SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBH* [2019] QCA 249
PARTIES:	**R** **v** **WBH** (appellant/applicant)
FILE NO/S:	CA No 149 of 2018 DC No 816 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 24 May 2018; Date of Sentence: 25 May 2018 (McGill SC DCJ)
DELIVERED ON:	15 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2019
JUDGES:	Morrison and McMurdo JJA and Applegarth J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – INDECENT – where the appellant was convicted after a trial on one count of indecent treatment of a child under 16 – where the appellant was sentenced to three and a-half years' imprisonment with parole eligibility set at 28 April 2019, after serving about 11 months – where the appellant challenges his conviction on a number of grounds – where it is contended that the verdict was unreasonable or cannot be supported having regard to the evidence – where it is contended that the learned trial judge erred in various ways, causing a miscarriage of justice – where the appellant submits that the learned trial judge erred by commenting to the jury about the evidence of the appellant's sister and mother in a way that suggested that their evidence was less reliable than other witnesses who testified at the trial – where it is contended that the learned

trial judge erred in failing to warn the jury against the danger of improperly using generalised evidence of sexual misconduct to conclude that the appellant was likely to be guilty of the charged offence – where it is contended that the trial judge erred in the admission of the appellant's response to the accusation of his wife as evidence – where it is submitted that the learned trial judge erred by failing to direct the jury in accordance with the principles derived from *Robinson v The Queen* – where it is contended that there was a failure to direct the jury adequately regarding the appellant's response to the accusations of his wife – where it is submitted that the time of the offence was material fact to be proved beyond reasonable doubt – whether there has been a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant seeks to challenge the sentence which was imposed upon him – where the appellant seeks to challenge his sentence on two bases – where it is contended that the sentence imposed was manifestly excessive – where it is submitted that there was an error in the application of the principle of totality – whether the sentence imposed was manifestly excessive – whether there was an error in the application of the totality principle

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, mentioned
Mill v The Queen (1998) 166 CLR 59; [1988] HCA 70, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Caulfield [2012] QCA 204, cited
R v PBA [2018] QCA 213, cited
R v PV; Ex parte Attorney-General (Qld) [2005] 2 Qd R 325; [2004] QCA 494, cited
R v TN (2005) 153 A Crim R 129; [2005] QCA 160, cited

COUNSEL: T A Ryan for the appellant/applicant
J A Wooldridge for the respondent

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

[1] **MORRISON JA:** The appellant was convicted after a trial on one count of indecent treatment of a child under 16, that child being under 12 years old and to the appellant's knowledge, his lineal descendent. The indictment also presented the count as a domestic violence offence. The complainant was the appellant's daughter, aged between seven and eight years old.

[2] The day following his conviction by the jury the appellant was sentenced to three and a-half years' imprisonment with parole eligibility set at 28 April 2019, after serving about 11 months.

[3] The appellant challenges his conviction on a number of grounds, the first of which is that the verdict was unreasonable or cannot be supported having regard to the evidence. The other grounds all contended that the learned trial judge erred in various ways, causing a miscarriage of justice:

(a) ground 2 – commenting to the jury about the evidence of the appellant's sister and mother in a way that suggested that their evidence was less reliable than other witnesses who testified at the trial;

(b) ground 3 – failing to warn the jury against the danger of improperly using generalised evidence of sexual misconduct to conclude that the appellant was likely to be guilty of the charged offence;

(c) ground 4 – ruling that the evidence of the appellant's response to the accusation of his wife was admissible, and permitting the admission of that evidence;

(d) ground 5 – failing to adequately direct the jury as to the evidence led as to the appellant's response to that accusation;

(e) ground 6 – failing to direct the jury in accordance with the principles derived from *Robinson v The Queen*;[1] and

(f) ground 7 – failing to direct the jury that the time of the offence was a material fact to be proved beyond reasonable doubt, and that it was necessary for the jury to be unanimous as to the time of the offence.

[4] The appellant also seeks to challenge the sentence which was imposed upon him on two bases, the first being that it was manifestly excessive, and the second being that there was an error in the application of the principle of totality. As will become evident the first basis depended upon the success of the second.

