SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDH* [2019] QCA 134
PARTIES:	**R** **v** **SDH** (appellant/applicant)
FILE NO/S:	CA No 217 of 2018 DC No 412 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 6 August 2018; Date of Sentence: 27 August 2018 (Fantin DCJ)
DELIVERED ON:	4 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2019
JUDGES:	Gotterson and McMurdo JJA and Bowskill J
ORDERS:	**1. The appeal against conviction is dismissed.** **2. Leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted of three counts of incest – where the Crown tendered an exhibit for the first time during cross-examination of the appellant – where the learned trial judge also questioned the appellant about the exhibit – whether the Crown impermissibly split its case resulting in a substantial miscarriage of justice – whether the learned trial judge unfairly intervened in the trial CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the Crown contended all three counts of incest occurred before the victim turned eighteen – where the appellant contended two counts occurred after the victim turned eighteen – whether it was open to the jury to conclude beyond reasonable doubt that each count occurred within the period charged – whether the verdicts were unreasonable and cannot be supported by the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE

OR INADEQUATE – where the appellant was sentenced to six years' imprisonment in respect of each of the three counts of incest – where the appellant applies for leave to appeal against sentence – whether the sentence was manifestly excessive

Criminal Code (Qld), s 222, s 668E

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Kalbasi v Western Australia (2018) 92 ALJR 305; (2018) 352 ALR 1; [2018] HCA 7, cited
Lane v The Queen (2018) 92 ALJR 689; (2018) 357 ALR 1; [2018] HCA 28, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v BAQ [2005] QCA 31, cited
R v Bauer (2018) 92 ALJR 846; (2018) 359 ALR 359; [2018] HCA 40, cited
R v BZ [2003] QCA 26, cited
R v Chin (1985) 157 CLR 671; [1985] HCA 35, cited
R v Gibb [2018] QCA 120, cited
R v NJ (2008) 189 A Crim R 402; [2008] QCA 331, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
R v Tout [2012] QCA 296, cited
R v WN [2005] QCA 359, cited
Shaw v The Queen (1952) 85 CLR 365; [1952] HCA 18, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: S J Hamlyn-Harris 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] **GOTTERSON JA:** I agree with the orders proposed by Bowskill J and with the reasons given by her Honour.

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

[3] **BOWSKILL J:** On 6 August 2018 the appellant was convicted, following a trial, of three counts of incest, under s 222(1)(a) of the *Criminal Code* (Qld). The victim of the offending was his step-daughter, CL. The case was unusual, in that it was based on the appellant's own admissions, to a friend and in a letter to his wife. CL did not give evidence, having left Australia to travel and live overseas before the trial. The appellant admitted he had sex with CL three times, although argued it was due to coercion on her part. The central issue in dispute at the trial was whether this occurred before she turned 18, as the Crown contended, or afterwards, as the appellant contended. The appellant was sentenced to six years' imprisonment on each of the counts, with parole eligibility fixed at 6 August 2021, after serving three years in custody. The appellant represented himself at the trial. He was legally

represented by counsel at the sentencing hearing, which took place on 27 August 2018.

[4] He appeals against his conviction on grounds that a miscarriage of justice was occasioned by the impermissible splitting of the prosecution case (ground 1); that the learned trial judge unfairly intervened in the course of the trial by cross-examining the appellant on evidence presented by the prosecution after the appellant had elected to give evidence (ground 2); and that the verdicts on counts 2 and 3 were unreasonable and cannot be supported by the evidence (ground 4).

[5] He also applies for leave to appeal against the sentences imposed, on the ground that the term of six years is manifestly excessive.

Appeal against conviction

[6] As a matter of law, in the circumstances of this case, the appellant's conduct would be a criminal offence even if the incidents occurred after CL turned 18.[1] However, the Crown case was put on the specific basis that the criminal acts occurred prior to CL's 18th birthday, and so it is appropriate to deal with the appeal on that basis.

[7] Each of the three counts on the indictment were worded in identical terms, that on a date unknown between 31 October 2012 and 8 March 2016, the appellant had carnal knowledge with or of his step-daughter. The date range was explained in the evidence as spanning the period from when the family moved from Darwin to Cairns (the offending said to have occurred after the move to Cairns) to the day before CL turned 18. CL was aged 14 to 17 during this time period.

[8] The jury heard evidence at the trial from a Mr U, who had known the appellant for about 12 to 18 months. He had known the appellant's wife for much longer, since about 1998. Mr U gave evidence that, in about February 2016, the appellant came around to visit him, and they were talking about CL's boyfriend. Mr U said:

> "And we were chatting about that, and then he [the appellant] had said he had something to get off his chest and wanted to tell me. And then he proceeded to tell me that he had slept with [CL] and ---"

[9] He continued:

> "Yeah. He slept with [CL]. And I was – like, I was shocked and was processing it all. And I was basically asking him, well, you know, what happened? Why? You know, 'Why did you do that?' You know, like, 'You could have had an affair could have got an escort or something.' You know, 'Why did you sleep with [CL]?' You know, it just didn't make sense to me. But, yeah, that's what he told me. So – yeah.
>
> All right. And did he tell you how often he did this? --- First he said once, and then later he said another time.

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[1] See s 222(8) of the *Criminal Code*. There is no general exception under s 222 where the offspring or lineal descendant is an adult; but there is a specific exception, under s 222(8)(b), where both persons are adults and entitled to be lawfully married. As the appellant was married at the relevant time, he was not entitled to be lawfully married to the complainant.

> On another occasion? --- On another occasion. Yeah.
>
> Okay. And what did he say on the other occasion? --- He – it happened somewhere, I can't remember exactly where.
>
> Yeah? --- But he said another time, he did sleep with her.
>
> Okay? --- Yeah.
>
> All right. And did he say anything else when he was at your house that day? --- No. It was mostly because of [CL] and the boyfriend.
>
> Yeah? --- And then he proceeded to tell me that he slept with her once, and then – and then he later admitted that he'd slept with her again."[2]

[10] In cross-examination, Mr U agreed that it could have been March when the appellant first spoke to him.[3]

[11] Mr U gave evidence that, two or three months later, he was helping the appellant move to his sister's house, and the appellant gave him an envelope containing a letter, to give to the appellant's wife, which Mr U did.[4]

[12] The appellant's wife, Ms M, also gave evidence. She had been married to the appellant for 10 years. She had two children prior to the marriage, who were aged 11 (CL) and 12 (her son) at the time she married the appellant. She described how the family had lived in Cairns at first, then moved to Darwin in 2010, and moved back to Cairns in November 2012.[5]

[13] Ms M gave evidence of two incidents that occurred in Darwin, which were relied upon by the Crown as evidence of other discreditable conduct, from which the jury could infer the appellant had a sexual interest in CL and had been willing to act on it. In the first incident Ms M described, CL was aged about 14. She had been in the pool, and when she got out she went to a room in which the appellant was on the phone. Ms M followed her to see what she was doing. She saw the appellant laying flat on the bed, wearing a sarong, and saw CL sitting on top of him, with her legs on either side of his legs, wearing her bikini. She thought CL was asking the appellant to turn the internet on. Ms M ran out of the room in shock, and then went back in and "pulled her [CL's] hair and dragged her off him". She told the appellant "you need to pray for your sins", and later saw him kneeling and praying in the bedroom, probably an hour after what happened.[6]

[14] Ms M described another incident, the next day, in which she and the appellant and CL were in the kitchen after work and school. She left to go to the bathroom, and when she returned, heard the appellant say to CL "do you still love me?", and she said "yes", and then the appellant said "kiss me", and CL kissed him on the lips. Ms M said she shook her head and said "you two never learn", or something.[7]

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2 AR 125.
3 AR 130.
4 AR 125-128.
5 AR 131, 138.
6 AR 136-137.
7 AR 137.

