for a couple of days. It was more than just spotting. She did not seek treatment from a doctor. She did not tell anybody at the time. The complainant was embarrassed and did not think about asking someone to take her to the doctor.
- [50] On the occasion they went to Queen Mary Falls, the appellant had told the complainant to go back to the car because she was behaving poorly. She grabbed hold of a fence and refused to leave the area. At that stage, the appellant picked her up. It was whilst that happened that she said the appellant was inappropriately touching her breasts. The complainant's mother asked what she had said. The complainant replied "yeah, that's right, he's been touching me for a long time and you haven't even known about it".¹³
- [51] The appellant had watched porn more than 10 times whilst driving in the car with the complainant. The appellant asked the complainant to look at the porn on an occasion other than the New South Wales trip. The image was of a bottom with a penis going into the bottom. The viewing of the porn and the playing with the penis ended with ejaculation. The appellant made noises. The complainant did not see where the ejaculate went, but said after the appellant had finished, he laughed and kept driving.
- [52] The next thing the complainant recalled from the New South Wales trip was when they stopped near an air strip and a service station. It was really dark. The appellant had a pipe and some marijuana. He asked the complainant if she wanted some. She said "ok". The appellant said he wanted the complainant to suck on his penis. The complainant said "no". The appellant said "please". He asked the complainant to show him her breasts. The complainant said "no". The appellant started touching her breasts.
- [53] The appellant got the marijuana out of a little lapsack, in the middle of the front bench seat. The complainant smoked the marijuana. She had used marijuana before. Once the complainant was giggling, the appellant asked the complainant to suck on his penis. The complainant had her head near the steering wheel. The appellant was facing towards the passenger side of the car. The appellant was sitting on her face whilst trying to slip his hand down the top of her pants. The complainant lifted her legs up and crossed them and moved his hand away. The complainant then sat up and said "no, no more". The appellant's pants were at his ankles, as were his underpants. The appellant asked if she wanted more marijuana. She said "yes" and he gave her some more. On the trip back, the appellant kept touching the complainant's breasts. It happened more than twice.
- [54] The complainant said on the occasion when the appellant asked her to have a shower with him, the appellant asked her if she wanted a cone. The complainant said "yes". The appellant took her to the ensuite. There was no one else home. The appellant removed some cannabis from a cupboard under the sink in the ensuite. The complainant had three cones. Each cone took about three seconds. She then placed the bong onto the vanity unit. The appellant turned the shower on when she was having the last one. The appellant pulled the complainant by the arm into the shower. He took his clothes off. He was rubbing himself up the complainant from

¹³

AB 38/1.

behind. He was touching her vagina from the outside of her pants. The complainant remained fully clothed in the shower.

- [55] The occasion when she was cleaning GLR Street was after the shower incident. The complainant agreed she was worried something similar would happen, but her mother was tired and wanted to go to bed. The appellant was going back. The complainant went to help. She hoped he would be nice enough not to do it to her and just be her stepfather.¹⁴ She did not think anything of the appellant's request that she sit on his lap. She did not think anything when the appellant told her to lay on the floor. She was worried when the appellant knelt down beside her. She did not want his penis in her mouth. She did not get up and leave because she did not want to hurt his feelings. There was no resistance from the appellant when she moved away.
- [56] There was only one occasion her mother was right next to her when the appellant put his hands down her pants. The complainant was on the couch with a blanket over her. The appellant put the blanket over himself and started touching the complainant's legs. He moved his hand up and put it inside her pants. This incident was at 79 CQT Street, before they moved to GLR Street. Her mother was sitting on the other couch, in the same room. Her sister, ELY, was also in the room. The TV was on at the time. As the appellant was running his hand up and down her leg, she looked at her mother, hoping she would look at her. At one point, her mother did look at her, but did not understand what the complainant was trying to tell her. The complainant was trying to get her mother's attention for two minutes.
- [57] That incident stopped when the complainant had pain in her vagina. It was an itchy feeling. She got up and went to the toilet. This was the occasion she suffered the injury to her vagina. The appellant placed two fingers in her vagina. The appellant was moving his fingers in and out. The appellant had not previously placed his fingers inside her vagina. She felt a pinching sensation and pain. The complainant did not scream. She thought 'that hurt', got up and walked out of the room. The complainant estimated she was aged 11 or 12. She thought she was at EI Primary School. She knew this was not her period.
- [58] The appellant used to come into a shop, at which her mother and elder sister, KTJ, were working. He started dating her sister. The complainant noticed the appellant was over at their house a lot when her father was at work. After her mother and father split up, it became clear the appellant was in a relationship with her mother. The complainant considered the appellant was to blame for her parents' separation. However, she grew to get along with the appellant.
- [59] There was a good side to the appellant and an evil side. It was good for 10 to 12 months. During that time, the complainant was living in CHM Street with her father. The appellant would take them motor bike riding. He would build things in the shed. He was a great step father, but there were times when he took it too far, to the point he was abusing the complainant. The appellant was doing something wrong by not only her, but also her mother.
- [60] At the time of the separation, the complainant had a fight with her mother. She called her horrible names. The complainant never really had a good relationship with her mother. After the separation, she lived with her father but spent some

¹⁴ AB 50/31.

weekends with her mother. Her mother would send her home because she was too naughty. However, she had told her the truth. She could not believe they believed the appellant; “They don’t for one second, believe their own daughter”.¹⁵