Circumstances of the offending

[5] Evidence given in the trial came from a number of witnesses. The first was that given by the complainant. Evidence was also given by the complainant's sister, complainant's brother and complainant's mother. Two other witnesses related to the appellant gave evidence: the appellant's sister and his mother.[2]

Complainant's evidence

[6] The complainant gave her evidence in the form of a recorded police interview admitted under s 93A of the *Evidence Act* 1977 (Qld), and pre-recorded oral evidence, admitted under s 21AK of that Act.[3]

[7] At the time of her interview COM was aged about eight years and eight months. She was recalling events which fell in a period of approximately one to two years prior to that.

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1 (1999) 197 CLR 162.

2 In these reasons I intend to refer to the witnesses in the following way: complainant, COM; complainant's sister, SIS; complainant's brother, BRO; complainant's mother MUM; appellant's sister, SOA; appellant's mother MOA; two of the complainant's cousins, CUZ1 and CUZ2.

3 The transcript of that interview in the Appeal Book (**AB**) was an unedited version. The correct transcript appears as part of exhibit AB-3 to the Affidavit of Mr Beard, tendered at the hearing of the appeal. Consequently, references to that transcript will be to the pagination of that exhibit.

[8] COM commenced by telling the interviewer that her father had suggested she sleep in his bed when they were in Toowoomba, as CUZ1 was being mean and naughty. She said that "in the morning, dad was annoying me … and he tried to make me touch his penis".[4] She said she then got out of bed and went to watch TV, waiting until everyone else woke up. MUM was absent on a trip to Thailand. When pressed for further details she said the appellant "kept making my hand go there … and then I had to go, so, I went to the lounge room".[5]

[9] COM was asked to describe the location in Toowoomba where it occurred, which she was unable to do, but said that they were at SOA's house, in respect of which she gave a general description. That description included that the house had a square hole in the roof, in the kitchen.[6] The description was reasonably detailed as to the nature of the house, the occupants and their rooms, and the pets that they had. COM confirmed that MUM was away in Thailand at the time, a trip she had only made once in 2013.

[10] COM said that she and the appellant were sleeping in the room usually occupied by CUZ2. She explained that CUZ1 had forgotten to take his medication and, as she understood it, she could not sleep upstairs because whilst her SIS and BRO could "fight off" CUZ1, she would be safe if she stayed with the appellant.[7]

[11] Later in the interview COM provided further details of what occurred:[8]

(a) she was "trying to sleep and [the appellant] kept … trying to bring me closer to him";

(b) the appellant tried to pull her closer before putting her hand on his penis; when the appellant tried to bring her closer he did so by grabbing her around the waist;

(c) the appellant "grabbed my hand and pulled it towards his penis, … so I got my … arm back, … then he's tried to bring me closer to him";

(d) the appellant grabbed her hand and "put it on his penis, then I … pulled my hand away, and then he started bringing me closer to him";

(e) her hand was actually touching the appellant's penis; at that time the appellant's pants were down;

(f) when she touched the appellant's penis it felt "like, sweaty wet"; and

(g) she kept telling the appellant to stop, but the appellant only made her touch his penis on the one occasion.

[12] COM said that the appellant had told her not to tell MUM and that if she did MUM would "get really really angry".[9]

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4 Page 3 line 52.
5 Page 4 line 20.
6 Page 5 line 7.
7 Pages 7-8.
8 Pages 10-13.
9 Page 18 line 44.

[13] COM said that she had told MUM "everything". In terms of a sequence of revealing what had occurred COM said that she told SIS first, and then MUM but on a different day.[10] She said that she told SIS "everything that happened".

[14] COM's oral evidence was given on 17 October 2016, when she was 10 years old. She affirmed the truth of what she had said in her interview. Cross-examination of her was very brief. Having rehashed her version as to when the event happened, namely in 2013 while MUM was in Thailand for about six weeks, four propositions were put to COM. They were that the incident simply did not happen, the appellant did not go to Toowoomba at all in 2013 while MUM was overseas, the appellant never showed his penis to COM, and never made COM touch his penis. COM disagreed with all of those propositions, saying that the event "did happen", and that the appellant did make her touch his penis.[11]

[15] Apart from establishing that at the time she spoke to SIS she had a good relationship with her, that was the extent of the cross-examination.

Evidence of SIS

[16] SIS's evidence was also given in the form of a recorded police interview admitted under s 93A and oral evidence given under s 21AK of the *Evidence Act*.

[17] At the time of her police interview SIS was 15 years and eight months old. At the time when she gave oral evidence she was about 18 years old.

