SUPREME COURT OF QUEENSLAND

CITATION:	*R v GBF* [2019] QCA 4
PARTIES:	**R** **v** **GBF** (appellant/applicant)
FILE NO/S:	CA No 218 of 2017 DC No 306 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 2 August 2016; Date of Sentence: 4 August 2016 (Wall QC DCJ)
DELIVERED ON:	1 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2018
JUDGES:	Morrison and Philippides JJA and Boddice J
ORDERS:	**1. The appeal against conviction be dismissed.** **2. Leave to appeal sentence be granted.** **3. The appeal against sentence be allowed.** **4. The sentences of nine years imprisonment imposed on each of counts 5 and 6, be set aside.** **5. The applicant be sentenced to two years imprisonment on each of counts 5 and 6, to be served concurrently with each other and the remaining sentences of imprisonment.** **6. The sentences in respect of counts 1, 2, 3 and 7 be confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – whether trial judge misdirected the jury making it easier to convict – whether directions as to lack of consent were inadequate – whether the jury should have been directed to consider honest and reasonable mistake CRIMINAL LAW – SENTENCE – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the complainant was the appellant's younger half-sister – where the appellant was aged 33 and 34 years, while the

complainant was aged 13 and 14 years – where the offending occurred on family holiday or at family residence – where the appellant was sentenced to nine years imprisonment for each count of rape – where the appellant was also sentenced to nine years imprisonment for each offence of indecent treatment of a child under 16 years – where each offence was a domestic violence offence – whether the sentence was manifestly excessive

Criminal Code (Qld), s 348

Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v BBP [2009] QCA 114, cited
R v Conway (2005) 157 A Crim R 474; [2005] QCA 194, cited
R v GAW [2015] QCA 166, cited
R v Goodwin; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 582; [2014] QCA 345, cited
R v Grimley [2017] QCA 291, distinguished
R v KAJ; Ex parte Attorney-General (Qld) [2013] QCA 118, cited
R v KAM (No 2) [2017] QCA 197, cited
R v MCT [2018] QCA 189, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited

COUNSEL: J J Allen QC, with N Edridge, for the appellant/applicant
C N Marco for the respondent

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

[1] **MORRISON JA:** I agree with the reasons of Boddice J and the orders his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Boddice J for the reasons given by his Honour.

[3] **BODDICE J:** On 2 August 2016, the appellant was convicted by a jury of three counts of rape (counts 2, 3 and 7) and two counts of indecent treatment of a child under 16 (counts 1 and 5). Each was a domestic violence offence. The jury found the appellant not guilty of a further count of rape (count 4) and not guilty of rape, but guilty of indecent treatment of a child under 16, in respect of a remaining count of rape (count 6).

[4] On 4 August 2016, the appellant was sentenced to nine years imprisonment for each of counts 2, 3, 5, 6 and 7. He was sentenced to a concurrent term of 12 months imprisonment in respect of Count 1.

[5] The appellant appeals his conviction and seeks leave to appeal against sentence. The grounds of appeal against conviction are:

(a) The jury should have been directed to consider honest and reasonable mistake as to consent with respect to count 2;

(b) The directions as to the element of lack of consent with respect to counts 2, 3 and 7 were inadequate;

(c) The convictions of counts 2, 3 and 7 are unreasonable and are not supported by the evidence in that a reasonable jury, properly directed, could not be satisfied beyond doubt of guilt and could only have returned verdicts of guilty of unlawful carnal knowledge;

(d) The verdict of guilty of count 5 is inconsistent with the verdict of acquittal of count 4;

(e) The Trial Judge misdirected the jury that the absence of evidence from the appellant might make it easier to convict; and,

(f) The Trial Judge failed to direct the jury as to the use they might make of evidence of uncharged sexual offences.

[6] The grounds of appeal relied upon, if leave is given to appeal the sentences, are that concurrent sentences of nine years imprisonment for each count of rape, were manifestly excessive and, further, that the sentencing Judge erred in imposing sentences of nine years imprisonment for two of the offences of indecent treatment of a child under 16 years.

Background

[7] All of the offences were alleged to have occurred between 1 December 2012 and 24 August 2013, against the same female complainant. The complainant, who was born on 21 February 1999, is the half-sister of the appellant.

[8] At the time of the offences the appellant was aged 33 and 34 years. The complainant was aged 13 and 14 years.

[9] Count 1 (indecent treatment of a child under 16), occurred during a family holiday in Ipswich soon after New Year's Day 2013. It was particularised as an occasion when the appellant kissed the complainant for two to three minutes.

[10] Counts 2 to 6 inclusive, were all alleged to have taken place at the family's then residence, at Condon in Townsville. The complainant lived at that residence with her mother, father and siblings. The appellant would also stay with his son, from time to time.

[11] Count 2 occurred on or around 14 or 15 February 2013. It was particularised as an occasion when the appellant came into the complainant's bedroom and placed his penis in the complainant's vagina.

[12] Count 3 occurred sometime after count 2. It was particularised as an occasion when the appellant penetrated the complainant's vagina with his penis, whilst they were on the back verandah.

[13] Count 4, of which the jury found the appellant not guilty, was alleged to have occurred on the same occasion as count 5. It was alleged the appellant came into the complainant's bedroom and put his penis in the complainant's vagina (count 4). He then licked her vagina (count 5).

[14] Count 6 was alleged to have occurred late one afternoon after the complainant had returned from school. It was particularised as an occasion when the appellant had the complainant perform oral sex on him. The jury found the appellant not guilty of rape, but guilty of indecent treatment.

[15] Count 7 occurred on 16 August 2013. At that stage, the complainant was living with her family at a residence in Deeragun in Townsville. It was particularised as an occasion when the appellant placed his penis in the complainant's vagina whilst she was in a bedroom.