[15] In cross-examination, Ms M agreed with the proposition put to her by the appellant that "the kissing part, is that not normal in our house where we give a peck on the cheek, on the lips?" She said "yeah. That's normal".[8]

[16] Ms M gave evidence that CL had lived with her and the appellant, from the time they met in 2009, until 2016. Her evidence about CL moving out was as follows:

> "All right. And when did she move out? --- Officially or like – because she was back and forth.
>
> All right. **So how old was she when she was moving back and forth? --- Seventeen.**
>
> **Okay. And when she moved back and forth, where would she go to? --- To her boyfriend's place.**
>
> **All right. And when did she officially move out? How old was she when she officially moved out? --- Eighteen.**
>
> **Okay. And ---? --- Towards the end of the year.**
>
> I beg your pardon? --- Towards the end of the year when she turned 18.
>
> All right. And where did she move to? --- Brisbane.
>
> Okay. Did she live anywhere else after she left your home in 2018? --- Two thous – say it again, sorry.
>
> Sorry, 2016 – 2016? --- She went to my parents for a little bit, but she wasn't, like, always there. They said she would always go out and come back the next day.
>
> All right. And she was 18 at this stage? --- Yep.
>
> All right. Okay. Now, why did [CL] move out? --- I guess she wanted to explore the world. She wanted to try different things. She had finished school. She always wanted to travel. Could've been our strict discipline at home."[9]

[17] At some point after CL had moved out, in May 2016, the appellant sent to Ms M, on her phone, a photo of CL, from her waist down, wearing nothing, with the message "here's a photo of your fucking whore slut", or something like that.[10] Ms M got the photo on a Friday, and on the following Monday, on the advice of the pastor (of their church), she went to the police.[11] Ms M said the police came to their house and told the appellant he had to leave, and the appellant moved out to stay with his sister that night.[12]

[18] A couple of days later, Mr U gave Ms M the letter from the appellant.[13]

[19] The envelope (exhibit 1) bore the words "Please be strong". The letter (exhibit 2) read as follows:

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8 AR 148.
9 AR 139. Emphasis added.
10 AR 142.
11 AR 143.
12 AR 144.
13 AR 144-145.

"My dearest and wonderful wife

I have been thinking for a couple of years of how to tell you the great sin I've commited against God and you.

These last couple of days have been the most painfull I've ever been. Just to think how I could hurt you so much. My love you, of all the people in the world do not deserve to be hurt. I'm balling my eyes out as I'm writing this. I've missed you so much. I honestly don't deserve you at all. You're to wonderful for me. Its going to be very very hard for me to live without you.

I think thats the way God wants it, so we'll leave it up to him. I've been thinking how or will I tell you but couldn't bring my self to do so. I'm so very sorry, I've asked God if I should so you must know the truth. I keep on telling [CL] to tell you but she wouldn't so I guess I have to tell you.

Just remember one most important thing. There will never been another [Ms M] in my life ever. No matter what the outcome is you will remain my wife and my very best friend for ever in my heart. I do not know how to love anyone that's been my problem mainly when it comes to you. I'm sorry.

Here we go. I was hoping [CL] would tell you, that **yes we had sex three times before she left**. You have to believe me she offered it to me. I have proof on my phone. That's the reason I've been wanting her to leave the hous calling her names and all that so she could leave us alone but you wanted her there. She will lie about everything and been touched abused all that crap but she has been with someone before, as you know I asked her, she said she couldn't remember she was too young.

Just believe me [Ms M] she offered it to me and made deals. Its on my phone. If you want to know more just ask me when you can. I am not lieing [Ms M]. I have to show the court the evidence of when we started.

If she was abused why the hell didn't she tell you huh?

She'll make up more excuses. She lies so much. The reason why I took photoes was to prove myself to you if it came to this.

I could go on, but that's all you need to know for the moment.

She never ever complained, just said we have to stop soon.

This is the reason I asked God to help me write and tell you the truth. From the very bottom of my heart I am sorry. I don't blame you if you hate me forever. I am very very sorry. Just forgive her when you can if you can.

Until we ever talk again Goodbye [Ms L]

PS Hope God strengthens your heart

> By the way she always threatnd to call abuse if she dint get what she wanted jokeingly
>
> She ended up doing it
>
> Poor soul …"[14]

[20] CL's birth certificate was tendered as exhibit 3.

[21] That was the extent of the evidence in the Crown case.

[22] At the end of the first day of the trial, before the Crown had formally closed its case, there was an exchange between the trial judge and the prosecutor, in relation to whether she was proposing to tender the photograph referred to in Ms M's evidence. The prosecutor said she was not, and the appellant said he did not want the photograph tendered. The exchange continued:

> "HER HONOUR: And what about the text messages? Do you have those as well, or not? Those are – obviously, it's the prosecution case, but I just – that goes – that was a separate exchange, was it, or a separate message? It wasn't embedded with the photograph.
>
> MS MEOLI: That – no, no.
>
> HER HONOUR: I see. All right. Mr SDH, do you require or wish to have either the photograph or your text message tendered by the prosecution?
>
> DEFENDANT: No, your Honour.
>
> HER HONOUR: Thank you.
>
> MS MEOLI: **I have text messages between – from his phone, but – between him and [CL], but that's a matter for him.**
>
> HER HONOUR: Yes. All right. And what about marriage certificate. Were you proposing to tender that, or not?
>
> MS MEOLI: No. I don't have that, your Honour. No.
>
> HER HONOUR: Thank you. Just bear with me a moment. Mr SDH, tomorrow, you will have to make some decisions once the prosecution case is closed. One of those, probably the most important one or one of them will be whether you give or call evidence. If you intend to raise as a defence the defence referred to by Ms Meoli at the start of the trial, that is, a defence that you were acting under the coercion of [CL] at the time of the alleged offences, then that is something you should consider including whether you want to ask any questions of any witness about that and whether you intend to give evidence about that yourself or call evidence from other witnesses about that. It's entirely up to you. You don't have to. But I'm just reminding you to think about that.
>
> DEFENDANT: **Your Honour, I will be giving evidence**."[15]

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14 AR 261-262. Emphasis added.