[18] In the police interview, which took place on 13 June 2015, SIS said that COM had spoken to her a few days before, and was upset because she did not want to go and see a doctor to get a mental health plan. When she told COM that COM could tell her anything, COM said that she "remembered that [the appellant] put his penis in me".[12] SIS told her that she (SIS) "have to tell Mum this, now". SIS then went to their mother and told her "exactly what she said".[13]

[19] SIS said that after she had been to see MUM, she asked COM "what else had he done to you?". COM's response was that the appellant had "touched her, her boobs and … he put his finger in her, and he put his penis in her … he made her watch videos … naughty videos".[14] SIS said that prior to that time she had not spoken directly to COM about such things.

[20] In her oral evidence SIS confirmed what she had said in her interview. She was then asked to focus her attention on the times when she had been to the Toowoomba house of her aunt, SOA. She said that in 2013/2014 she had gone to that house with BRO, COM, and the appellant.[15] She said she had stayed overnight at that house several times. She said that in June 2013 they stayed there on an occasion when the appellant "was cutting a hole in the roof for some sort of water issue … there used to be a big kind of brown spot where it looked like water had damaged part of the roof and [the appellant] had to cut a hole … so he could fix it".[16] She said that apart from SOA and themselves, the other person there was CUZ1. On that occasion the

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10 Page 19 line 24 to page 20 line 4.
11 AB1 46 lines 38-46.
12 Exhibit AB-1 to the Affidavit of Mr Beard, page 3.
13 Page 4 line 3.
14 Page 4 lines 21-34.
15 AB2 64 line 30.
16 AB2 64 lines 37-46.

appellant and COM stayed in one room, BRO and SIS stayed in CUZ1's bunk-bed upstairs, and CUZ1 stayed with SOA in her room.[17]

[21] SIS said that MUM went to Thailand for differing periods of time, one occasion six weeks and the other eight weeks. She could not remember how long for the occasion that she was speaking about.

[22] SIS said that she could recall the next visit to the Toowoomba house was on 8 January 2014, which she was able to establish by a text message between MUM and herself.[18] She said they stayed over the weekend because the appellant was plastering the roof. The text messages to which she had referred became exhibit 1,[19] a screen shot of the text with the date recorded.

[23] SIS said there was another occasion in late-June or early-July in 2014, when her family went down to Thredbo, stopping at SOA's house on the way. That was also a time when MUM was away in Thailand.[20] She said that on that occasion the sleeping arrangements were the same as she had said in respect of the 2013 visit. She said she could recall that her mother was in Thailand for June, but she did not remember how long the trip was.

[24] In cross-examination SIS was asked questions about whether she had discussed the significance about the trip to Toowoomba when MUM was in Thailand, with either COM or BRO. She was also questioned about what MUM had told her in that regard. SIS said MUM was not specific, merely asking whether she could remember the dates when they went to Toowoomba while she was way. SIS went through the Facebook messages with her.[21] However, SIS said that she did not discuss those matters with COM or BRO.[22] One of the reasons that she gave for not speaking to BRO about those matters was that we "don't really talk about Dad anymore … as he's not really part of our lives".[23]

[25] Cross-examination continued as to the living arrangements at the Toowoomba house. Specifically the focus was on where CUZ1 slept. SIS said she understood the arrangement in 2013/2014 to be that CUZ1 slept upstairs in a bunk bed.[24] She said she did not believe it to be true that CUZ1 moved into a bedroom downstairs after January 2012.[25] SIS accepted that CUZ2 and MOA[26] moved out of the house some years before, but could not comment on the specific date.[27]

[26] SIS was cross-examined about the text messages with MUM, in which she said "things are good other than [CUZ1]". As to that she said she meant that CUZ1 was annoying and could be difficult to control.[28]

[27] It was put to SIS, and denied by her, that the family did not stay at the Toowoomba house after January 2012.[29] What was being put in cross-examination was that

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17 AB2 65 lines 8-10.
18 AB2 65 lines 20-25.
19 AB2 248.
20 AB2 67 lines 35-45.
21 AB2 70.
22 AB2 70 lines 39-46.
23 AB2 71 lines 13-15.
24 AB2 72.
25 AB2 73 lines 1-3.
26 As well as CUZ2's father.
27 AB2 73 lines 13-20.
28 AB2 75 lines 7-19.
29 AB2 75 lines 21-29.