[16] At trial, the Crown called the complainant, her mother and two sisters to give evidence. The investigating officers also gave evidence.

[17] At the end of the Crown case, the appellant elected to neither give nor call evidence.

Evidence

Complainant

[18] The complainant was first interviewed by police on 24 August 2013. That recorded interview was admitted into evidence pursuant to s 93A of the *Evidence Act* 1977 (Qld) (***"the Act"***). The complainant also gave evidence at trial which was pre-recorded and admitted pursuant to s 21AK of the Act.

[19] In her interview, the complainant told police she had come to the police station about "an incest relationship". When asked to elaborate, the complainant replied "it's not incest, it's just um like getting fucked by my own step brother".

[20] The complainant said it had started when the family travelled to Brisbane earlier in the year. The complainant was staying at her sister's house. The appellant was staying at the same residence. Her parents were staying at the complainant's brother's house.

[21] The complainant said the appellant would go over to her brother's house to play cards with her parents. She was asleep when he returned, but he woke her up and told her to lay next to him on a mattress in the lounge room. It happened once, maybe twice.

[22] Whilst the complainant was lying beside the appellant, he tried to kiss the complainant. She paused and looked at the appellant, who asked her what was wrong. The complainant replied "it just doesn't feel right". The appellant said he would stop. The appellant also kept telling the complainant "No, it's alright, no one will ever find out".[1]

[23] The complainant said it occurred after New Year's Day 2013 and before the family returned to Townsville on 10 February 2013. That was the first time there was

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1 AB188 [1380].

sexual contact between the complainant and the appellant. The next occasion occurred when the complainant had returned to Townsville. It was around 14 or 15 February 2013.

[24] The complainant was asleep in her bedroom. The appellant's son was sleeping in the same room. The appellant walked in and tried to kiss her. He then tried to take off the complainant's clothes. The complainant knew it was the appellant, as she heard his voice and saw him when she opened her eyes. The complainant asked what he was doing. The appellant replied "nothing".

[25] The appellant then hopped on top of the complainant and "started fucking me". The appellant first ran his hands up the complainant's legs. The appellant's hands went onto the elastic on her hips. He pulled her shorts down and took them off the complainant. The complainant was "freaking out", whilst the appellant was taking down her shorts.

[26] The appellant then took a blanket and covered the complainant and himself. The appellant opened the complainant's legs, pulled her underpants to the side and put his penis in the complainant's vagina. The appellant took his penis out and said "did it feel good". The complainant said "yeah, why?" The appellant said he was "just asking".[2] The appellant then went to the toilet. When he returned, he said goodnight, went outside for a cigarette and returned and slept on the mattress on the floor with his son.

[27] When the appellant placed his penis in her vagina, the complainant said "why are you doing this, this feels so weird".[3] The appellant did not reply, he just smiled. The appellant was moving his penis backwards and forwards inside the complainant's vagina. The complainant did not consent to the appellant putting his penis in her vagina.

[28] The rocking back and forth did not go on for long. It stopped suddenly as the appellant was producing sperm. None of the sperm went inside her vagina. Every time the appellant had intercourse he would stop so that he had not put anything in her vagina. The appellant would go to the toilet. On the last occasion it happened, the appellant held his penis in his hand. The complainant saw white stuff coming out of the penis.

[29] There was a big break between that first occasion of intercourse and the next time, which occurred on the back verandah. The complainant had been sitting outside with the appellant and SDN, her brother. SDN went to bed. The complainant was going to go inside too, but the appellant asked her to stay a while. When the complainant asked why, the appellant replied "I want to fuck you before you go to bed".[4] The complainant said she did not want to, but the appellant kept saying please. The complainant said "Oh, whatever." The appellant told the complainant to bend forward.

[30] The complainant was near the table. The appellant came from behind, pulled down her shorts and underpants and put his penis in her vagina. The complainant was telling the appellant it did not feel right. The appellant said "Oh, everyone's asleep,

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2 AB198 [1825].
3 AB198 [1855].
4 AB203 [2060].

it's alright".[5] The appellant stopped after a while, went to the toilet and washed the sperm down. He was holding his penis as he walked inside. It was covered with his shorts. The appellant told the complainant she could go to bed now. The complainant pulled up her underwear and shorts, walked inside and went straight to bed in her room. She did not want the appellant to do what he did to her.

[31] The complainant could not remember the next incident after that occasion of intercourse on the back verandah. She estimated there had been five more occasions of sexual contact between her and the appellant. The last occasion happened on 16 August 2013, at the complainant's residence at Deeragun. The appellant followed the complainant into her sister SEB's room, where the complainant was going to get changed for bed.

[32] The appellant tried to kiss the complainant. She told him she was not interested and that she was going to tell her sister, SNE. The appellant said "no, don't please". The complainant said "well, it's come too far, I just feel uncomfortable." The appellant said "just one last time". The complainant said "no", but the appellant kept begging her. The complainant then said "oh, okay".[6]

[33] The appellant took off the complainant's dress and underpants. He told the complainant to lean forward and put her face on the bed. The appellant then put his penis into the complainant's vagina. The appellant suddenly stopped and ran outside, holding his penis. She could see the sperm coming out. The appellant ran into the bathroom and washed it. Again, the complainant said she did not want this to happen.

[34] On two of the other occasions the appellant had sexual contact, the appellant put his penis in her vagina whilst he was on top of the complainant. The appellant had also licked the complainant's vagina and told the complainant to suck his penis. On one occasion, the complainant said she did not want to suck his penis. The appellant said "just do it, it's going to feel good".[7] The complainant said she did not suck his penis on that occasion.