- [61] At some point, the appellant and her mother planned to marry. The complainant said “you aren’t getting married”.¹⁶ The complainant did not want them to get married because he cheated on her sister, with her mother. Whilst she realised the appellant made her mother happy, she did not want her to marry him.
- [62] There was an occasion when the appellant was watching porn on his iPhone. They pulled up at a quiet spot in her mother’s XR6. It was stopped at the end of the street, near the golf course. It happened when they were renting the shop because the vehicle had ZND written up the side. The appellant got his iPhone out. The complainant heard noises. The appellant asked her to look and moved the phone in front of her face. The appellant was playing with himself. His penis was out of his pants. It was erect. She was not sure if it was the first time, or whether it had happened before. The appellant did not say what he was doing. She did not ask. She just sat in silence and looked out the window.
- [63] The appellant was playing with himself and watching porn for about 10 minutes. He ejaculated onto his hand. The appellant asked the complainant to get something from the boot to wipe his hands. The complainant opened the boot to obtain the rag. The appellant left the rag beside the road. The complainant then asked if she could drive the vehicle. The appellant said her mother would not be happy if she crashed it. The complainant said she was not going to crash it. The complainant drove up and back along the street twice.¹⁷ It was just after lunch time. There was no one else in the vehicle.
- [64] The complainant accepted she had told her mother all these things with the appellant had never happened. She was getting along with her mother better than she had ever gotten along with her. Out of the blue, her mother asked the complainant. The complainant thought if I say it did not happen, maybe she will love me and treat me like I am a person. The complainant then said “no, it didn’t happen”. As soon as she said those words, she regretted saying them. Her mother said “okay”. The complainant said “I didn’t feel like talking to her after that because I know that he did this to me”.¹⁸
- [65] The complainant was sick and tired of being looked at as a liar. When asked how she thought telling her mother another lie would fix that situation, the complainant replied “I didn’t think about that. I just wanted my family to believe me about something in my life.”¹⁹ The complainant’s mother told the complainant she loved her and then she asked that question. The complainant gave that response because she was sick of getting looked at as an outsider. She was struggling with school. She was going through depression. She wanted to sit in her room, by herself, with her music.
- [66] The complainant said in the incident at WSQ Street when, the appellant laid on top of her on a mattress, the appellant used his knees to spread her legs that far apart

¹⁵ AB 61/16.

¹⁶ AB 62/15.

¹⁷ AB 63/20.

¹⁸ AB 69/24.

¹⁹ AB 69/30.

that they felt like they were going to break. He was able to push her legs that far apart because “I was like 12 and he’s huge, and he was pretending to hump me. Of course my legs were going to be spread apart.”²⁰ The appellant humped her four or five times. The appellant then heard her sister coming back up the stairs so he got off and walked away. There was no blanket on them at the time.

- [67] The complainant continued her pre-recorded evidence on 5 February 2016. At the commencement, the complainant said she recalled that on the occasion the appellant spread her legs so far that they were going to break, the appellant whispered he wanted to ‘fuck’ her. The appellant then hopped on top, opened her legs and started humping her.
- [68] The complainant had seen the appellant’s penis on a number of occasions. She could not now remember whether he was circumcised but described his penis as small. The appellant shaved his pubic hair. She recalled seeing his testicles. He shaved them too.
- [69] The complainant had seen the appellant masturbate to ejaculation, once or twice. The substance went on his hand. There was an occasion when it went on her chest. This was when they were living at ZND. It was night time. The complainant was on Facebook, using her phone. Everyone else had gone to bed. The appellant was wearing board shorts and a singlet. He walked up to the complainant and started playing with himself. His hand was on his penis, which was outside his pants. The appellant used a towel next to the complainant’s bed, to wipe it off her chest. The complainant agreed she never told the police, or the prosecutor about that incident. It had just come back to her.
- [70] The complainant agreed she was in a relationship with HGC. That relationship started a month after her 16th birthday. HGC was 34. HGC helped her through this period. He told her everything was going to be alright. He told her not to be afraid to tell people what the appellant had done to her. The complainant met HGC and HGP about two weeks after her birthday in 2013. Within about four weeks of meeting them, she started to tell HGP what the appellant was doing to her. HGC took her to the police station. It was not until 18 May 2014 that she gave a statement to the police. She was told police would contact her. She had to wait for them to be ready to listen.
- [71] The complainant stayed at their house, looking after their children, about four nights a week. On or about 4 July 2013, HGC’s wife accused the complainant of kissing HGC. The complainant said she did not kiss him. HGC’s wife had asked her to sleep next to her in the middle of their bed. The complainant was facing HGC, who kissed her while she was trying to sleep. HGC’s wife punched the complainant in the eye.
- [72] Shortly after that incident, her mother and the appellant spoke to the complainant about her relationship with HGC. The complainant said there was no relationship. The conversation was about being friends with HGC and his wife, after the wife had punched the complainant in the eye. They tried to stop the complainant from going over there. The complainant was not happy the appellant was interfering, as it was none of his business.²¹ The appellant stopped her from speaking to HGC and his

²⁰ AB 71/25.

²¹ AB 108/25.

wife on the telephone. The complainant denied she made up the allegations about the appellant in an attempt to stop his complaint about her possible relationship with HGC.