MOA and CUZ2 moved out in January 2012, at which time CUZ1 moved downstairs. SIS appeared to accept that, but said she could not be sure of them moving downstairs.[30]

[28] It was put to SIS that CUZ1 was very protective of spaces which he considered to be his own, and in particular the room upstairs, to the extent that those rooms were considered to be off limits.[31] SIS said she did not recall that to be the case.

[29] SIS said that after CUZ2 and MOA moved out the family used to stay at the Toowoomba house as well as MOA's house. She denied as untrue the proposition that after January 2012 they no longer stayed at SOA's house.[32] She also specifically denied the propositions put to her that she did not stay at SOA's house in 2013 or 2014.[33] SIS made her position clear by saying that she understood what was being suggested to her and "I'm saying that is wrong".

[30] It was put to her, and denied, that the appellant did not do any work on the ceiling in the kitchen of the Toowoomba house in 2013.[34] She reiterated her evidence that the appellant cut the hole in the ceiling in June 2013, and patched the hole in January 2014.[35]

[31] SIS's memory was that they went to Toowoomba in the middle of 2014, on the way down to Thredbo. However, she could not remember the specific dates.[36] SIS explained her greater confidence as to that, comparing the time of trial to the time when she gave her police interview, saying that "I've had more time to think now than I've had … when I was meant to give my statement".[37]

[32] It was put to SIS, and denied by her, that the appellant's cutting a hole in the ceiling occurred in January 2014. SIS said she was sure of her own memory.[38] She expressly disagreed with the proposition that the cutting of the hole and the plastering all occurred on the one weekend around 8 or 9 January 2014.[39]

Evidence of BRO

[33] BRO gave evidence by way of an interview tendered under s 95A of the *Evidence Act*, and pre-recorded evidence under s 21AK of that Act.

[34] At the time of the pre-recorded evidence BRO was 16 years old. The interview was conducted on 14 March 2017, seven months prior to the pre-recorded evidence.

[35] In his police interview BRO gave this account:

(a) the first time that MUM went to Thailand the family stayed at SOA's Toowoomba house; they went to the snow the following day;[40]

(b) BRO stayed in CUZ1's room upstairs;[41]

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30 AB2 76 lines 17-20.
31 AB2 76 line 37 to AB 77 line 9.
32 AB2 77 lines 28-33.
33 AB2 78 lines 1-9.
34 AB2 78 lines 38-42.
35 AB2 79 lines 16-22.
36 AB 79 lines 24-32.
37 AB 80 line 24.
38 AB 81 lines 1-5.
39 AB 81.
40 Exhibit AB-2 to the Affidavit of Mr Beard, page 3 lines 51-58.
41 Page 4 line 4.

(c) after that trip they returned to the Toowoomba house because of water damage; that was on a different trip;[42]

(d) he was unsure what year it was when MUM first went to Thailand, but she had been twice, each time in June;[43]

(e) BRO recalled what time of the year she went, as in each case it was around his birthday; he thought the first time was 2013;[44]

(f) BRO said that he and SIS slept in CUZ1's room, and COM and the appellant slept in CUZ2's room;[45]

(g) at the time CUZ2 was not at home;[46]

(h) BRO was able to give a reasonable description of the home, and draw a map of it;

(i) when they stayed over in the Toowoomba house, BRO could not remember whether it was before or after his birthday;[47]

(j) BRO's recollection was that in the following year, the second time MUM went away to Thailand, the family did not go to stay in Toowoomba;[48]

(k) BRO described an occasion after the snow trip when there was water damage to the Toowoomba house, and the appellant came to fix a hole in the wall by plastering it;[49]

(l) on that occasion they stayed overnight; MUM was still in Thailand;[50] on that occasion, BRO, SIS and CUZ1 stayed upstairs in CUZ1's room, and COM and the appellant stayed in the room downstairs;[51] and

(m) BRO identified where the hole in the wall was, by saying it was in the kitchen near the ceiling.[52]

[36] In his pre-recorded evidence BRO affirmed the truth of everything he had said in the police interview. In cross-examination BRO disagreed with the suggestions put to him that they only ever stayed at the Toowoomba house while MUM was in Thailand before the snow trip, that they had never stayed at that house after December 2011 and that the last time they stayed there was December 2011.[53] It was also put to him that he had never stayed at SOA's house without MUM being present, and that every time he had stayed at SOA's house, MUM was present. BRO disagreed with both suggestions.[54]

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42 Page 4 lines 24-34.
43 Page 6.
44 Page 7 lines 3-34.
45 Page 8.
46 Page 9 lines 1-3.
47 Page 16 line 24.
48 Page 20.
49 Page 26.
50 Page 27.
51 Page 28 lines 4-15.
52 Page 30 lines 28-43.
53 AB2 52.
54 AB2 53 line 46 to AB 54 line 7.