[35] The complainant was unable to recall when these other occasions occurred. They all took place at the residence at Condon when everyone else had gone out. The appellant came on top of the complainant when she was lying down. On every occasion the complainant told him it did not feel right, but the appellant said "no, it's fine".

[36] On one occasion (after the Queen's Birthday weekend 2013), the complainant came home from school. She was sitting on the couch watching television. The appellant sat next to her. He grabbed her hand and put it on his penis. He told the complainant to suck on it. When the complainant asked "why", he said "because I want you to". The complainant said "no", but the appellant kept begging, saying "please, just once".

[37] The appellant, who was wearing long jeans, undid his fly and took his penis out. The complainant then sucked on the appellant's penis. The complainant stopped

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5 AB205 [2165].
6 AB213 [2545].
7 AB216 [2700].

sucking his penis because she did not like it, "it just felt so wrong".[8] The complainant estimated it was late afternoon, 4.30 or 5.00 pm.

[38] The complainant estimated the appellant had licked her vagina two or three times. She did not consent to that act. The appellant had sometimes licked her vagina before he put his penis into her vagina. On the occasion the complainant remembered, the appellant put his penis into her vagina, pulled it out and then licked her vagina.

[39] In August 2013, the complainant's mother asked her if anything was going on between the complainant and the appellant. The complainant said "no". When asked if she was sure, the complainant replied "yes". The appellant also denied it.

[40] On the day she attended the police station, the complainant had travelled to McDonalds with SNE who asked her if anything was going on. The complainant said "yes". As they were travelling home, SNE saw the appellant. SNE started punching into the appellant. She swore at him. The appellant asked what was wrong and SNE told him. The appellant started crying and walked away.

[41] The complainant estimated she first told SNE at around 12.30 pm that day. SNE had asked if anything was going on with the appellant. The complainant initially said "no". SNE then said "just tell me, you don't have to hide anything from me". The complainant said "yes, there is", the appellant has been "fucking me".

[42] The complainant said at the time of the sexual contact with the appellant, she was in grade 8. The appellant had seen her in her school uniform on many occasions. The appellant did not take any precautions or safeguards during the acts of intercourse. He was not wearing anything on his penis.

[43] In her pre-recorded evidence, given when the complainant was 17 years of age, the complainant confirmed she spent a fair amount of time with the appellant when he first came to live with her family. She could confide in him. He would talk to her about anything. She discussed with him any problems she had at school. The appellant would give her advice. She felt she could rely on him. She became very close to the appellant. The complainant agreed she started to think of the appellant as pretty special.

[44] The complainant denied she had initiated sexual contact with the appellant. She denied reaching up and rubbing his leg on one occasion and trying to kiss him on another occasion when she went and lay beside the appellant in the lounge room. The complainant denied that on the first occasion she alleged the appellant had intercourse with her, she had come into the room, got on top of the appellant and tried to kiss his face. She denied the appellant pulled away and said "you shouldn't be doing that". She denied it was very embarrassing for her for the appellant to have spoken to her in that way.

[45] The complainant accepted that on the first occasion the appellant had sex with her she did not yell or call out with pain when the appellant put his penis in her vagina. She did not call out to anyone. The complainant agreed that on the occasion the appellant had intercourse with her on the verandah she did not see him go into the toilet after he left the verandah. The complainant heard the door shut. She knew it

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8 AB220 [2890].

was the toilet door. The complainant agreed that act of intercourse occurred after she had said "whatever", in response to the appellant's plea for her to have sex with him.

[46] The complainant denied that the act of sexual intercourse on the verandah did not take place. The complainant also denied that the other acts of sexual contact did not take place. The complainant said she did suck the appellant's penis but could not remember if it was on the occasion the appellant had placed her hand on his penis and asked her to suck it.

[47] The complainant denied she was angry with the appellant because of her embarrassment when he had told her she should not be touching him. The complainant denied her behaviour towards the appellant changed from the time when he first came to live with her family. The complainant always talked to the appellant about anything. The complainant continued to talk to the appellant even after the family meeting.

[48] The complainant agreed she had told a number of people that nothing had happened between her and the appellant. The complainant agreed her mother and SNE had not believed her when she had said that nothing was happening between her and the appellant. Her mother had asked for confirmation and the complainant had said that nothing was happening to her mother.

[49] It was only after SNE told the complainant she did not have anything to hide from her, that the complainant told SNE that something had happened between her and the appellant. The complainant denied she felt she had to make SNE happy. The complainant denied she was only saying something had happened between her and the appellant because that was what they wanted to hear. When people first asked her about her relationship with the appellant she told them nothing had happened because she was scared to tell people what had happened between them.

Other Evidence

[50] SNE, the complainant's sister, first met the appellant in Townsville at a ceremony for a deceased family member. After the ceremony, he stayed with SNE's parents at Condon in Townsville. SNE's siblings were all living at that residence. SNE had her own residence. The appellant then returned to Ipswich for a period of weeks.

[51] The appellant would go back and forth between Townsville and Ipswich. On one occasion, the family drove down to Ipswich. It was probably three or four months after Christmas. SNE, her two children and her mother and step father stayed with one relative, while her siblings, including the complainant, stayed with another relative. The appellant was mainly staying with the other relative.

[52] After 6-8 weeks, the family returned to Townsville. Two days later, the appellant came back to Townsville. He lived at Condon until the family moved to Deeragun. At that stage, SNE gave up her residence and moved into the residence at Deeragun. The appellant's son was also living at these residences.

[53] On 24 August 2013, SNE asked the complainant what was going on between her and the appellant. The complainant did not reply. SNE explained she was trying to understand what a 12 year old girl had that was interesting to a 34 year old male,

causing him to ring the complainant all the time. Again, the complainant did not answer.