15 AR 151-152. Emphasis added.

[23] There followed a further exchange between the trial judge and the appellant, including about whether he proposed to argue the admissions he had made (to Mr U and to Ms M in the letter) were not made, or were not voluntary (he said he did not). The prosecutor then said that, in her submission, the issue of coercion was raised by the letter the appellant had sent his wife. The prosecutor suggested it would be prudent for the trial judge to remind the appellant of "the opportunities that he will lose if he does give evidence" – that he would subject himself to cross-examination, and lose the opportunity to make the only address to the jury (the Crown having no right of address, where a defendant is unrepresented and does not give evidence). The trial judge proceeded to explain that, in clear terms, to the appellant.[16]

[24] On the following day, there was some further brief cross-examination of Ms M, by the appellant. He then said to the trial judge that there were some more questions he wanted to ask, but he was worried he might say the wrong thing. Her Honour sent the witness and the jury out, so that the appellant could discuss it with her in their absence. The appellant said to the trial judge:

> "I wrote a letter to my wife. I know exactly what it meant. And she knows too. It has nothing to do with those charges. Nothing completely. So I was wanting to, if I could ask her if she understood that letter I wrote."

[25] The trial judge explained that the appellant could ask Ms M what she thought about the letter, but that Ms M could not give evidence about what Ms M thought the appellant meant when he wrote it.[17] There was no further cross-examination of Ms M, and the prosecution closed its case.

[26] After a no case submission by the appellant was rejected,[18] the appellant was called upon and elected to give evidence.[19]

[27] In his evidence, the appellant said the following, in relation to the letter he had written to his wife, Ms M:

> " … So as I state in the letter, I wrote in it, 'There's – I've been thinking of a couple of years to tell you that I've done very wrong against you and God.' Now, what that meant, what I meant by that, was when [CL], the witness, the – yeah, the witness or – how would call it?
>
> HER HONOUR: Just call her [CL]? --- [CL]
>
> And I think everyone knows who you mean? --- Yeah. [CL] used to bribe me, offer me things, and – things like, 'If you buy me a car, I'll give you what you want.' Every time I'd say, 'What are you talking about?' She'd go, 'Joking. I'm only joking, psycho.' Then she'd offer me something else and this kept on going on. Now, she – I said, 'I'll tell mum what you said.' She goes, 'Please, don't tell mum.' Now, to me – to me – excuse me – that was a sin. I'm a Christian. I'm a Seventh Day Adventists. And in the Bible, sin, it's

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16 AR 154-156 and 159-160.
17 AR 174.
18 AR 178-183.
19 AR 184.

> not a big sin. It's not a little sin. Sin is sin to God. So that's how I've been brought up, so I put that down as, 'A great sin against you and God,' for not telling my wife what she was doing. And I said to her on occasions, 'Get [CL] to live with your mum or send her to boarding school. She's going to split this marriage up.' She didn't know why. She goes, 'She's got every right to be in here. It's her father's house.' So we left it at that. Now, that's what I meant by 'a couple of years.' I held back not telling her. That's the greatest sin. So remember I said to God sin is sin, no big sin, no small sin. So I hope youse understand that. Now, the dates that I told her – when she received that letter, it was in June some time. I can't remember. But it was read out yesterday. She was 18 already. Now, some of the things she said to me earlier was, 'If you tell anybody this, I will put you in jail.' A couple of times I turned around to her and swore at her and she'd go, 'Settle down, psycho –' that's what she used call me '– I'm only joking.' And I put in that letter the same thing. She said 'jokingly' if you heard it yesterday read by [Mr U]. [CL] was 18 – 18. After a few days or a week, we had sex. Now, three times, I told [Mr U] twice and I told my wife three. That was the last time before she moved out. She was going to go to her friend's place, come back, get clothes, then go. And the last time was when her mother went to work and she was going to start work. I had to take them to work, back – both of them, back and forth. That's when the last time it happened, the third time. So I wrote that down. I said, 'Yes, I did, three times before she left.' Everything else before that [indistinct] run down didn't happen because if that happened, why isn't the witness here telling everybody what I've done? That's what I mean. It's where is that witness. If I'm going to be here convicted of something that I didn't do earlier, those ages mean nothing because they had nothing to do with my letter. So I just hope you understand what that letter meant because that's very important to me in this case. Thank you, your Honour."[20]

[28] After the trial judge asked if there was anything more he wanted to say about the letter, the appellant said:

> "Yeah. But I was telling my wife how very sorry I was for what had happened. Now, I was telling the truth and I said to [CL], 'Will you go and tell your mum what happened?' And she said, 'No.' And as she walked away, she goes, 'If you tell –' I said, 'I'll tell mum.' And she said, 'If you tell mum, I'm going to put you in jail.' I said what for? And she just walked off. I never took nothing – notice. I just left it at that. I didn't say any more. And then she used to make deals with me. Now, there's a part there where I have proved that she invited me the last time into the bedroom. That's why I said I've got proof on my phone. …"[21]

[29] In cross-examination, the prosecutor asked the appellant what proof he had on his phone. The appellant said "[w]here she invited me into the bedroom". He said he had his phone there and could show the court that. He read out his phone number,

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20 AR 185-186.

21 AR 187.

which ended in the numbers 451. He was asked about another number, ending in 393, and although at first was "not really sure", later agreed that was his number. The prosecutor then showed him a document, which was a series of text messages. The appellant accepted they were text messages between him and CL, starting on 17 January 2016 and ending on 10 March 2016. The third column of the document identifies messages as "from" and "to". The appellant also agreed that the "from" messages were sent by him to CL, and that the "to" messages were CL's replies to him.[22] On this basis, it was contended by the respondent on this appeal that the text messages had been extracted from CL's phone, not the appellant's phone. That was not disputed by counsel for the appellant.

[30] The prosecutor proceeded to cross-examine the appellant about some of the messages. The list of text messages was tendered as exhibit 5.[23]

[31] After questioning the appellant about a number of the text messages, the prosecutor asked if this was the evidence he had referred to, about CL inviting him into the bedroom. The appellant said no, but that he had another phone (or another phone number), and said it was (in messages sent to) that different phone number that she had invited him into the bedroom.[24]

[32] The appellant said he had that phone with him in the courtroom, and then was asked to identify the message in which he said CL invited him into her bedroom. The appellant did that, and read out a text message exchange (said to have occurred on 18 April 2016) which included:

[CL to appellant]	"You pick me up, or I'll smash you." [followed by a symbol (I infer, an emoji) of "a face and a gun to the head"]
[appellant to CL]	"You want to eat it"
	"I'll let Mum read this message"
[CL to appellant]	"You've got three minutes"
[appellant to CL]	"Fuck"
[CL to appellant]	"I'm ready"
[appellant to CL]	"I told you. Too late."
[CL to appellant]	"It's only 2".[25]

[33] The appellant's evidence was that CL's message "I'm ready" was the invitation to the room.[26]

[34] At the end of the cross-examination, the trial judge asked the appellant some further questions about some of the text messages in exhibit 5:

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22 AR 192-194.
23 AR 264-273.
24 AR 199.
25 AR 201-202.
26 AR 202. A screen shot of part of this exchange was tendered as exhibit 6 (although does not form part of the appeal record).