- [73] In about March 2014, HGC punched her in the mouth. The complainant tried to call her brother but HGC smashed her telephone. A few days later HGC turned up with a friend and punched through a window. Shortly after, the appellant arrived with the complainant's sister, ELY. The complainant denied she had rung the appellant or asked the appellant to sort HGC out. She denied ever seeking the appellant's help.
- [74] The complainant denied that in the first nine or ten months of her mother's relationship with the appellant, she hated the appellant. The complainant could not accept he was with her sister first, and then moved on to her mother, but did not hate him. He had taken her mother from her father. Her sister did not speak to her mother and stopped her mother seeing her children for a very long time. During that period, the complainant was very difficult to get along with in relation to the appellant. She did not appreciate the appellant trying to discipline her. The appellant was not her father or mother. He had no right to hit her. The complainant remembered only one occasion when the appellant smacked her; it hurt. When she went to her room, she kicked holes in the walls.
- [75] The complainant recalled only one occasion when the appellant tried to undo her pants. That was when they were outside the petrol station in New South Wales. The complainant said she was not sure if there had been another occasion. When she had marijuana she could not remember what happened 10 minutes ago. On occasions she would try to reconstruct her memory from bits and pieces, but if she could not remember something, she would not say anything.
- [76] The complainant agreed that on the occasion she told her mother the allegations were not true, she told the appellant she was sorry. The complainant did not want to lose her family. The complainant denied ever telling her sister, TYN, that she made up her complaints about the appellant to try and get her mother and father back together again, and to get some money out of it. The complainant denied ever telling her sister, LBS, to "fuck off, it's my time with FAR". There were occasions when she went driving with the appellant. She was keen to take part in lapping, but did not go on her own. Her sisters, or the appellant's daughter went with her.²²

Other witnesses

- [77] RGN, the complainant's biological father, married the complainant's mother in the early 1990's, but started a relationship with her around 1987. They had six children together: KTJ, born in 1989; IND, born in 1992; TYN, born in 1993; ELY, born in 1997; the complainant; and LBS, born in 2000. They separated in February 2009. At that time they were living in GAT, NNT. Five of their children were living with them. KTJ had one child and was living away from them in the Ipswich area.
- [78] RGN went to stay with KTJ for two or three months after the separation, before he obtained his own residence at Booval where he remained for approximately two and a half to three years. The complainant moved in with him, as did his son, IND. The complainant first came to live with him when he was living at KTJ's residence. It

²² AB 116/19.

was two or three weeks after the separation. RGN came home one Friday afternoon and the complainant was at KTJ's house. It then became a permanent arrangement.

- [79] RGN came to know the appellant a few months before the separation. He was going out with KTJ. At the time of the separation that relationship was on its way out. The complainant's mother made the first step to start a relationship with the appellant. RGN first became aware of their relationship, close to a year after the separation. For a time there was not much contact between the complainant and her mother. The complainant did not want to go to the mother's house. She disliked her mother. There was a degree of tension about the separation felt by the complainant and the other children.
- [80] The complainant only started to visit her mother again when the mother had moved to 83 CQT Street. The mother was living with the appellant and the other children. After a period of time the complainant started to stay overnight at her mother's house. RGN would only be walking back in the door to his house, when he would receive a phone call asking him to go and pick the complainant up again.
- [81] In the early days after the separation, his relationship with the complainant was good and close. At some point he became aware the complainant had made allegations against the appellant. The complainant was about 11 or 12 years old. He was still living at Booval. He thought the complainant's mother may have been living in WSQ Street. He asked the complainant if anything happened. The complainant said "Yeah, FAR had touched me."²³ He did not ask her more questions. She did not give him any more details.
- [82] RGN took the complainant to the Yamanto Police Station the next day. They went to an interview room with one of the detectives. There was a problem with the cassettes. Whilst the detective was out of the room, the complainant said "I don't want to do this no more".²⁴ They informed the detective who said there was nothing more they could do.
- [83] The complainant lived with him permanently for around three years in total. She stopped living with him when she was aged 14 or 15. He still does not know what caused her to move out. He and his son were watching TV one evening. The complainant was out on the front verandah talking on the telephone. She came inside the house and packed her possessions. At that stage he had moved to North Booval.
- [84] The complainant went to live with RGN and his wife at Saddlers Crossing. He first met them around 2013/2014, through the RGN's connection with the wife's mother. Initially, RGN did not have contact with the complainant. After a few weeks, he started to have contact in small doses. RGN currently interacted with the complainant by telephone and text messages, every now and then. He also had contact with the appellant. He was living at the same address with RGN's son, IND, daughter, LBS and the complainant's mother.
- [85] RGN recalled he was once going to help the appellant pick up some furniture from New South Wales and bring it back to Queensland. The complainant wanted to go on the trip. RGN ended up working and did not go with them. The complainant

²³ AB 203/2.

²⁴ AB 203/16.

was aged late 14, early 15. His recollection was that there were two trips to New South Wales for this furniture collection. He did not go on either trip. During the trip, the complainant was continuously on Facebook. He was seeing messages, such as 'past another roo'. There were other general communications in the 10 hour trip. There were no photographs.