[54] SNE asked the complainant to answer that question and she would not mention it again. At that point, the complainant broke down and said the appellant "fucked her". The complainant was so upset she could not get her words out. Soon after, SNE saw the appellant. She started throwing punches at him. The appellant looked surprised and said he did not know what was going on. SNE told him he was a liar, that he had touched her baby sister. The appellant walked off.

[55] SNE went straight back home and told her mother and her sisters. SNE then had a further conversation with the complainant. Her sisters, mother and step-father were present for that conversation. The complainant told SNE the appellant "had her suck him off and went down on her, did oral sex on her and stuff like that".[9] The complainant was very upset. SNE then took the complainant to the police station.

[56] In cross examination, SNE agreed that as the oldest, she had a lot of contact with her younger siblings. She was very protective of all of her siblings. They would mostly do what she told them to do. SNE agreed that prior to the complainant telling her what had happened, she already thought something was going on between the complainant and the appellant. She denied jumping to conclusions.

[57] SNE continued to ask the complainant questions because she did not believe the complainant's initial response. If the complainant had again responded "no", she would have continued to ask the complainant. She denied she would have kept asking until the complainant gave the answer SNE wanted from the complainant.

[58] SNE did not believe the complainant's initial response because of everything that was happening in the household. There was a jealousy conflict. There were secret telephone calls late at night where the complainant would walk away and talk on the telephone. You could not touch her telephone. It was always with her. That behaviour was not her sister. The complainant was normally a very quiet person.

[59] SNE had noticed a few things out of the ordinary between the appellant and the complainant; "the gestures, the touching, body holding, just not right between a brother and a sister". They were "very affectionate".[10] That affection was not coming equally from both sides. It was more on the appellant's side, with the showering of expensive gifts like telephones and clothes for no apparent reason.

[60] SBQ, the complainant's mother, had known the appellant a long time as he was her husband's eldest son. She lived with her husband and six children, one being the complainant, at Condon from March 2012 to 27 June 2013. The family then moved to Deeragun. The family left Deeragun in September 2014. The appellant stayed with the family when they were living at Condon and Deeragun. When he first commenced staying with them, the complainant was at school. She would wear her school uniform.

[61] In cross examination, SBQ conceded she may have been in error in thinking the complainant and the appellant did not attend a family function at Kirwan Tavern in July 2013. She accepted that at some point during that function she had indicated they were going to drop the complainant and the younger children back home. The

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9 AB80/12.
10 AB83/45.

appellant said he would go home as he was tired, and the complainant said she would go home and babysit the younger children.

[62] SBQ took some of her older children to another party, about 20 minutes away from the family home. She would have been away from the family home for around 50 minutes. She could not recall whether anyone was awake when she arrived back to the family home that evening. They were all in their bedrooms.

[63] SBQ said when the appellant first stayed with them, he would sleep in the boys' bedroom. The appellant's son moved to the residence at that time. He slept in the lounge or in the spare bedroom. Occasionally, the appellant would also sleep in the bunk bed in the garage. He was never allowed to sleep in any of the girls' bedrooms. She definitely would not have put him in the complainant's bedroom to sleep.

[64] The house was always a full house. There were 10 people living there. There was not much space for privacy. To some extent, they were living in each other's pockets. SBQ would never have left just the appellant and the complainant alone in the house at night. On the occasion after the family function, the other younger children were also present in the house with the complainant and the appellant.

[65] SBQ agreed there was a family meeting at which the complainant and the appellant were asked if there was anything going on between them. It occurred "a couple of weeks" before the complainant's police interview. SBQ's niece had come over that day. The niece worked in an area with children. SBQ had her suspicions as the complainant was not herself. She was always upset. The complainant denied there was anything going between her and the appellant. The complainant was asked if she was sure. The complainant replied "yes".

[66] SCB, the complainant's sister, first met the appellant in August 2012, when he came to stay at their house in Condon. He left in November 2012, to travel back to Ipswich. SCB travelled with the appellant and his son to Ipswich. She stayed with her sister for a few months. She returned to Townsville in late February 2013, with her family, including the complainant.

[67] The family had travelled down to Ipswich at a time later than SCB. Some family members were staying with SCB's brother, others with SCB's sister. The appellant stayed at her sister's house, as did the complainant. When SCB travelled back to Townsville, the appellant remained in Ipswich. She later saw him again in Townsville.

[68] In cross examination, SCB agreed that at the family meeting she directly asked the complainant if anything was going on between her and the appellant. The complainant said "no". There were also family suspicions at the time that SCB and her sister, SEB, were involved with the appellant.

[69] Marcus Muller, the investigating officer, accepted a thorough investigation into rape allegations would include a medical examination of the complainant's genitals, if there was forensic evidence to be gathered, having regard to the time frame involved in the complaint. It would depend on all of the circumstances. There was no medical examination of the complainant. There was no forensic examination undertaken of sheets or clothing or other items. He accepted there was a possibility important evidence would be missed without such forensic or medical examinations.

Conviction Appeal

Appellant's submissions

[70] The appellant submits the trial judge was obliged to direct the jury on the defence of mistake of fact in respect of Count 2, notwithstanding defence counsel not having sought such a direction. An inference the appellant had an honest and reasonable, but mistaken belief the complainant was consenting to that sexual contact arose from evidence of earlier physical intimacy constituting count 1, comments made by the complainant during the first act of intercourse, the lack of any positive indications of dissent, the nature of the intimate relationship between them and the fact the complainant felt it necessary to communicate to the appellant that she did not want any further sexual contact.