"HER HONOUR: Mr SDH, in exhibit 5, the text message exchanges, on the 19th of January 2016 is a message from you to [CL], saying:

> *Are you going to stop texting and seeing that dog?*

What did you mean when you sent that? Who's 'that dog'? --- I meant that – that boy that came to the house.

Okay. Is that a boyfriend? She had a boyfriend at that time? --- Yeah.

On 8 February 2016, there's a message from you to the complainant:

> *You don't deserve to be alive.*

Do you remember sending that? --- Yes, your Honour.

And then the following day on 9 February 2016, a message from you to her:

> *I'm going to catch you and him very, very soon. Watch what happens. You come and go to work. I'll get you both. I'll swear you wish you never lived.*

Do you remember sending that? --- Yeah. I send it to threaten her to leave him.

And then the following message on the same date 9 February 2016:

> *Forget to tell you you are the biggest slut I've known.*

So it's in that context that those messages were - - -? --- Yes, your Honour.

- - - sent, is it? --- Yes, your Honour.

Mr SDH, at the end of the exchange on the 10th of March 2016, and I'll have this put on the visualiser so you can look at it, there are a series of messages, which I'll read out to you and you can see them. There are, in fact, a whole page of messages – several pages of messages on the same date. But the ones I want to ask you about are these. You say:

> *I was going come to KA to talk about your hair but too late now.*

The complainant says:

> *Can you bring my stuff back?*

You say:

> *Can I have three?*

The complainant says:

> *Okay.*

Sorry. You say – after you say:

Can I have three?

You then say:

Okay. Answer, please.

And then you say:

Why does it take so long to answer? Just remember, I hold the key. I might just stay here.

And then you say:

Answer before I take off now.

And the complainant says:

Why three?!

And then she says:

I only owe one.

And then you say:

Forget it.

And then you say to her:

Three or nothing, your choice.

And then you say:

I'm not coming home. You think I'm joking.

What did you mean when you said:

Can I have three?

? --- Your Honour, we – she used to give me massages every night. My wife knows that. I'd pay her $50 for a massage.

You paid her to massage you? --- To massage because she wanted money to do things. All right. So when I said, 'You owe me one.' She goes, 'No. I owe you two.' 'That's all right. You give me three then.' She goes, 'No.' That's how we used to talk. But there was nothing to do with anything with that. And, as my wife knows – she'll say that always massages were involved in this. When she wanted money, I said, 'You give me a massage.' She said, 'I'll give you a massage. You pay me 50 bucks. I'll give two hours, one hour, three hours, whatever.' That's how we spoke to each other. My wife can back me up on that."[27]

[35] The appellant was asked if there was anything further he wished to say, by way of re-examination, and said there was not.

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27 AR 205-207; see also exhibit 5 at AR 272-273.

[36] The appellant's evidence about the Darwin incidents was essentially to accept the incidents described by Ms M occurred, but to deny that they had any sexual connotation, saying kissing on the mouth was a "normal thing in our family".[28]

[37] There were two aspects to the defence case at the trial: firstly, that CL was over 18 when the appellant had sex with her three times; and, secondly, that CL "coerced" the appellant into doing that. Nothing is raised on this appeal in relation to the defence of coercion.

Ground 1 – impermissible splitting of the prosecution case (and ground 2 – cross-examination by the trial judge)

[38] By ground 1, the appellant contends that by failing to tender the text messages (which became exhibit 5) as part of the Crown's case, and only introducing them in the course of cross-examination of the appellant, the prosecution impermissibly split its case, resulting in a miscarriage of justice.

[39] By ground 2, the appellant contends the learned trial judge unfairly intervened in the course of the trial, by cross-examining the self-represented appellant on some of the text messages. The appellant does not rely on ground 2 as a basis for setting aside the convictions on its own, but rather relies upon it as supplementing ground 1, on the basis that the "unfairness and prejudice occasioned to the appellant by the way in which the text messages were put into evidence is aggravated by her Honour then asking that series of questions".

[40] The general principle is that the prosecution must offer all its proof before an accused is called upon to make his or her defence. This has been described as a matter of practice and procedure, not substantive law, and there are recognised circumstances in which there may be a departure from that general rule.[29] Those circumstances include where the prosecution seeks to lead evidence in reply directed to an issue the proof of which does not lie on the prosecution, such as insanity, or to rebut evidence of the accused's good character, provided the prosecution had not anticipated the raising of the issue, and led evidence in relation to it. Evidence may also be permitted to be given in reply, to prove a purely formal matter the proof of which was overlooked in chief.[30] More broadly, the discretion to permit the prosecution to adduce evidence after the close of its case will only be exercised in special or exceptional circumstances.[31] Whilst the High Court has declined to lay down any rigid formula for this, it has been said that exceptional circumstances do not embrace a situation which ought reasonably to have been foreseen by the prosecution or which would have been covered if the prosecution case had been fully and strictly proved.[32]

[41] In *R v Chin* (1985) 157 CLR 671 Gibbs CJ and Wilson J drew a distinction between the introduction of evidence by means of cross-examination of the accused or his witnesses, and evidence adduced by calling other witnesses after the close of the prosecution case, saying, at 678-679:

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28 AR 190, 191-192.

29 *Shaw v The Queen* (1952) 85 CLR 365 at 378-379; *R v Chin* (1985) 157 CLR 671 at 676-677 and 684; and *R v Soma* (2003) 212 CLR 299 at [28].

30 *R v Chin* at 677, 680 and 685.

31 *Shaw v The Queen* at 379-380; *R v Chin* at 684-685.

32 *R v Chin* at 684-685.

> "The cross-examination may serve the purpose of confirming the evidence already given by witnesses for the prosecution, but the Crown Prosecutor may also prove, by admissions made by the accused under cross-examination, facts which were not proved in chief, whether because it was not possible to prove them, or simply because the Crown Prosecutor failed to advert to them. The trial judge, of course, retains his discretionary powers to ensure that the cross-examination is not unfair. In general, it would be unfair to raise, in cross-examination, some entirely new matter which was affirmatively probative of the guilt of the accused but which had not been the subject of evidence either at committal proceedings or in the prosecution's case in chief, unless the accused had been given prior notice of such matter."

[42] Justice Dawson (with whom Mason J agreed) made the same distinction, observing (at 687) that the discretion to disallow cross-examination by the prosecution for the purpose of adducing evidence which could and should have been tendered during the presentation of the prosecution case "is not as confined, or cannot be as rigorously applied against the prosecution, as in the case of an application by the prosecution to call evidence by way of reply when only exceptional circumstances will justify the granting of the application". It is always a question of fairness.

[43] The appellant submits the text messages in exhibit 5 were admissible as part of the Crown case because the Crown knew from the appellant's letter that he had claimed to have "proof on my phone" that CL "offered it to me". The appellant submitted "[t]he prosecutor had the text messages and they could have been used by her as part of the Crown case, but she chose not to do so". The appellant also submitted that exhibit 5 was relevant, and admissible as part of the Crown case, to negative the defence of coercion, raised by the appellant by reference to the letter.