- [86] In cross-examination, RGN agreed that in his statement to police dated 20 June 2014, he made some comments about telephone calls between the complainant and HGC, while the complainant was living in RGN's house. He was not very happy the complainant was on the phone at all hours to HGC. He wondered why HGC was talking to the complainant, when HGC's wife was in bed at that time. He spoke to the complainant. She moved out soon after those conversations. He formed the view the complainant was in a relationship with HGC, shortly before HGC's wife moved out. He has not spoken directly to the complainant about that relationship.
- [87] RGN agreed that after the separation the complainant was quite cranky with her mother. That anger was mostly about the family having broken up. Even before the separation he had seen there were problems in the mother/daughter relationship. The complainant and her mother did not get along well. The complainant was not the easiest child to raise. At some stage, he took the complainant to see a counsellor called Margaret, at Lifeline. That happened on one occasion only as the complainant did not want to go back. He did not take the complainant to see any other counsellors.
- [88] RGN did not at any stage disallow contact between the complainant and the appellant. The complainant did not want to go to the appellant's residence. RGN agreed that during the New South Wales trip, the complainant at no stage mentioned anything about the appellant acting inappropriately towards her. He agreed in this police statement, he stated that in the week before that trip the complainant said "can I go again? I want to go. Can I go again?"²⁵ That was the second trip the appellant made. His recollection was the complainant, having been with the appellant on the first trip, was pleading to be allowed to go again. His understanding from the complainant's Facebook posts during that trip, was that she was having a great trip.
- [89] HGC, a 33 year old mechanic, first met the complainant in late 2013, through his wife's mother, who was in a relationship with the complainant's father. He has known the appellant since 2009, when they worked together at a motor vehicle dealership. The complainant came to live with HGC and his wife, in early 2014. The complainant was then aged 14. At that time, HGC's three children were aged six, five and six months old. HGC developed a friendship with the complainant.
- [90] The complainant came to live with them after she had confided, that "there was a lot of drug use, and there was insufficient food, no money and also what [the appellant] had been doing to her".²⁶ The conversation occurred in early 2014 when HGC and his wife were sitting on their back stairs. The complainant broke down and volunteered information that the appellant had been interfering with her for the last four years. There were quite a few occasions when the complainant spoke of other incidents she had been through and asked for their help.

²⁵ AB 209/44.

²⁶ AB 213/18.

- [91] The complainant said that when she was living in CQT Street, MMP, the appellant pulled his penis out and said “look at this”, when they were in the car or in the driveway. When asked if he could recall any other details of the conversations, HGC said “there’s quite a bit, that [the appellant], would sometimes let her drive the car, if she would show him her breasts. Other times he would buy her smokes if she would do something that he wanted. There was something else, I don’t, it, don’t know if I put it in the statement, road – road trip, New South Wales, somewhere...”²⁷
- [92] HGC told the complainant it was not right and she needed to talk to the police. HGC took the complainant to the Police Station, in early 2014, not long after she had moved in with them, if not the night she moved in. HGC came home from work and went straight to the Police Station. They did not hear anything back until police asked the complainant to come in to make a statement. There was at least four months between his visit to the Ipswich Police Station when he was next spoken to by police.
- [93] In cross-examination, HGC denied the complainant had come to his residence with her father to purchase drugs from HGC. HGC did not do drugs. The complainant stayed the first night she came to their house. The complainant slept on the couch. The complainant did, on occasions, sleep at the foot of their bed. HGC denied kissing the complainant in bed. He recalled an occasion when his then wife hit the complainant. HGC woke up to a fight between them. They were both standing and fighting at that time. He denied they had all been in bed together. He could not recall an occasion when all three slept in the same bed together. When HGC and his wife parted ways, the complainant stayed with him. She would look after his children.
- [94] HGC denied at any time participating in a sexual relationship with the complainant. Their relationship was that of best friends. She was someone to talk to and she helped out with his children after the breakup of his marriage. After his wife left, there were occasions when the complainant would lay along the foot of his bed. He denied she slept with him. The complainant stayed in a caravan at night time. Once he had sold the caravan, the complainant had her own room at his home. She did not sleep in that room earlier, because it was a smaller house at that time.
- [95] HGC accepted the complainant’s family considered he was in a relationship with the complainant but did not accept they indicated they did not approve of the time she spent with HGC. The complainant moved out of his residence in 2015. She moved in with her boyfriend. He has not seen her for close to two years. He denied he was aware the complainant’s family were considering reporting his relationship with the complainant to police. He denied encouraging the complainant to make the complaints. He denied speaking to her about compensation. The only time compensation was brought up was when the police officer gave the complainant an information booklet.
- [96] TYN, the complainant’s sister first met the appellant when she was working in a take away shop at the age of 14. Her mother and older sister, KTJ, worked at that shop too. The appellant came in frequently. He formed a relationship with KTJ. At that stage, TYN was living with her mother and father at GAT Road, next door to the

²⁷ AB 214/40.

take away shop. When TYN's parents separated in 2009, she was living with KTJ and the appellant at QIM Street, BLN. She had run away from home about a month or two before the separation.

- [97] At the point of her parents' separation, her father came to stay with them. Not long after, her father obtained his own residence. The complainant's mother and the other children remained at GAT Road. TYN did not think the separation would disintegrate the family, but three to four weeks after the separation, she became aware the complainant was living with her father. TYN described the complainant as a daddy's girl, who had ADHD. She was quite a handful.
- [98] TYN became aware her mother and the appellant had begun a relationship, not long after the separation. TYN was quite upset about it. Her sister "kind of lost the plot",²⁸ after the breakup with the appellant. As a consequence, TYN moved away to the other side of the city, away from the family, which was "quite peaceful".²⁹ Between the ages of 16 to 21, TYN was not involved with the family very much. She had zero contact with her mother. She would see the complainant on a regular basis as she was living with their father. During that period, she described the complainant as hiding out in her bedroom. She would go down in the backyard and listen to music.
- [99] Prior to May 2014, when the complainant gave a statement to police, TYN was aware of an incident at a waterfall, in which it was alleged the appellant had grabbed the complainant's breasts. TYN spoke to the complainant about it, but "she basically didn't really have any proper evidence, really – not so much evidence, but anything to say, other than 'he groped me, grabbed my boobs.'"³⁰ It was "quite obvious that what she was saying was, you know, bullshit".³¹ TYN did not want to talk about it.
- [100] When they were living in GLR Street, the appellant was working on a small motor bike. The complainant would sit on it while the appellant was working on it. The complainant was going down there "when she was having her time with [the appellant], and stuff like that".³² For a brief period, TYN moved back in with the family. By that stage, TYN had her own child. TYN said her memory was not good because she had a history of drug abuse. She did not remember anything unless it happened to her when she was a little girl. She did not think she was a reliable witness.
- [101] The complainant "ran off to be with HGC",³³ not long after she made these allegations. TYN recalled a conversation between the complainant and her mother about the allegations at WSQ Street, early in the piece. Her mother was sitting on her bed, reading her books. The complainant went in to talk to her. TYN was listening in the hallway. Her mother said "Why did you fucking say it? Why did you do it? Because if it wasn't true, why did you fucking say it?", to which the complainant said "I just wanted to get my mum and dad back together."³⁴ On the day before that conversation, there had been a discussion that the complainant had

²⁸ AB 224/1.