[71] Further, the trial judge's directions as to the element of lack of consent, in respect of counts 2, 3, and 7, were inadequate. The matters in s 348(2) of the *Criminal Code* which vitiate consent, were not raised in evidence at trial, but were referred to by the trial judge uncritically when summarising the prosecutor's submissions. Thereafter, the trial judge departed from the statutory definition to direct the jury that circumstances which may result in consent not being freely and voluntarily given, include "persistent importunity and sustained or undue pressure on the person". The jury would have been left with the impression they could conclude consent was not freely and voluntarily given, if it was given "only after persistent begging from the appellant". The jury should have been directed to consider whether "in all the circumstances, the complainant was rendered unable to exercise freedom of choice".

[72] The trial judge was required to explain how the law applied to the particular facts of the case. In discharging that duty, the trial judge should have directed the jury to consider those aspects of the evidence that the appellant contends give rise to consideration of an honest and reasonable, but mistaken belief as regards count 2, and those aspects of the evidence referred to by the trial judge when directing the jury as to honest and reasonable, but mistaken belief in respect of counts 3 and 7, when considering whether the prosecution had proven the element of a lack of consent beyond reasonable doubt. The failure to do so may reasonably have affected the jury's verdicts.

[73] The appellant submits the convictions of counts 2, 3 and 7 are unreasonable and not supported by the evidence, in that had the jury been properly directed, a reasonable jury could not be satisfied beyond reasonable doubt that the prosecution had proven lack of consent and negatived mistake in respect of counts 2, 3 and 7. There is a significant possibility an innocent person has been convicted of those offences. Accordingly, the court should substitute verdicts of guilty of unlawful carnal knowledge for each count.

[74] The appellant submits the verdict of guilty of count 5 is inconsistent with a verdict of acquittal of count 4. Those differing verdicts are an affront to logic and common sense. The counts related to one incident. The differing verdicts cannot be reconciled by any test of logic and reasonableness.

[75] The appellant submits the trial judge's direction that there being no sworn evidence by the appellant to the contrary to the complainant's account, may make it easier for the jury to be satisfied of the accuracy and reliability of the complainant's evidence

beyond reasonable doubt was a misdirection. Notwithstanding proper directions being given in relation to the absence of evidence from the appellant at an earlier time, there was a reasonable possibility that misdirection affected the jury's verdicts, such that there was a miscarriage of justice.

[76] Finally, the appellant submits the trial judge failed to direct the jury as to the use they might make of evidence of uncharged sexual acts and other discreditable conduct. The complainant had referred to uncharged acts of sexual intercourse and oral sex with the appellant in her recorded interview. SNE had given evidence she did not believe the complainant's denials about sexual conduct with the appellant due to observed changes in the complainant's behaviour. The prosecutor, in closing address, referred to SNE's evidence, observing the jury might think those observations were well founded and noting that SNE was not challenged on these observations. The effect of that address was to suggest the jury should treat SNE's evidence as proof of sexual interest in the complainant at the relevant time.

[77] Whilst defence counsel suggested an innocent explanation for the observed close relationship in address, the trial judge referred at length to portions of the transcript during summing up, which included SNE's reference to evidence of uncharged sexual acts and other discreditable conduct. The trial judge gave no directions to the jury as to the use they might make of such evidence. It was reasonably possible the absence of such directions may have affected the jury's verdicts.

Respondent's submissions

[78] The respondent submits there was no obligation on the trial judge to direct the jury on mistake of fact regarding count 2. An obligation to direct the jury only arises in respect of defences fairly raised on the evidence. The complainant's evidence did not raise mistake of fact for count 2. Further, nothing in the complainant's account supported a conclusion she had encouraged the appellant's advances. The appellant's counsel did not suggest at trial the complainant was consenting or that her actions enlivened an honest and reasonable mistaken belief on the part of the appellant that she was consenting.

[79] There was no reasonable possibility the failure to so direct the jury may have affected the verdict. It was accepted the circumstances of count 2 were distinguishable from the other counts. Further, the circumstances of count 1 did not assist the appellant in giving rise to such a defence. Nothing in that recorded exchange between the appellant and the complainant on that occasion of kissing could be said to honestly and reasonably engender a belief the complainant would consent at some later stage to intercourse.

[80] The directions given by the trial judge in respect of a lack of consent were not inadequate. Section 348(2) of the *Criminal Code* does not exhaustively define the circumstances in which consent will not be freely and voluntarily given. The trial judge's specific reference to "persistent importunity and sustained or undue pressure on the person" was an accurate, short form description of the complainant's evidence. The trial judge used the word "may", leaving the question of whether that conduct was capable of rendering any consent not free and voluntary to the jury.

[81] The directions appropriately focus the jury's attention on the relevant issues, namely that they carefully assess the effect of the circumstances impacting on the complainant at the time, including her age, the age difference between them and

their familial relationship. The trial judge summarised the evidence which could give rise to a mistake of fact in relation to counts 3, 6, and 7 on the indictment. No further direction was sought by defence counsel. There was no reasonable possibility the failure to direct the jury, as now submitted, may have affected the jury's verdict.

[82] The respondent submits the convictions of counts 2, 3 and 7 were not unreasonable. There was evidence sufficient to support an acceptance of the complainant's evidence of each act of sexual intercourse. It was not unreasonable for the jury to conclude those acts of intercourse occurred without consent. The complainant gave evidence she was not consenting, and her evidence and that of SNE provided ample basis for the jury to be satisfied beyond reasonable doubt that the appellant did not have an honest and reasonable belief the complainant was consenting to those acts.

[83] The trial judge directed the jury in relation to a lack of corroboration, summarised the evidence of the complainant on each count, left alternate verdicts of unlawful carnal knowledge to the jury and left the defence of mistake of fact for the jury's consideration. It was open to a jury, upon acceptance of the complainant's evidence, to be satisfied beyond reasonable doubt that the complainant did not consent to each act and that the appellant did not have an honest and reasonable, but mistaken belief of such consent.