[44] On the appeal, the respondent submits the Crown was not required to tender exhibit 5 as part of its case, because exhibit 5 was not proof of what was on the appellant's phone; but rather comprised text messages produced from CL's phone. The respondent also submitted exhibit 5 was not admissible in the Crown's case, to rebut the defence of coercion, because under s 222(4) of the *Criminal Code* the defence requires that the accused person was "at the time when the act… of carnal knowledge happened, acting under the coercion of the other person", and it is not possible to conclude from exhibit 5 when any act of sexual intercourse took place. The respondent submits exhibit 5 was not admissible in the Crown case, and the only purpose in putting the text messages to the appellant was to challenge his credibility, in light of his evidence that he had "proof on [his] phone" of CL "offering it to him", and the absence of any such messages in exhibit 5.

[45] In my view, the text messages in exhibit 5 were admissible in the Crown's case, as circumstantial evidence of the nature of the relationship between the appellant and CL during the time period covered by the text messages (which ended the day after her 18th birthday), from which the jury could have been invited to infer, firstly, that there had already been a sexual relationship between the appellant and CL, prior to the text messages being exchanged and, in addition, that having regard to the content of them, it was unlikely CL would have engaged in a sexual relationship with the appellant after the time period covered by the text messages. That is, the messages were relevant, as a piece of circumstantial evidence, to the issue for

determination by the jury, as to whether the appellant had sex with CL (which he admitted) before she turned 18 (which he denied).

[46] The text messages ought to have been tendered as part of the Crown's case.

[47] The conduct of the trial was therefore affected by a failure to strictly comply with the rules of procedure, which is a miscarriage of justice within s 668E(1) of the *Criminal Code*. So the question is whether, notwithstanding that error, no substantial miscarriage of justice actually occurred: s 668E(1A) of the *Criminal Code*.[33]

[48] The appellant argued that the error in this case represented "such a departure from the essential requirements of the law that it goes to the root of the proceedings",[34] that the proviso in s 668E(1A) should not be applied. That is to say, that the error was of such a fundamental nature that, even if this Court were to conclude that guilty verdicts were inevitable, the appeal should be allowed.[35] Counsel for the appellant submitted that the way in which the text messages were put into evidence (during cross examination of the appellant) "painted him in a very poor light and that would have prejudiced him in the eyes of the jury in a way that he would not have been prejudiced if the evidence had been led in the usual way" (that is, as part of the prosecution case in chief). The appellant also argued that there had been a substantial miscarriage of justice because he might not have elected to give evidence, had the Crown led the text messages as part of its case.

[49] The procedural error in this case is not of such a kind that it can be said, without more, that a substantial miscarriage of justice has occurred.[36] Importantly, the appellant does not contend the text messages should not have been admitted into evidence at all; only that they ought to have been admitted as part of the Crown's case in chief.

[50] More broadly, having regard to the whole of the record of the trial, no substantial miscarriage of justice actually occurred. Even if the error had not occurred, and the text messages had been tendered as part of the Crown's case, in my view, the outcome would have been the same.[37] It could not be said the appellant lost a real chance of acquittal.

[51] I do not accept the argument that, had the text messages been tendered as part of the Crown's case, the appellant may not have elected to give evidence. A review of the record reveals that he was determined to give evidence, in order to explain what he meant in the first line of his letter to his wife, when he said "I have been thinking for a couple of years of how to tell you the great sin I've committed against God and you". In light of his admission, that he had sex with CL three times, on its face that first line of the letter was a powerful indicator that had occurred "a couple of years" before the letter. The appellant's evidence was that the "great sin" was not having sex with CL, but rather not telling his wife that CL was bribing him. He

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33 *Kalbasi v Western Australia* (2018) 352 ALR 1 at [12].

34 Referring to *Wilde v The Queen* (1988) 164 CLR 365 at 373.

35 *Lane v The Queen* (2018) 357 ALR 1 at [38].

36 Cf a significant denial of procedural fairness: *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]; or failure to give a direction to the jury about the need to reach a verdict in which the jurors were unanimous about the factual basis for the conviction: *Lane v The Queen* at [47]-[48]. See also *Kalbasi v Western Australia* at [15] and *R v Thompson* [2019] QCA 29 at [20]-[24].

37 *Weiss v The Queen* at [42].

wanted to convey that to the jury.[38] It can readily be concluded that, even if the text messages had already been put in evidence as part of the Crown case, the appellant would still have elected to give evidence.

[52] In addition, I do not accept that the way in which the text messages came to be admitted into evidence (in the course of cross-examination of the appellant) "prejudiced him in the eyes of the jury in a way that he would not have been prejudiced" if the evidence had been led as part of the Crown's case. The *content* of the text messages does paint the appellant in a poor light, as observed by the appellant's counsel. But as already noted, it is not argued on this appeal that the text messages were not admissible at all. The appellant clearly had notice of the text messages, and the fact that the Crown had them, before he elected to give evidence.[39] Had they been tendered as part of the Crown case, they would still be before the jury; and the prosecutor could still have cross-examined the appellant about the content of them.

[53] Further, in my view the learned trial judge did not "unfairly intervene in the trial" (ground 2) by asking the appellant questions about some of the text messages. The relevant principles were referred to recently in *R v Gibb* [2018] QCA 120 in the reasons of the Chief Justice (with whom Gotterson and McMurdo JJA agreed):

> "[75] It is permissible for a trial judge to ask questions
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> > 'designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself'.[40]
>
> And a judge may ask questions of a witness
>
> > 'not only to clarify his or her evidence, but also to test that evidence where the judge perceives that it may be untruthful or even inconsistent with other evidence'.[41]
>
> Miscarriages of justice may arise when questioning appears to be directed towards advancing the case for the prosecution or it is such as to give the jury the impression that the judge is aligned with the prosecution or is convinced of the accused's guilt.[42]
>
> …
>
> [78] In *Michel v The Queen*,[43] Lord Brown set out the parameters of the trial judge's proper role at trial:
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> > 'Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to

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38 See, for example, at AR 157.
39 See at AR 151.
40 *R v Esposito* (1998) 45 NSWLR 442 at 472.
41 *R v Senior* [2001] QCA 346 at [36].
42 *R v Mawson* [1967] VR 205 at 207.
43 [2010] 1 WLR 879.

> witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.'[44]

…

> [80] The overall question in relation to interventions is whether the trial has in consequence been rendered so unfair as to produce a miscarriage of justice. That is a question to be decided
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> > '… in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions'.[45]"[46]

[54] The questions asked by the learned trial judge were at the end of the prosecutor's cross-examination and were open questions, asking the appellant what he meant by certain messages, not cross-examination of him. The messages were in evidence, and therefore part of the jury's considerations. The appellant had been cross-examined by the prosecutor about some of the messages. It might fairly be said her Honour was giving the appellant an opportunity to explain some of the other messages, rather than leaving the jury to construe them without hearing from him. Her Honour's questions did not transgress the appropriate limits of a trial judge's intervention, and did not result in any unfairness to the appellant.