Evidence of SOA

[37] SOA is the appellant's sister. In her evidence in chief she said there were no occasions in 2013/2014 when the appellant and his family stayed overnight at her house.[55] She also said that prior to that date there was only one occasion where the family stayed overnight at her house, and that was in December 2011, for one night.[56] She also said that there was no occasion after 2013/2014 when they stayed at the house. Further, she said that on the occasion they stayed at her house MUM was with them.[57]

[38] In cross-examination she affirmed that there was no visit by the family to her house in the middle of 2013 when MUM was in Thailand.[58] She said there was a day trip made by the whole family (including MUM) after she came back from Thailand.[59]

[39] She said that at the time of the time of the visit in 2013 CUZ2 was no longer living with her, having moved out in January 2012.[60] Once they moved out CUZ1 moved to a downstairs room leaving the bunk beds in his previous room. CUZ2's bedroom was then used as part of a Lego display. SOA said there was no bed in CUZ2's old room after January 2012.[61] SOA said that once CUZ2 moved out the appellant's family no longer stayed at her house, but stayed at MOA's house.[62]

[40] Referring to a water leak in the ceiling of her kitchen, SOA said that it was rectified by a plumber in June 2012, and the work done to repair the hole was done in January 2014 by the appellant.[63] She said that the visit in January 2014 was for the appellant to fit the plaster to the hole and allow the adhesive to dry.

[41] SOA said that in July 2014 the appellant's family came through Toowoomba on their way to the snow, but did not stay. She said they stayed at MOA's house.[64] By that time the hole in the ceiling had been covered up.[65]

Evidence of MOA

[42] MOA is the appellant's mother. In her evidence in chief she said that there was no visit from the appellant and his family to Toowoomba in the middle of 2013 while MUM was in Thailand.[66] She said that after MUM returned from Thailand the family drove up in July or August 2013 and then returned in January 2014.[67]

[43] MOA said she moved out of SOA's house in January 2012 along with CUZ2.[68] She said part of the reason for that was to give MOA more space because CUZ1 was autistic and it was upsetting to him to have other people around.[69]

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55 AB2 131 line 23.
56 AB2 131 lines 26-27.
57 AB2 131 line 34.
58 AB2 132 lines 16-20.
59 AB2 132 lines 22-30.
60 AB2 132 lines 40-47; along with MOA and CUZ2's father.
61 AB2 133-134.
62 AB2 135 lines 7-10.
63 AB2 136.
64 AB2 138 lines 13-20.
65 AB2 139 line 23.
66 AB2 140 lines 27-30.
67 AB2 140 lines 32-42.
68 And CUZ2's father.

[44] MOA said that when she moved out in January 2012 she took her furniture with her, as did CUZ2.[70] MOA said after they moved out the family did not stay overnight at SOA's house, because SOA wanted the house to herself so that CUZ1 would not get upset. For that reason it was arranged that they would stay with MOA.[71]

[45] Referring to the water leak in the ceiling, MOA said that a plumber came to make a hole and repair the pipes in June 2012,[72] and the appellant fixed the hole in January 2014.[73]

[46] MOA also referred to the fact that MUM did not come upon the trip when the hole was fixed.[74] She also said she was aware that the appellant and the family, but not MUM who was away in Thailand, went on a snow trip in July 2014. At that time they stayed at MOA's house.[75]

Evidence of MUM

[47] MUM said that she travelled to Thailand in July 2013 and again in June-July 2014.[76] In each case the reason for her travel was that a relative had given birth.

[48] MUM said that she was familiar with SOA's house and, in the course of her evidence in chief, she was able to give a description of its layout.[77] She said that the last time she attended that house was probably 2013, when the whole family went. They stayed overnight with SOA, "in different bedrooms depending on where [CUZ1] had his bedroom at the time.[78]

[49] MUM said the last time she stayed there was some time before November 2013, a date she recalled because that is when she ended the relationship with the appellant.[79] At that time MOA had moved out.