²⁹ AB 224/5.

³⁰ AB 224/41.

³¹ AB 225/44.

³² AB 226/45.

³³ AB 227/20.

³⁴ AB 227/45 - AB 228/1.

lied. That was why her mother was questioning her about it. She was told about that earlier conversation by her father and sister, KTJ.

- [102] The complainant also telephoned TYN in 2014 when TYN was living in Belmont. The complainant was crying and said “No one fucking believes you. No one will listen to me. You know I’m going to get an \$85,000 payout for this.”³⁵ TYN described the complainant as rambling and “talking shit”. She asked the complainant “Why are you doing this?”
- [103] In cross-examination, TYN agreed that in her police statement she had said that every time the appellant went for a drive in his car, the complainant was always the first to ask to go with him. The complainant would “crack a total narnie”, if any of the sisters wanted to go as well.³⁶ The complainant said “this is my time with [the appellant].”³⁷ It would end up resulting in the complainant being sent home because of how she was carrying on. That was her recollection throughout the years, up to around 2014 when the complaint was made. Every two or three weeks, the complainant would have a real row with her sisters about not getting her time. Once, when one of the sisters went downstairs to where the appellant was working on the motor bike, the complainant said “buckle up, it’s my time with [the appellant].”³⁸ TYN thought it was quite bizarre. When asked whether she had ever seen the appellant and anybody else sit on the bike, TYN said “nobody else would be able to fit on the bike”.³⁹ It was a small, one seat bike.
- [104] KTJ, the complainant’s oldest sister, first met the appellant in 2008, whilst she was working at a take away shop in GAT Road. She started a relationship with the appellant after a couple of months of him chasing her. They were together for ten and half months. At that stage, her family were living next door to the shop. This was before her parents’ separation.
- [105] KTJ’s parents separated on 27 February 2009. At that stage, she had been in a relationship with the appellant for eight months. They were living at QIM Street, BLN. She had one child of her own. In about March/April 2009 she found out the appellant and her mother were cheating on her, and her father. They continued that relationship after her mother kicked her father out of the house. There was an overlap between her relationship with the appellant and the appellant’s relationship with her mother “most definitely”.⁴⁰ KTJ’s father came to stay with her initially after the separation. After a matter of weeks, he obtained his own place in BLN.
- [106] Within a couple of days of the separation, the complainant came to stay at KTJ’s house. TYN and her boyfriend, were also living with them at that time. TYN had been living with KTJ for four months or so. When KTJ’s father moved to BLN, the complainant moved with him too. At that stage, their brother IND was still living with their mother in GAT Road. He was kicked out of the house by their mother. He then went to live with his father.

35 AB 228/19.

36 AB 229/21.

37 AB 229/23.

38 AB 229/37.

39 AB 230/5.

40 AB 245/7.

- [107] Prior to May 2014, KTJ had heard from her mother and father that the complainant had made allegations against the appellant. It was first brought to her attention around September 2010, in the context of her mother and father asking her if she could sort out what had happened. She approached the complainant within a week or so and attempted to talk to her. At that time the complainant was about 11 years old. KTJ asked if the complainant wanted to talk about it. She told the complainant she believed her. The complainant did not say a great deal other than that the appellant had grabbed her from behind, up between the breasts area. She just “sort of cried”.⁴¹ This conversation occurred at Big W, in BLM Fair.
- [108] In 2011, KTJ tried to approach the complainant again about the subject. The complainant did not say anything more, other than the same thing. KTJ revisited the subject again in 2012, when the complainant stayed with her. The complainant never really opened up. KTJ did not think the complainant thought she could trust her. KTJ did not have any other conversation with the complainant about those allegations.
- [109] In cross-examination, KTJ accepted she had said, in her police statement in June 2014, the complainant “would put up a big stink about her not being allowed to go back over to CPD and FAR’s house”. Her mother would not give the complainant permission to go over to her mother’s house. The appellant’s daughter always got priority over the complainant, so the complainant always missed out. It was because that child was in the house that the complainant was not permitted to go to that house. KTJ also recalled that the complainant had mentioned she had been told she would receive some form of compensation. The complainant did not think she was going to get any money out of it. The complainant had mentioned an amount of \$80,000 once.
- [110] ELY, another of the complainant’s sisters, was aware of the complainant’s allegations against the appellant. When her parents separated in 2009, she remained living with her mother whilst complainant moved in with her father. The complainant would visit the mother’s house from time to time. More often than not, she would come over for the weekend each fortnight. Sometimes ELY would spend the weekend with her father. It was only a couple of times that she stayed at his residence.
- [111] Before the complainant went to police with her allegations against the appellant, the complainant told ELY she had told HGC’s wife the appellant had done something to her. ELY was working at ZND when she received a telephone call from the complainant, saying she had done something stupid. She asked her to come to the shop. When the complainant arrived at the shop, the complainant started crying. The complainant told ELY she had been talking to HGC’s wife, who said she had been touched by her uncle, or someone in her family. To comfort her and make her feel not so alone, the complainant said the appellant “done it to me”.⁴² ELY asked the complainant why she did that. The complainant said she did not know. ELY asked if it was true. The complainant said “no, it’s definitely not.”
- [112] ELY rang the appellant and said he needed to come to the shop, as ELY needed to talk to him. The appellant came to the shop. ELY let the appellant and the complainant talk for a minute. She stood on the inside of the door. She heard the complainant say “HGC’s wife had said this to me, and I was talking to her and I didn’t mean to say it, but I said that you had done it to me to make her not feel alone.” ELY did

⁴¹ AB 247/15.