[84] The respondent submits the verdict of guilty on count 5 is not inconsistent with the acquittal on count 4. In cross examination, the complainant was unable to recall the event that gave rise to counts 4 and 5. In her recorded interview, the complainant gave evidence of one particularised occasion on which the appellant licked her vagina. That formed count 5. Count 4 was one of four particularised occasions of vaginal intercourse. The jury may have been more willing to act on the complainant's account in her recorded interview as to the occasion of oral intercourse, but afforded the appellant the benefit of the doubt in relation to the occasion of vaginal intercourse, the subject of count 4.

[85] The respondent submits the trial judge did not misdirect the jury concerning the absence of evidence from the appellant. The words "that may make it easier", was a comment, not a direction. The jury were told they could reject comments. Further, the words were uttered in the context of a direction relating to the relevance of a lack of corroboration to the assessment of the complainant's evidence. That direction was to the appellant's advantage and in strong terms, focussing the jury's attention on the relevant factors.

[86] The words were also said in summing up which had emphasised the importance of accepting the evidence of the complainant as credible before any conviction could follow, the difficulties in accepting the complainant's evidence, that the appellant is presumed innocent, that the burden of proof rested with the Crown and that no adverse inference was to be drawn from the appellant not giving evidence and that the prosecution bore the onus of proving the appellant was not operating under a mistake of fact. The failure of defence counsel to seek redirection fortified that conclusion.

[87] Even if the uttered words constituted a misdirection, the misdirection did not give rise to a substantial miscarriage of justice, having regard to the terms of the

summing up as a whole, and having regard to the verdicts which indicated the jury did not accept all of the trial judge's observations.

[88] Finally, the respondent submits the trial judge did not fail to direct on the use that could be made of the evidence of uncharged sexual offences. Defence counsel at trial did not request such a direction. The trial judge had declined the prosecutor's request for a discreditable conduct direction. There was no reasonable possibility the absence of such a direction affected the verdicts. The evidence of such acts arose only from the recorded interview, was severely lacking in detail, was not relied upon by the prosecutor as evidence capable of demonstrating sexual interest and was not referred to by the prosecutor, defence counsel or the trial judge in the course of the trial. The focus of the trial was whether the jury could be satisfied the charged acts occurred, without consent.

Discussion

Ground 1 – Failure to direct on mistake of fact on count 2

[89] At trial, neither the prosecution nor the defence contended that a defence of mistake of fact arose in respect of count 2. As trial counsel did not seek such a direction, the appellant must demonstrate the direction should have been given and that it is "reasonably possible" the failure to do so "may have affected the verdict".[11]

[90] Although the appellant contends the trial judge was obliged to direct the jury on mistake of fact in respect of count 2, such an obligation only arises if the defence was fairly raised on the evidence, even if it was not relied upon as part of the defence case.[12] In the present case, such a defence was not fairly raised on the evidence.

[91] The complainant's evidence, which was the only evidence in respect of count 2 on the indictment, raised no reasonable basis for a consideration of mistake of fact. Although the complainant did not give evidence of offering any physical resistance, there was nothing in her evidence suggestive of a reasonable basis for the appellant to have believed honestly that she was consenting to the act of intercourse. Nothing was put to the complainant in cross examination suggestive of conduct giving rise to such a belief.

[92] Nothing in the circumstances of the events, the subject of count 1, could reasonably be said to have given rise to an honest but mistaken belief the complainant would consent to an act of intercourse. The complainant had expressly said to the appellant during the kissing episode, the subject of count 1, that it did not feel right. The complainant's statement during the act of intercourse "why are you doing this" and "this feels weird", could not found a reasonable belief the complainant was consenting to that act. Her conduct may be contrasted with what was said to be her actions in the subsequent acts of intercourse. At trial, defence counsel accepted the circumstances of count 2 were distinguishable from those other counts.

[93] A consideration of all of those circumstances does not support the contention that there was an obligation on the trial judge to direct the jury on a defence of mistake of fact in respect of count 2. Further, those circumstances exclude a conclusion that

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11 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38] and [49].

12 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.

it was reasonably possible the failure to direct the jury in respect of mistake of fact may have affected the jury's verdict in respect of that count. This ground fails.

Ground 2 – Inadequate direction concerning lack of consent

[94] The direction now sought on appeal was not sought at trial. Further, it was not contended at trial that the trial judge's directions as to the need for a lack of consent were inadequate.

[95] Whilst it is correct that the matters, the subject of the statutory definition of the circumstances in which consent will not be freely and voluntarily given, as set out in s 348(2) of the *Criminal Code*, were not factors relied upon by the prosecution at the appellant's trial, it does not follow it was an improper direction for those factors to be referred to by the trial judge in the course of the summing up. They are factors relevant to a consideration of whether consent, if given, had been freely and voluntarily given by the complainant in respect of each act of intercourse.

[96] Whether consent was freely and voluntarily given, requires a consideration of the particular circumstances. Those circumstances specifically included that the acts of intercourse had taken place after what the complainant had described as pleading by the appellant. Considered in context, the trial judge's reference to "persistent importunity and sustained or undue pressure on the person", was an appropriate short form description of the complainant's evidence.

[97] That short form description took place whilst the trial judge was appropriately directing the jury about the need for a careful assessment of the effect of all the circumstances impacting on the complainant at the time, in the context of a familial relationship and a significant age disparity. In that context, there was no need for the trial judge to direct the jury to consider whether "in all the circumstances the complainant was rendered unable to exercise freedom of choice". In the particular circumstances, such a direction was apt to mislead the jury.[13] This was not a case involving inducement. It was properly characterised as a case involving pressure.