[55] Having regard to the whole of the record of the trial, I do not consider a substantial miscarriage of justice was occasioned by the failure of the prosecutor to adduce evidence of the text messages in its case in chief. The appellant admitted that he had sex with CL on three occasions. The only issue for the jury was whether that occurred before CL turned 18, or after, as the appellant contended. The appellant's explanation of the meaning of the opening line of the letter from the appellant to his wife was implausible. Once that explanation is rejected, the opening line was, as I have said, a powerful indicator that the appellant had sex with CL three times "a couple of years" prior to the letter, which was well before she turned 18. That conclusion is reinforced by the evidence Ms M gave about the incidents which occurred when CL was aged 14, in Darwin, from which it may reasonably be inferred the appellant had a sexual interest in CL and had been willing to act on it.[47] It is also reinforced by the contents of the text messages, for the reason advanced above, that those messages reveal something about the nature of the relationship between the appellant and CL, from which it may be inferred they had already been involved in a sexual relationship of some kind, and that it is unlikely they would do so subsequently. I am persuaded that the evidence properly admitted at the trial proved, beyond reasonable doubt, the appellant's guilt of the three counts of incest on which the jury returned verdicts of guilty.[48]

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44 At 889. This passage was cited with approval by the New South Wales Court of Appeal in *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128.

45 *Galea v Galea* (1990) 19 NSWLR 263 at 281.

46 References in the original.

47 See *R v Bauer* (2018) 359 ALR 359 at [48]-[50].

48 *Weiss v The Queen* at [39], [41]-[44].

[56] I would therefore dismiss the appeal on grounds 1 and 2.

Ground 4

[57] Separately, the appellant contends that the verdicts of the jury on counts 2 and 3 were unreasonable and cannot be supported by the evidence.[49]

[58] The appellant argues that there is a reasonable basis for concluding that the second and third times the appellant had sex with CL (counts 2 and 3) may have been after she turned 18, and therefore outside the period charged. He argues that "[t]his is because of the evidence of [Mr U] together with the evidence of [the appellant] himself, which suggests that when [the appellant] first told [Mr U] [in February or March 2016] it may have only been once, but by the time he spoke to him again [by inference, later] it had happened again, and by the time of the letter to his wife [late May or early June 2016] it had happened three times".[50] For that reason, it is submitted the jury should have had a reasonable doubt about counts 2 and 3.

[59] An appeal on this ground requires this Court to perform an independent examination of the whole of the evidence to determine whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of committing the offences. The question is one of fact; not whether there is, as a matter of law, evidence to support the verdict.[51] In performing this task, particular regard must be had to the role of the jury as the constitutional tribunal for deciding issues of fact in a criminal trial, and to the advantage enjoyed by the jury over a court of appeal of seeing and hearing the witnesses called at trial.[52]

[60] It is by no means clear that the effect of Mr U's evidence was that the appellant told him on one occasion that he had slept with CL once, and then later told him that it had happened another time; as opposed to the appellant telling him first that he had slept with CL once, and then later saying it had happened more than once. The probative value of Mr U's evidence was limited to the admission by the appellant that he had "slept with" CL. Mr U's evidence was equivocal in terms of how many times that had happened, or when that had happened.

[61] It was open to the jury to reject the appellant's evidence; in particular, to reject his explanation of what the first line of the letter meant as implausible. Having done so, that first line of the letter supported the inference the jury were asked to draw, as the only rational inference, that the three times the appellant had sex with CL occurred "a couple of years" ago; therefore, before she turned 18 (in March 2016). In addition, there was the statement, further on in the letter, that "yes we had sex three times before she left". As observed by counsel for the respondent on the appeal, the evidence of Ms M was that CL started moving back and forth from the home when she was 17, and then finally moved out towards the end of 2016. The letter was received by Ms M in May 2016. Accordingly, it was open to the jury to infer that "before she left" referred to a time frame earlier than when she finally moved out; a time frame commencing when she was 17. The evidence of the other

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49 Section 668E(1) of the *Criminal Code*.

50 Appellant's outline of submissions at [36].

51 *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14], [20]-[22], referring to *M v The Queen* (1994) 181 CLR 487 at 492-493, 494-495; *R v Baden-Clay* (2016) 258 CLR 308 at [66].

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

discreditable conduct in Darwin, also supported the inference of the sexual conduct occurring earlier in time; as did the evidence of the text messages in exhibit 5.

[62] It was open for the jury to conclude, beyond reasonable doubt, that each of the three times the appellant had sex with CL occurred before she turned 18, and therefore to convict him of each of the three counts. I would dismiss the appeal on ground 4 also.

Application for leave to appeal against the sentence

[63] The appellant appeals the sentence of six years' imprisonment imposed in respect of each of the three counts, on the ground that the sentence was manifestly excessive.

[64] The appellant's principal argument is that the learned trial judge sentenced the appellant on a factual basis which was not borne out by the evidence. In particular, he challenges the findings of the learned trial judge that he was "a very strict disciplinarian", "that it was common for [him] to threaten the complainant", that he "had a domineering, controlling and manipulative relationship with" CL, and that the "threatening, controlling nature of the relationship" was an aggravating factor.[53]

[65] The appellant argued that the sentencing process was also affected by the following errors:

(a) taking into account the content of the text messages (exhibit 5) as an aggravating circumstance;

As I find no substantial miscarriage of justice occurred as a result of the manner in which exhibit 5 was tendered in evidence, it is unnecessary to address this argument further.

(b) sentencing the appellant on the basis that CL did not invite the appellant to have sex with her, in circumstances where, even if the appellant's evidence was rejected, there was simply an absence of evidence as to the circumstances in which the offences occurred (that is, there was no evidence from CL to contradict the appellant's evidence);

(c) sentencing the appellant, impliedly, on the basis that these were child sex offences, when there was no basis for concluding the offences must have occurred when CL was under 16.

[66] In her Honour's sentencing remarks, the factual circumstances of the offences were described as follows:

> "The three offences were committed against your teenage stepdaughter on unknown dates during a period from 2012 to 2016. You had penile vaginal intercourse with her on three separate occasions. At that time, the complainant was aged between 14 and 17 years old. You were aged between 57 and 61 years old. There is no evidence of when, during that time, the sex occurred, nor of the circumstances of the particular offending.
>
> That is because this was an unusual case. The entire Crown case was based on your own admissions. The complainant, who is now 19 years old and lives overseas, did not give evidence. Hence, there

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53 Sentencing remarks at AR 256.

were no other details about the circumstances of the actual offences. You have been married to the complainant's mother since 2009. At the time you married her, she had two children from an earlier relationship – a son and a daughter. The daughter is the complainant.