⁴² AB 253/14.

not hear the next part of the conversation. When she moved so she could hear more clearly, she heard the complainant say “I’m very sorry.” She asked to give the appellant a cuddle. Straight away she heard the appellant say “No. No. Not at all”.⁴³

- [113] ELY had a further conversation with the complainant on 13 February 2016. The complainant again told ELY the allegations were not true. The complainant said “can you please tell mum that I love her so much and I’m really sorry, and I’m really sorry for what I have done to [the appellant].” ELY said “okay”, and said “[The complainant], is it true or not?” The complainant said “no, it’s not”. ELY said “well, you need to stand up and you need to say something.” The complainant said “no, I don’t want to because I don’t want to get HGC in trouble.”⁴⁴ ELY has not had contact with the complainant since that conversation, other than receiving text messages for birthdays or Easter.
- [114] In cross-examination, ELY said she believed the complainant and HGC were sharing a bedroom. ELY had visited their previous residence around 9 March 2015, just after the complainant’s birthday. ELY asked to use their toilet. On the way out of the bathroom, she noticed that HGC’s bedroom had the complainant’s leopard print blanket on it. The complainant would not let her sister touch her blanket. She did not know why the complainant would let HGC touch it, let alone sleep with it.
- [115] As a consequence of ELY’s evidence, defence counsel made application for the complainant to be recalled to give further evidence. That application was not opposed by the Crown. In further cross-examination, the complainant recalled an occasion when she has spoken to ELY at ZND. She told ELY that HGC’s wife had told her that her uncle, or another family member, had inappropriately touched HGC’s wife. She told ELY that in order to make HGC’s wife feel like she was not alone, she said the appellant had done something similar to her. ELY asked her if it was true. The complainant told ELY it was true. After that conversation, ELY went back into the shop briefly. Soon after, the appellant attended the shop.
- [116] The complainant went to the shop to get ELY to believe her. ELY said “he’s going to be around here in a minute, you go down there and tell him that you’ve told HGC and HGP, and I’ll sit here and then I might believe you.” The complainant had a conversation with the appellant in a car in the car park, about 10 metres from the back door of ZND. It was within visual distance of the shop door. The complainant said to the appellant “I’ve told HGP that you’ve done this to me and it’s stopping”. The appellant cried and said “I’m going to go to jail”. The complainant said “I know”. She then walked out of the car, up to ELY and said “see”. ELY said “Oh F. off”. She could see ELY through the windscreen. The appellant had a hat on so ELY would not have been able to see if the appellant was crying, or what he was saying. The complainant could not hear anything in the shop from in the car.
- [117] The complainant agreed that on 13 February 2016, when she was living in a residence with HGC at Dinmore, she had a conversation with ELY. She told ELY she wanted her to let her mother know she missed her and she loved her. The complainant denied asking ELY to tell her mother she was sorry for what she had done to the appellant. She denied telling ELY what she had said was not true. That did not happen. She denied saying she did not want to get HGC in trouble.

⁴³ AB 253/30.

⁴⁴ AB 254/25.

- [118] Amanda Roberts, the detective responsible for the investigation of the complainant's complaint, recorded the interview with the complainant on 18 May 2014. She first spoke to the complainant in early April 2014. At that initial conversation, Roberts asked the complainant if she wanted to make a complaint. The complainant was not ready to do so. Almost a week before the recorded interview on 8 May 2014, the complainant re-contacted Roberts and said she was ready.
- [119] Roberts sought to interview a number of witnesses. The complainant's mother declined to provide a statement. The appellant's brother did not want to get involved and the complainant's sisters, LBS and ELY, declined a request for statements.
- [120] At the conclusion of the Crown case, the appellant elected not to give or call evidence.

Appellant's submission

- [121] The appellant submits that two juries had a reasonable doubt about important aspects of the complainant's evidence, with the first jury acquitting of two counts and the second jury acquitting of five counts. The second jury sought assistance as to the meaning of 'reasonable doubt', more than 24 hours after they retired to consider their verdicts. Less than hour later that jury indicated they were unable to reach a verdict and were given a direction consistent with *Black v The Queen*.⁴⁵ The jury retired and returned verdicts almost 24 hours later, having sought no further re-directions in the interim. Against that background, there is a genuine concern the jury compromised, as a consequence of not being able to reach a unanimous agreement.
- [122] The risk of compromise is heightened where, as here, the evidence sought to found all counts, comes from essentially one witness and the jury did not accept that witness on more than one of the counts. Those acquittals mean the jury must have had a reasonable doubt about the complainant's evidence on several counts, but were left unassisted for a lengthy period, before delivering their verdicts. The unreasonableness of those verdicts is strengthened by the jury's conviction on Count 12, but acquittal on Counts 13 and 14. All three accounts occurred on the same occasion, as part of a continuing sequence. There was no basis for the jury to distinguish between those counts, in terms of the reliability of the complainant's evidence. There is also no proper explanation for the jury's verdicts in respect of Counts 4 and 9 on the indictment.
- [123] The appellant further submits that the directions given to the jury, regarding use of evidence of acts the subject of the previous acquittals, were insufficient. Whilst the admission of that evidence was a tactical decision, the directions given only told the jury they were not to use that evidence against the appellant and that the evidence was placed before them solely to assist in their assessment of the complainant's credibility. Non-acceptance of that evidence would bear upon whether the jury accepted the complainant's evidence in relation to the charges before them, beyond a reasonable doubt. The jury were not directed that they must accept the fact of the earlier acquittal, and that they must not use the evidence in any way to reconsider the guilt of the appellant of those earlier offences, or to question or discount the effect