[98] The trial judge succinctly and accurately summarised the evidence relevant to the jury's consideration of a defence of mistake of fact in relation to counts 3, 6 and 7. The trial judge properly directly the jury as to the matters to be considered when determining whether the jury was satisfied beyond reasonable doubt that the Crown had negatived the existence of an honest and reasonable but mistaken belief on the part of the appellant, that the complainant was consenting to each such act of intercourse.

[99] There is no reasonable possibility that the failure to direct the jury in the manner contended for by the appellant may have affected the jury's verdict. This ground fails.

Ground 3 – The verdicts on counts 2, 3 and 7 are unreasonable

[100] In considering this ground, the Court must undertake an independent review of the trial record to determine whether it was open, upon the whole of the evidence, for the jury to be satisfied of the appellant's guilt of each count beyond reasonable doubt.[14] In undertaking that assessment, the court should accord special respect and legitimacy for the jury's verdicts. The serious step of setting aside a jury's verdict

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13 cf. *R v Grimley* [2017] QCA 291 at [28]-[30].

14 *MFA v The Queen* (2002) 213 CLR 606 at [59].

on the ground it is unreasonable is not to be taken without particular regard for the jury's position and the advantage enjoyed by it in having seen and heard the witnesses called at trial.[15]

[101] The complainant gave direct evidence of each of the acts of intercourse, the subject of counts 2, 3, and 7 on the indictment. Her evidence as to the fact of penetration on each such count was not shaken in cross examination. Whilst there were aspects of her account which could reasonably call into question the reliability and accuracy of her evidence in respect of each such occasion of intercourse, nothing in those aspects of her evidence required the jury to have a reasonable doubt as to its accuracy and reliability.

[102] It was open to the jury, accepting the complainant's evidence in respect of each such count, to be satisfied beyond reasonable doubt that those acts of intercourse had taken place, notwithstanding the assertions in cross examination that no such acts had ever taken place. Once the jury reached that conclusion, it was open to the jury to be satisfied beyond reasonable doubt that the complainant did not give consent in respect of each such act and, further, that the Crown had negatived, beyond reasonable doubt, the existence of an honest and reasonable, but mistaken belief on the part of the appellant that the complainant was consenting to each such act of intercourse.

[103] The complainant was at the commencement of her teenage years. The appellant was over 20 years older. The complainant had expressed an unwillingness to engage in the acts. She had only participated thereafter as a consequence of pleading on the part of her much older half sibling.

[104] The verdicts of the jury were not unreasonable as it was open, on a consideration of the whole of the evidence, for the jury to be satisfied of the appellant's guilt of each of counts 2, 3 and 7. This ground fails.

Ground 4 – The verdict on count 5 is inconsistent with the verdict on count 4

[105] To succeed on this ground, the appellant must satisfy the Court that the verdicts cannot stand together because "no reasonable jury, who had applied their mind properly to the facts in the case" could have arrived at them.[16] The test is one of logic and reasonableness. If the differing verdicts are properly able to be reconciled, this ground will fail unless the verdicts are an unacceptable affront to logic and common sense.[17]

[106] In the present case, the complainant was unable to recall the events of an occasion of vaginal intercourse and subsequent oral sex, when giving evidence at trial. The complainant had given an account of this occasion in her recorded interview, which was played to the jury. During that interview, the complainant had said the appellant had performed oral sex on her on more than one occasion. The complainant said acts of vaginal intercourse had occurred on a number of occasions. On some occasions they had been preceded by acts of oral sex. The occasion, the subject of counts 4 and 5, was described as being when oral sex had followed an act of vaginal intercourse.

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15 *R v Baden-Clay* (2016) 258 CLR 308 at 329.
16 *R v GAW* [2015] QCA 166 at [19].
17 *R v GAW* [2015] QCA 166 at [22].

[107] Having regard to the complainant's lack of recall when giving evidence at trial, the jury may reasonably have afforded the appellant the benefit of the doubt as to whether the act of vaginal intercourse, the subject of count 4, had occurred in the manner described by the complainant, but have been satisfied beyond reasonable doubt, that an act of oral sex had occurred without the complainant's consent and in circumstances where the prosecution had established the appellant could not have an honest and reasonable, but mistaken belief that the complainant was consenting to that act.

[108] The difference in the acceptance of the complainant's account of these events was explicable on the basis of the differing quality of her account in respect of count 4 and count 5. The verdict of guilty of count 5, but not guilty of count 4, does not amount to an unacceptable affront to logic and common sense. This ground fails.

Ground 5 – Absence of evidence from the appellant

[109] Whilst the statement by the trial judge "that may make it easier" may be characterised as a comment rather than a specific direction, the cases where a judge may comment on the failure of an accused person to give evidence are rare and exceptional. As Gaudron, Gummow, Kirby and Hayne JJ observed in *Azzopardi v The Queen*:

> "They will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. A comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case."[18]

[110] The circumstances of the instant case did not warrant any such comment by the trial judge. No reference ought to have been made to the jury's task being made easier by the absence of evidence from the appellant. Such a reference implicitly suggests the jury has been deprived of something to which there was an entitlement. That suggestion is contrary to both the presumption of innocence and the right to silence.[19]

[111] Although those words ought not to have been uttered by the trial judge, neither the prosecutor nor defence counsel sought any redirection or correction. That is unsurprising, having regard to the specific directions which had been given by the trial judge to the effect that the appellant was presumed innocent, that no adverse inference was to be drawn from the appellant not giving evidence, that the prosecution bore the onus of proof, including that the appellant was not operating under a mistake of fact and that any comment the trial judge may make in respect of the evidence was an observation that may be accepted or rejected by the jury.

[112] Having regard to those clear directions, there was no real possibility the jury may have misunderstood the trial judge's directions and that the appellant was deprived of a real chance of acquittal as a consequence of the trial judge's inappropriate observation. There has been no miscarriage of justice from that observation. This ground fails.