[50] She was asked about a conversation with COM in mid-January 2015. The extent of her evidence is as follows:[80]

> "And can you tell the court what it was that you asked [COM]?---I asked her if her dad had ever touched her inappropriately, and she said yes. I asked if he had ever made her touch him, and she said yes. I asked if he'd ever made her watch the dirty videos, and she said yes. And I said, had he ever put his penis in her, and she said no."

[51] MUM said that COM was embarrassed, upset and crying at the time. After that conversation she went to where the appellant was in the lounge room and "just confronted him about it".[81] In her evidence she described what happened:[82]

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69 AB2 140 line 44 to AB 141 line 22.
70 AB2 142.
71 AB2 143 lines 1-6.
72 AB2 143 lines 25-37.
73 AB2 144 lines 1-11.
74 AB2 144 line 15.
75 AB2 144 lines 36-47.
76 AB2 146 lines 19-31.
77 AB2 147.
78 AB2 147 lines 34-43.
79 AB2 147 line 45 to AB 148 line 2.
80 AB2 148 lines 30-34.
81 AB2 149 line 4.
82 AB2 149 lines 7-29.

> "So if you can tell the court what it was that you said or did, in terms of confronting him, as you've described?---Yep. So I just went up to him and – and, you know, just asked him about – told him – sort of told him that I knew what'd happened between him and [COM], and he just sort of acknowledged it and put his head down.
>
> And when you say he acknowledged it, can you describe what it was that you observed about him?---Well, he was sort of nodding and – and sort of agreeing with me, in – in his body language, and then he just [indistinct] put his head down, because he was ashamed, I guess, of … getting caught.
>
> HIS HONOUR: Well, you saw him nod and then – was he sitting down this whole time?---He was, yep.
>
> All right. And he nodded his head, did you say?---Yep.
>
> And then he just put it down on his chest?---Yep, and sort of, like, slumped his shoulders over."

[52] MUM was then asked if she could remember anything specific that she had said to him, and to clarify what she had said. Her answer was: "It's hard to say, because there's more, I guess, context to it … All I can recall is that I sort of, you know, said to him that … I knew what he'd been doing to [COM], and that … I didn't want him to deny it, because it took so much courage for her to stand up and say something to me."[83]

[53] In cross-examination MUM said that shortly after the conversation with the appellant she asked him to leave the house. She agreed that she did not know what he was thinking at the time of the conversation, nor what he meant by nodding his head.[84]

[54] She was cross-examined about the occasions they stayed in Toowoomba. MUM said that every time they went there they stayed with SOA and once CUZ2 moved out they used CUZ1's room.[85] She said she did not stay at SOA's house after MOA had moved out, and her recollection of where they stayed in the house was prior to them moving out.[86]

[55] It was put to her that she went to SOA's house in November 2013, and she responded that she was not sure. She agreed that after MOA moved out, she [MUM] did not stay in the house again.[87]

[56] She said it was possible that after she returned from Thailand in 2013, the family went to Toowoomba to deliver some presents. She said she could recall a visit to SOA's house when there was a hole in the ceiling. Again, she could not recall the exact time.[88] She could recall that the appellant and her children went to Toowoomba to finish the ceiling, but that was an occasion when MUM was not

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83 AB2 149 line 38 to AB 150 line 3.
84 AB2 150 lines 26-38.
85 AB2 151.
86 AB2 152.
87 AB2 152 lines 18-22.
88 AB2 152.

there. She was able to say that because of the text conversations between herself and her family.[89] Those texts pinpointed the dates when they were there.

[57] MUM was cross-examined about what conversations she had with SIS and BRO in relation to the dates on which the Toowoomba trips occurred. She said she discussed it with SIS, but only from the point of view of working out what the time frame was. She said she did not discuss it with BRO at all.[90]

Police evidence

[58] The police officer responsible for obtaining the statements from COM, SIS and BRO, was called to give evidence. In cross-examination he was asked some questions about the extent of the investigation.