You and the complainant's mother were devout members of the Seventh Day Adventist Church. You were very religious, and on your own evidence, a strict disciplinarian at home…

The matters came to light through admissions made by you to two separate people in 2016. In February or March 2016, you told a friend from the church that you had sex with the complainant once or twice. The complainant left home shortly after her 18th birthday in March 2016. After she left, you fought with your wife. You sent her a text message containing a photograph of the complainant from the waist down, naked, followed by a message saying something like, "Here's a photo of your fucking whore slut". Your wife reported that to police. They asked you to leave the house, which you did.

A few months later in late May or early June 2016, you wrote a letter to your wife in which you said, 'I have been thinking for a couple of years of how to tell you the great sin I have committed against God and you'. In that letter, you admitted to having sex with the complainant three times, but you sought to blame the complainant by writing that she offered it to you and made deals with you. You also, in the letter, blamed the complainant for not telling her mother about it.

You represented yourself at trial and pleaded not guilty. At the trial, you cross-examined your wife, the complainant's mother, and you gave evidence. You admitted having sex with the complainant but said it only happened after she was 18 years old. You also sought to raise a defence that the complainant had coerced you into having sex with her.

The jury did not accept your version of events. That is not surprising, given all the other evidence. There was no evidence that could amount to coercion by the complainant, who was 14 to 17 years old and living at home. There was unchallenged evidence that gives context to the offending, and to your relationship with the complainant. You were her stepfather, a large man much older than her, and a very strict disciplinarian. When the complainant was 17, she had a boyfriend and you became very upset about that.

You gave evidence that it was common for you to threaten the complainant. Between January and March 2016, before she turned 18, you sent numerous text messages to the complainant in which you abused her in grossly offensive sexual terms. You swore at her, threatened her, made sexual references to her, including asking her to "give you one" before she left and to let you "have a touch" before she left.

Those text messages included statements in the following terms: 'You don't deserve to be alive', 'I'll get you both. I'll swear you wish you never lived', 'You are the biggest slut I know', 'I could kill

> you right now', 'You have to give me one before you go', 'Let me have a touch before you go', 'Just a quick one', 'You are going to pay…you've just lost me for good'.
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> You had a domineering, controlling and manipulative relationship with the complainant. The jury was satisfied that you had sex with her on three separate occasions when she was under 18 years of age. You had known the complainant since she was 11. You had lived with her and her mother for many years. You were in a parental and protective relationship with her. She regarded you as her father. Your behaviour in seeking to blame her for the offending was manipulative and showed a complete lack of remorse.
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> There is no Victim Impact Statement from the complainant. There can be no excuse for these offences. All adults have a responsibility to avoid sexual abuse of any child. But for a father to have any sexual activity with his daughter, including his step-daughter, is a gross breach of trust and of parental responsibility. It violates all notions of protecting children from harm. The harm, often, lasts a lifetime.
>
> Here, there are a number of aggravating circumstances. The gross breach of trust; the fact that these were domestic violence offences; the threatening, controlling nature of the relationship; the fact that you sought to blame the complainant; and the very significant age disparity. As I said, it is not clear exactly how old the complainant was when the offences occurred, but she was between 14 and 17 years…"[54]

[67] The findings made by the learned trial judge, about the nature of the relationship between the appellant and CL, were amply supported by the evidence. The appellant had been CL's stepfather from when she was aged 11. On the basis of Ms M's evidence, the appellant had shown a sexual interest in CL when they lived in Darwin, when she was aged about 14, and a willingness to act on it. When Ms M was asked why CL moved out of home, she said, among other things, "could've been our strict discipline at home", describing herself and the appellant as "strict parents", and to her upbringing as "different to the friends that she would hang around with" because "we were religious" and "we'd pray every night and stuff, study the Bible and stuff".[55] The appellant also described himself and Ms M as "strict parents".[56]

[68] In the context of being asked in cross-examination about a text message he sent to CL on 5 March in which he threatened to "send the dog [a reference to CL's boyfriend] a photo of you on your bed with your legs apart making plans for tomorrow", he said he did not have such a photo, and "[t]hat was just to threaten her because she was sleeping around when she shouldn't have". He said "I used to threaten her with a lot of things".[57] As noted above, the appellant did send a photograph of CL, naked from the waist down, to her mother, Ms M, with the

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54 AR 255-256.
55 AR 139 and 141.
56 AR 190, also 199.
57 AR 195-196.

accompanying message "here's a photo of your fucking whore slut", or something like that. Later in the cross-examination he agreed with the proposition that, in the text messages, he was threatening CL, and said "I always threaten her. But she wouldn't listen. I've threatened her".[58]

[69] The appellant agreed that the text messages in exhibit 5 were demonstrative of the type of relationship he had with CL. The learned trial judge's summary description of those messages in the sentencing remarks was accurate. The messages are abusive and offensive, replete with threats, manipulation and attempts to control CL.

[70] Looked at overall, the evidence amply supported her Honour's conclusion that the appellant had a domineering, controlling and manipulative relationship with CL.

[71] As for the other errors contended for by the appellant: firstly, in my view there is no basis to call into question the learned trial judge's finding that, the jury having rejected the appellant's account, which it must have done in reaching guilty verdicts, there was "no evidence that could amount to coercion by the complainant, who was 14 to 17 years old and living at home". There did not need to be positive evidence to the contrary in order for her Honour to find that what the appellant said, about CL "coercing" him, was not correct. Once his evidence about that was rejected, what remained were the objective facts of a 57 to 61 year old step-father, who was a strict disciplinarian, and admitted to having threatened her in order to control her behaviour, having sex with his step-daughter, for whom he had been in a parental role since she was 11, three times in the period from when she was aged 14 to 17. It is frankly implausible that CL would have invited, let alone coerced, her step-father to have sex with her.

[72] Secondly, I do not consider the learned trial judge erred by impliedly sentencing the appellant on the basis that these were "child sex offences". Her Honour stated expressly that CL was aged between 14 and 17 at the time of the offences, but that there was no evidence of when, during that time, the sex occurred, nor the circumstances of the particular offending. Her Honour's reference to all adults having a responsibility to avoid sexual abuse of any child were entirely appropriate, in the context of her Honour's sentencing remarks. Throughout the whole of the period, even when she was 17, CL was still a child.

[73] The appellant's argument that the sentence of six years imprisonment imposed on each count was manifestly excessive was principally advanced on the basis of error in the factual basis of the sentence. I do not consider any such error has been shown.

[74] The appellant also contended that, in any event, the sentence was manifestly excessive, given the particular circumstances of this case. Where it is contended a sentence is manifestly excessive, other than on the basis of specific error, the test is whether, having regard to all the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.[59] A sentence is not established to be

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58 AR 203.

59 *R v Pham* (2015) 256 CLR 550 at [28]; *Hili v The Queen* (2010) 242 CLR 520 at [58]-[60].

manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".[60]

[75] Having regard to the authorities placed before this Court, and acknowledging that the circumstances of the cases of incest are diverse, making it difficult to speak of "a normal range",[61] in my view the sentence was not manifestly excessive.