⁴⁵ (1993) 179 CLR 44.

of the acquittal. Accordingly, the appellant was deprived of the full benefit of those acquittals.

Respondent's submissions

- [124] The respondent submits the issue for the jury was whether they accepted the complainant's evidence of the commission of each of the offences. The jury had the opportunity of hearing the complainant, including her extensive cross-examination. The inconsistencies were matters for the jury. Those inconsistencies account for the acquittals. There were no inconsistencies in the complainant's evidence in respect of the counts, the subject of the verdicts of guilty. The inconsistencies that existed did not require the jury to acquit on all counts. There was other evidence supportive of the complainant's evidence in respect of each of those counts. Further, the jury were given detailed, careful and proper directions in accordance with *Markuleski, Longman, and Robinson*.
- [125] The respondent further submits that evidence of the charges which had been the subject of acquittals at the earlier trial, was admitted for the appellant to achieve a forensic advantage in undermining the credit of the complainant. No further directions were sought by trial counsel in relation to the use of that evidence by the jury. In such circumstances, the trial judge was not bound to give a further direction that the appellant was acquitted. The trial judge expressly told the jury they could not use the evidence against the appellant at all. Such a direction afforded the appellant the full benefit of those acquittals. There was no real chance the appellant was deprived of acquittals on those counts. The jury's acquittal on some counts and conviction on others, shows the jury did not need further direction as to the proper use of that evidence.

Consideration

Unreasonable verdict

- [126] A determination of whether a jury's verdict is unreasonable requires this Court to independently assess whether, on a consideration of the evidence as a whole, it was open to the jury to be satisfied of the appellant's guilt of each of the offences, beyond reasonable doubt.⁴⁶ The serious step of setting aside a jury's verdict is immeasurable and not to be undertaken without the Court having particular regard to the advantage enjoyed by a jury, over this Court, which has not seen or heard the witnesses called at trial.⁴⁷
- [127] In undertaking this assessment, regard should also be had for the fact that a verdict of not guilty does not, of necessity, mean the jury found the complainant dishonest or unreliable. The jury may have accepted the complainant as reliable, but had a reasonable doubt as to the defendant's guilt of the particular count.⁴⁸ As Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen*,⁴⁹ stated:

“In the case of sexual offences, of which there may be no objective evidence... [a] juror might consider it more probable than not, that a complainant is telling the truth but requires something additional

⁴⁶ *SKA v The Queen* (2011) 243 CLR 400 at [21] - [22].

⁴⁷ *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].

⁴⁸ *R v SCS* [2017] QCA 78 at [42].

⁴⁹ (2002) 213 CLR 606 at 617 [34].

before reaching a conclusion beyond reasonable doubt...[a] verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence, might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence, than about others."

Their Honours also noted that where a number of offences are alleged, it may appear to the jury that justice is met by convicting of some only.

- [128] In the present case, there was good reason for the jury to scrutinize the complainant's account of the appellant's sexual offending over an extended period of time, with particular care. There were, within the complainant's own account, inconsistencies which raised issues as to the complainant's reliability. There was also the complainant's admission that she had, on occasions, stated to others that her allegations against the appellant were untrue.
- [129] Notwithstanding these matters, in respect of each count in which verdicts of guilty were returned by the jury, the complainant had given consistent accounts, both in her interviews with police and in her evidence at trial, sufficient to support a conclusion that the appellant was guilty of each offence, beyond reasonable doubt. The consistency in those accounts, even allowing for other inconsistencies, allowed a jury to accept the complainant as reliable. Once those accounts were accepted as reliable, it was open to a jury to be satisfied of the appellant's guilt of each of those counts beyond reasonable doubt.
- [130] A consideration of the complainant's evidence reveals there was a consistency in the specificity of the complainant's account in respect of Count 2. There was a consistency in respect of the circumstances in which the complainant was in the vehicle with the appellant, as to the conversation that took place between the complainant and the appellant and as to the circumstances in which the appellant had deliberately exposed his penis to the complainant. Similarly, the acts the subject of Counts 5, 6 and 9 on the indictment, had a consistency in the events surrounding the circumstances in which the appellant engaged in the indecent treatment of the complainant.
- [131] There was also an extra degree of specificity associated with the complainant's account in respect of the events, the subject of Count 11 on the indictment. That account included details of the complainant sustaining an injury to her vagina which resulted in the complainant suffering bleeding for some days after that event. That specificity was a reason why the complainant's account would be viewed as reliable and accurate.
- [132] By contrast, the complainant's evidence of the events of Count 4 involved an allegation that the appellant, whilst he and the complainant were both clothed, ordered the complainant's sister to put a load of washing on before he started humping her for two seconds, in the course of which he caused the complainant's legs to be spread

so far apart, that it hurt her. In the context of other more specific allegations, it was open to the jury to give the appellant the benefit of the doubt in relation to whether that extremely brief event occurred in the circumstances relayed by the complainant. A failure to accept the complainant's account in relation to this allegation did not, however, mean her credibility as a whole was properly to be called into question.