Admissions

[59] There was a joint admission put into evidence. It was that the appellant's mobile phone number showed a call from a location "Toowoomba East" on 12 July 2014 and a call from a location "Thredbo Mt Crackenback" on 13 July 2014.[91]

Discussion

[60] As distinct grounds were raised apart from the overarching ground of unreasonable verdict, I intend to deal with each of those points first, noting the competing submissions.

Ground 2 – comments about the evidence of SOA and MOA

[61] In the course of the summing up the learned trial judge referred to the evidence of SOA and MOA, and the fact that their evidence was inconsistent with other evidence as to when the family stayed at the Toowoomba house. His Honour then said:[92]

> "Now, there is something I should explain to you because you may have been perhaps a little puzzled by the fact that the Crown prosecutor was calling two witnesses who, in substance, said that the offence could not have happened. The position is that the prosecutor is not limited simply to calling evidence which his evidence consistent with the Crown case.
>
> A prosecutor has a duty to call all witnesses who can give material and admissible evidence necessary to explain the unfolding of the narrative and a complete account of the events; and the obligation extends to calling a material witness even though the witness would give an account inconsistent with the Crown case. The fact that a prosecutor might suspect that the witness is not reliable is not aground on which a prosecutor is entitled to refuse to call a witness. There would have to be identifiable circumstances which clearly established unreliability. … and in this case … you should bear in mind, therefore, that the mere fact that the prosecutor called these witnesses does not mean that the prosecutor is putting them forward as witnesses consistent with the Crown case."

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89 AB2 153.
90 AB2 155.
91 AB2 253.
92 AB1 52 lines 16-31.

[62] No objection was advanced then, nor is there one now, as to what his Honour had said to that point. It is the following passage which contains comments which, according to the submissions of Counsel for the appellant, suggested that the evidence of SOA and MOA was inferior when compared to the evidence of other witnesses, or suspect in some way. The learned trial judge went on:[93]

> "It has one other consequence that you may have noticed; and that is that the evidence that they gave was not tested by cross-examination in the ordinary way in which cross-examination of some of the other crown witnesses was tested. The witnesses were cross-examined; one of the differences between evidence in chief and cross-examination is that what are called leading questions – that is questions which suggest an answer – are allowed in cross-examination and you may have thought that defence counsel took advantage of that when cross-examining [SOA and MOA]. … [I]n these circumstances one of the consequences of calling the witness is that the prosecutor does not get the opportunity to test, by cross-examination, the evidence given by the witness. So, they've [sic] matters for you to consider in the sense that those two witnesses are in, in a sense, a different category from witnesses who are being subjected to the normal, hostile cross-examination which witnesses are commonly subjected to. And, to the extent that you would be assisted by that sort of testing by cross-examination that has not been present in this case."

[63] Both of SOA and MOA were witnesses which had been indicated by way of an alibi notice, given late with respect to the commencement of the trial. On the morning of the trial the prosecutor was yet to speak to either of them. The alibi notices were said to be the product of the period of the charge, that is, between 31 May 2013 and 2 August 2014, in Toowoomba.[94] So much was signified to the learned trial judge, and then submissions moved on to the implied admission evidence. At the end of those submissions the learned trial judge reverted to the question of the two witnesses, SOA and MOA. The prosecutor explained that they were witnesses of which the Crown was advised in terms of alibi notice, and that Counsel for the defence was seeking that the Crown call those witnesses in the trial. His Honour took a particular view about the sense of that course, describing it as "ridiculous".[95] The prosecutor advised the learned trial judge that in respect of those two witnesses, there was a police statement from one, but in respect of the other an affidavit had been provided to the Crown the previous afternoon.[96]

[64] The jury were empanelled, the names of proposed witnesses were read out and the learned trial judge gave an unobjectionable set of directions to them about their task. Time was then given to the prosecutor to confer with SOA and MOA.

[65] SOA was called first. Cross-examination of her proceeded largely by way of leading questions, some of which demonstrated that SOA was a witness who had

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93 AB1 52 lines 33-47.
94 AB2 96 lines 29-47.
95 That was not a comment made in front of the jury.
96 AB2 99 lines 39-42.

prepared for evidence with the defence.[97] When MOA was called the prosecutor only asked her name, age and relationship to the appellant.[98] Once again the questions in cross-examination were leading questions, many of which demonstrated that MOA was prepared by the defence.[99]

[66] By the time the jury received the evidence of SOA and MOA they had already seen the pre-recorded evidence of COM, SIS and BRO. In each case those witnesses had been subjected to what might be described as normal cross-examination, that is to say unfriendly or hostile cross-examination.