Ground 6 – Failure to direct on use of evidence of uncharged sexual offences and discreditable conduct

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18 (2001) 205 CLR 50 at 75.

19 *R v Conway* (2005) 157 A Crim R 474 at 484 [38].

[113] The direction now sought on appeal was not sought at trial. In fact, the trial judge specifically declined a request from the Crown for a direction on discreditable conduct in relation to different evidence.

[114] There were good forensic reasons for defence counsel not to have sought a direction in relation to the use of uncharged acts. The complainant's evidence of the uncharged acts was vague and not the subject of further discussion in her evidence at trial. It was not relied upon by the Crown as evidence capable of demonstrating sexual interest. The acts did not feature in addresses. Importantly, the summing up directed the jury to the evidence and the particular issue in respect of each charged offence, namely, whether it had occurred and, if so, without consent and in circumstances where the Crown could negative a defence of mistake of fact.

[115] A consideration of the whole of the circumstances of the trial and, in particular, of the contents of the summing up excludes any real possibility that the failure to give a direction as to the use of evidence of uncharged acts or any other discreditable conduct, deprived the appellant of a real chance of acquittal in respect of any of the counts, the subject of verdicts of guilty. The verdicts of not guilty in respect of one count of rape and of guilty of indecent treatment, but not guilty of another count of rape, evidenced the care with which the jury undertook its task in the context of those clear and specific directions.

[116] There has been no miscarriage of justice by reason of the failure to give a direction in respect of the use of uncharged acts or other discreditable conduct. This ground fails.

Sentence application

Applicant's submissions

[117] The applicant contends that concurrent sentences of nine years imprisonment for each count of rape were manifestly excessive when considering the totality of the appellant's offending behaviour and having regard to comparable decisions. The sentencing judge also erred in imposing sentences of nine years imprisonment for the offences of indecent treatment, for comparable authorities support sentences in the order of two to three years imprisonment for each such count.

Respondent's submissions

[118] The respondent submits the sentences imposed were not manifestly excessive. The offending involved multiple acts of unprotected sexual intercourse between half siblings, in circumstances where there was a significant disparity in age. The offending had a lasting impact on the complainant and her family and had occurred when the applicant was in a position of trust and there existed a power imbalance. The offending was persistent, extending over nine months and involved convictions for domestic violence offences. The sentencing judge's approach of sentencing the applicant to nine years imprisonment on each count was open on the authorities.

Discussion

[119] Whilst the applicant contends that a sentence of nine years imprisonment for offences of rape was manifestly excessive, the applicant points to no specific error in respect of each count of rape. Accordingly, to succeed, the applicant must demonstrate that the sentences imposed for the counts of rape were "unreasonable

or plainly unjust", such that it can be inferred there has been a failure to properly exercise the sentencing discretion.[20]

[120] No such inference can be drawn in the present case when regard is had to all of the factors relevant to sentence.[21] The applicant committed three acts of rape and three offences of indecent treatment of a child under 16, over a period of nine months. The complainant was a half sibling who had just commenced her teenage years. The applicant was more than 20 years older. The counts included unprotected vaginal intercourse in circumstances where the applicant used emotional pressure to overcome the complainant's expressed resistance. There was plainly a power imbalance and an abuse of trust. Each conviction was for a domestic violence offence.

[121] Those circumstances amply support a conclusion that a sentence of nine years imprisonment, to reflect the overall totality of the applicant's criminal conduct, was well within the bounds of a permissible exercise of the sentencing discretion. A consideration of comparable authority,[22] also supports a conclusion that the sentences for rape were neither unreasonable nor plainly unjust, such as to give rise to an inference that there had been a failure to properly exercise the sentencing discretion.

[122] Unlike the offender in *R v KAJ; Ex parte Attorney-General (Qld)*,[23] the applicant did not have mitigating factors such as an early plea of guilty and significant rehabilitation. There was also an absence of remorse. Further, the applicant's offending involved the commission of domestic violence offences, a specific aggravating feature not present in respect of the offender in *R v KAJ*.

[123] There is, however, substance in the applicant's contention that sentences of imprisonment of nine years for two counts of indecent treatment of a child under 16 was manifestly excessive. Although an appropriate exercise of sentencing discretion, in the case of an offender for multiple distinct offences, can on occasions result in the imposition of the same sentence on each count, such an approach is not the preferred approach.[24]

[124] In the present case, the differing nature of the offences warranted the imposition of separate and distinct sentences in respect of the two counts of indecent treatment of a child under 16. In the circumstances, it is necessary to re-exercise the sentencing discretion in respect of two counts of indecent treatment of a child under 16.

[125] Allowing for all of the circumstances, the appropriate sentence in respect of each such count, to reflect both the aggravated features of the applicant's conduct and any mitigating features in his favour, is a sentence of two years imprisonment.

Orders

[126] I would order:

1. The appeal against conviction be dismissed.

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20 *House v The King* (1936) 55 CLR 499 at 505; *R v MCT* [2018] QCA 189 at [240].

21 *R v Goodwin; Ex parte Attorney-General* [2014] QCA 345 at [5]; *R v MCT* [2018] QCA 189 at [239].

22 *R v BBP* [2009] QCA 114; *R v KAM (No 2)* [2017] QCA 197.

23 [2013] QCA 118.

24 *R v Nagy* [2004] 1 Qd R 63 at [23]-[39], [66], [69]-[70].

2. Leave to appeal sentence be granted.

3. The appeal against sentence be allowed.

4. The sentences of nine years imprisonment imposed on each of counts 5 and 6, be set aside.

5. The applicant be sentenced to two years imprisonment on each of counts 5 and 6, to be served concurrently with each other and the remaining sentences of imprisonment.

6. The sentences in respect of counts 1, 2, 3, and 7 be confirmed.