[76] In addition to the factual circumstances set out above, it is relevant to note that although the appellant had a criminal history, it was described as "not terribly relevant", as it contains no previous convictions for sexual offences, although did include dated convictions for offences of violence in New South Wales between 1990 and 1998. The appellant was said to have come to Australia from Papua New Guinea in 1974, where he was raised and educated to year 10. He came to Australia at age 19, and worked as a labourer and more recently as a painter. He had previously been married, before his marriage to Ms M, and has three adult children from that previous marriage. After moving to Cairns from Sydney in 2005, he joined the Seventh Day Adventist church, which is where he met Ms M, whom he married in 2009. The learned trial judge recorded that there was no information available to her from which a view about his risk of reoffending could be formed, although the absence of any convictions for sex offences was taken into account. He had spent 21 days in pre-sentence custody, which was declared. On the basis of the authorities provided to the learned trial judge, which included those referred to below, the prosecutor submitted the range was five to seven years imprisonment, with a sentence at the higher end of the range being appropriate, given that the matter went to trial, and that the appellant had sought to blame CL; counsel who appeared for the appellant at the sentence submitted the range was four to six years.

[77] On this appeal, the appellant submits a sentence significantly lower than six years would have been appropriate, namely three years' imprisonment.

[78] As already observed, the circumstances involved in incest cases are all very different, making comparison difficult. Nevertheless, the following decisions of this Court are of some guidance.

[79] In *R v BZ* [2003] QCA 26 a defendant was convicted following a trial of one count of unlawful carnal knowledge of his step-daughter, when she was 15 and a half years old (as a consequence of which she became pregnant and had a child), as well as an additional 34 counts of incest involving the same step-daughter, when she was aged 20 to 24. He had also been convicted of another count of indecent dealing (when the complainant was aged between nine and 11), in respect of which the Crown accepted the conviction could not be supported and was therefore overturned on appeal. The step-father was 20 years older than his step-daughter. The sentencing judge took into account the lack of remorse, the fact that the complainant had been abused by her stepfather in a gross breach of his position of trust, and that it was a bad case of sexual exploitation of a woman by a stepfather. The defendant had a record of previous convictions, including for offences of dishonesty, as well as, in 1977, for indecent dealing with his niece, aged six or seven. He was

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60 *Hili v The Queen* at [58] and [59]; *R v Tout* [2012] QCA 296 at [8].

61 *R v WN* [2005] QCA 359 at p 4 per Keane JA.

sentenced to three years on the unlawful carnal knowledge, and a further four years on each of the counts of incest, making an overall sentence of seven years. On appeal, because of the acquittal on the indecent dealing count, the sentence on the incest counts was reduced to three years, resulting in an overall sentence of six years.

[80] *R v BAQ* [2005] QCA 31 involved one count of attempted incest, between a 44 year old father and his 17 year old daughter. The incident was described as isolated, and extremely brief, involving no penetration. The defendant was not sentenced until 12 years later. The maximum penalty for the offence at the time it was committed, in 1993, was 10 years imprisonment. This is to be contrasted with the maximum penalty which now applies, of life imprisonment. The defendant cooperated with police after a formal complaint was made 10 years after the incident, pleaded guilty, expressed remorse, had no criminal history, and a good work history up until about 1991 when he became medically unfit for work. The sentence originally imposed of three and a half years imprisonment, with recommendation for post-prison community based release after 14 months, was reduced on appeal to a term of three years, suspended after 12 months.

[81] This case provides no support for the appellant's argument that three years' imprisonment would be an appropriate sentence for the offending in this case. *BAQ* was a far less serious case, involving one isolated incident of attempted incest, at a time when the maximum penalty was only 10 years.

[82] In *R v WN* [2005] QCA 359 this Court refused an application for an extension of time in which to apply for leave to appeal a sentence of four and a half years' imprisonment, imposed on a 51 year old defendant who pleaded guilty to one count of incest with his 22 year old daughter, committed in 2004. The defendant and daughter had only become aware of one another when the daughter turned 16, as she had grown up a ward of the State. The defendant was described as suffering cognitive and substantial intellectual difficulties. The daughter had psychiatric problems, which the Court said rendered her especially vulnerable, and put this case in a more serious class of case than incest between freely consenting adults. That observation was made in the light of the defendant's prior conviction of incest, with his 32 year old sister, from whom he had been separated from infancy. The maximum penalty was then, as it is now, life imprisonment.[62]

[83] Despite the vulnerability of having psychiatric problems, the daughter in *WN* was older than CL, and there was not the abuse of the trust arising from the parental relationship that existed between the appellant and CL (because in *WN* they had not known of one another before the daughter was 16). A higher sentence than was imposed in *WN* was called for in this case, which involved three counts, not one; and convictions following a trial, not a plea of guilty, from which remorse and insight could be inferred.

[84] In *R v NJ* [2008] QCA 331, a defendant convicted on his guilty plea of one count of incest involving his 14 year old daughter was sentenced to five years' imprisonment, suspended after serving one year. The offence had occurred more than 33 years before the sentence. In those 33 years the defendant was said to have lived a life consistent with community expectations of behaviour, including committing no other offences. On appeal, the sentence was reduced to four years,

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62 See the *Criminal Law Amendment Act* 1997 (Qld) (Act No 3 of 1997), s 32.

suspended after six months. Among other things, the Court of Appeal found that the sentencing discretion had miscarried because the lengthy delay was referred to as an aggravating factor, when it ought to have been considered a significant mitigating factor, in which the defendant could demonstrate rehabilitation; and there was also ample evidence of remorse. The defendant was 78 at the time of resentence by the Court of Appeal; had no prior convictions; was otherwise of good character; demonstrated remorse; and cooperated with the authorities when the matter was finally reported to the police. He was described as suffering a number of debilitating health issues, which were found to support the early suspension of the sentence. Although there is no mention of the maximum penalty in the decision, as the offence was committed in 1974/1975, it would have been seven years.[63]

[85] The sentence of four years in *NJ* following the appeal does not support a conclusion of manifest excess in this case. There are not the features of extensive delay, or remorse, present in this case. And again, this was not an isolated incident.

[86] Taking into account the following factors, the penalty of six years imprisonment on each count, to be served concurrently, was not manifestly excessive: the relationship between the appellant and CL, that the appellant had been her step-father from when she was aged 11; that he was aged between 57 to 61 at the time of the offences, and she was aged between 14 to 17; as he described himself, he was a strict disciplinarian, and threatened her to control her behaviour; his offending conduct was correctly described by the learned trial judge as a gross breach of trust and of parental responsibility; his relationship with CL was also aptly characterised as domineering, controlling and manipulative; although he admitted having sex with his step-daughter three times, he sought to place the blame for that on her, arguing that she had coerced him into having sex with her; this was not a case of an isolated incident of incest, but involved three counts; he was convicted following a trial, and there was no demonstration of remorse; and he had some criminal history, albeit not for previous sexual offences.

Orders

[87] For the reasons above, I would order as follows:

1. The appeal against conviction is dismissed.
2. Leave to appeal against sentence is refused.

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63 See *The Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Qld) (Act No. 17 of 1989), s 19 (amending the maximum penalty from seven to ten years).