- [133] The circumstances in which the events the subject of Counts 7 and 8 occurred, also were of a nature which rendered it open to a jury to give the appellant the benefit of the doubt as to whether he digitally penetrated the complainant's genitalia, after pulling her into the shower fully clothed, before masturbating himself, particularly as on that occasion the appellant conceded she had consumed three cones of marijuana.
- [134] These differences do not account for the jury's verdict of guilty of Count 12, but not guilty of Counts 13 and 14 on the indictment. All three of those counts were alleged to have occurred in the course of one incident. During that incident, the complainant alleged the appellant touched her breasts (Count 12), put his penis into her mouth (Count 13) and digitally penetrated her vagina (Count 14).
- [135] Whilst the fact that all three counts were allegedly committed as part of the one incident raises a concern the jury must have not accepted the complainant's account of that incident as a whole, as being reliable and credible, it was open to the jury to be satisfied generally of the complainant's credibility. That included being satisfied the appellant, on this occasion, had touched her breasts, but giving the appellant the benefit of the doubt as to whether he had forced the complainant to give him oral sex, whilst inserting his fingers into her vagina. The complainant's evidence included a description of the applicant's penis as not being circumcised in circumstances where an admission at trial, on behalf of the Crown and defence, was that the appellant's penis was circumcised. That inconsistency may have caused a jury to afford the appellant the benefit of the doubt on Counts 13 and 14.
- [136] Once it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of Counts 2, 5, 6, 9, 11 and 12 on the indictment, it was open to the jury to be satisfied, on the consideration of the whole of the evidence, of the appellant's guilt of Count 1 on the indictment. That count relied upon the acts constituting each of those counts, as particulars of the allegation that the appellant had carried on an unlawful sexual relationship with the complainant.
- [137] On a consideration of the evidence as a whole, it was open to the jury to be satisfied, beyond reasonable doubt, of the complainant's guilt of Counts 1, 2, 5, 6, 9, 11 and 12. The verdicts of the jury were not unreasonable. This ground fails.

Direction

- [138] The jury were properly directed as to the need to consider carefully the complainant's testimony, and to have regard to any non-acceptance of that evidence in determining whether or not they accepted the complainant's evidence on other counts beyond reasonable doubt. However, the evidence placed before the jury did not merely include evidence of acts which were uncharged acts. That evidence included evidence of acts which had been the subject of acquittals at the appellant's previous trial.

[139] Although the jury were directed that they were not to use that evidence against the appellant “at all”, the jury was directed that the evidence was placed before them “solely to assist in your assessment of the complainant’s credibility. If you do not accept the evidence, then – in respect of those matters, then that finding would bear on whether or not you accept the complainant’s evidence relating to the charges which are before you, beyond reasonable doubt.” Such a direction did not expressly direct the jury that if the jury accepted the complainant’s account in respect of those events, the jury could not use that account as evidence that those events had in fact occurred, thereby questioning or discounting the effect of those acquittals, bolstering the complainant’s credibility.

[140] The use of that evidence in that way would deprive the appellant of the full benefit of those previous acquittals. In the *R v Storey*, Barwick CJ said:⁵⁰

“Where evidence which would tend to prove the earlier charge or some element of it is admitted in the subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal, and not use the evidence in any way to reconsider the guilt of the accused of the earlier offence or to question or discount the effect of the acquittal.”

[141] In the present case, the evidence was placed before the jury without objection and for a tactical forensic benefit of the appellant. No re-direction was sought by the appellant’s counsel. In those circumstances, the mere fact of a misdirection would not sustain an order setting aside the jury’s verdicts of guilty, unless the appellant established that, by reason of the misdirection, there was a miscarriage of justice in that he was denied a fair chance of acquittal.

[142] In circumstances where there was good reason for a jury to closely scrutinize the complainant’s evidence, it cannot be said that the failure to direct the jury to the effect that the appellant had been acquitted of those offences and that they could not use that evidence in a manner inconsistent with the full benefit of those acquittals, did not deprive the appellant of a fair chance of acquittal on Counts 1, 2, 5, 6, 9, 11 and 12.

[143] To adapt and adopt the words of Mason J [as His Honour then was] in *Storey*,⁵¹ the directions of the trial Judge:

“did not give sufficient emphasis to the fact that the jury were bound to accept the verdict of acquittal...as the only possible view of the evidence relating to those charges; it was not open to them to accept a view of the facts inconsistent with that acquittal...the trial miscarried by reason of the trial judge’s omission to give the jury a correct direction on the effect of the acquittal and the use to which the prosecutrix’s testimony as to events...would be put”.

[144] The fact of those acquittals were additional matters which may reasonably have caused the jury to afford the appellant the benefit of the doubt in respect of the counts for which verdicts of guilty were entered at trial. Accordingly, there was a miscarriage of justice.

⁵⁰ (1978) 140 CLR 364 at 372.

⁵¹ At 398.

[145] As this ground has succeeded, the verdicts of guilty ought to be set aside and a new trial ordered.

Orders

[146] I would order:

1. The appeal be allowed.
2. The jury's verdicts of guilty on Counts 1, 2, 5, 6, 9, 11 and 12 be set aside.
3. A new trial be ordered on each of those Counts.

[147] **BOND J:** I agree with the reasons for judgment of Boddice J and with the orders proposed by his Honour.