[67] In those circumstances I am unable to conclude that what his Honour said about SOA and MOA was objectionable. There was a stark difference between the manner in which cross-examination of those two witnesses proceeded, from that which applied to the others. There was also the evident curiosity of the prosecutor calling MOA and asking nothing more than pro-forma questions of her name, age and relationship to the appellant. When that happened the jury must have been wondering why the prosecutor called that witness at all.

[68] The learned trial judge had given the jury standard directions, telling them that it was a matter for them whether they accepted all of the evidence of a witness, or only part of it, and what weight they were to place on any particular aspect of that evidence.[100] Directions had also been given to assist the jury to assess reliability of witnesses.[101] The learned trial judge commenced with the evidence of SOA and MOA by identifying that their evidence was inconsistent with other evidence. In that context his Honour then embarked on explaining what might have been puzzling to the jury, namely the Crown's calling two witnesses who said the offence could not have happened.

[69] His Honour's comments did not indicate that the evidence of SOA or MOA was inferior or suspect at all. All his Honour did was to highlight the way in which the evidence was adduced and tell the jury that that method of adducing the evidence might be something they wish to take into account when assessing whether they accepted the evidence of SOA and MOA, either in whole or in part. There was no suggestion that once the jury had tested the evidence in that way, if they chose to do so, that the evidence of SOA and MOA should be treated differently or given less weight than any other evidence. It was, as his Honour said, a matter for the jury to weigh in their process.

[70] This ground fails.

Ground 3 – failure to warn about generalised evidence of sexual misconduct

[71] This ground concerned part of SIS's evidence as to a conversation with COM. The evidence was pre-recorded, and SIS was made available for cross-examination by the Crown. In her police interview SIS said that in this conversation COM had said she remembered what the appellant had done, and that was that she remembered he

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97 For example, questions asked at AB2 133 line 19, 133 line 38, 134 line 8, 134 line 22, 134 line 36, 134 line 45, 135 line 7, 135 line 26, 137 line 37, 137 line 40, 137 line 43, and 138.

98 AB2 140.

99 Examples are the questions at AB2 140, 141 lines 9-18, 141 lines 41-43, 142 lines 18-44, 143 lines 1-10, 143 lines 1-10, 143 line 35, 144 and 145.

100 AB1 45.

101 AB1 45-46.

had "put his penis in me".[102] Shortly thereafter, during her interview, SIS said that she had asked COM what else the appellant had done to her and COM said that the appellant had "touched her, her boobs and … he put his finger in her, and he put his penis in her … he made her watch videos".[103]

[72] Cross-examination concerned a conversation between COM and SIS about the things that COM said the appellant had done to her. SIS said she only spoke to COM about these matters on the one occasion. In the conversation SIS said that COM told her that the appellant had: (i) touched her breasts; (ii) touched her vagina; (iii) put his penis in her; and (iv) put his finger in her.[104] All of those matters were put to SIS as leading questions, to each of which she responded "Yes". In re-examination SIS was asked whether COM had told her where she was when those things happened and the answer was "No".

[73] On appeal the submission by Counsel for the appellant accepted that the evidence was led "for the forensic purpose of establishing inconsistency between that disclosure and the account given to the police by the complainant the next day".[105] The contention was that the jury ought to have been warned "against the risk of impermissibly reasoning that the charged act, which involved an allegation of much less serious conduct than some of the uncharged acts, was more likely to have been committed because the appellant may have committed other more serous acts of sexual misconduct upon the complainant".

[74] What becomes evident from the approach of the appellant's then Counsel, is that the adducing of the evidence was intended as a means of attack on the credibility of COM. That seems to be so because the cross-examination of COM did not descend into which version (as given by SIS) was the more accurate, but merely asked COM whether she had told SIS "about the things you say your Dad did to you".[106]

[75] Further, in her police interview all that COM said about what she had told SIS was that she had told her "Everything that happened".[107]

[76] During the course of summing up this evidence of SIS was referred to by the learned trial judge. The jury were directed in these terms:[108]

> "Now, this is, on [SIS's] evidence, something that was said about a week before she spoke to the police officer on the 13th of June 2015, which was the day before [COM] – the complainant spoke to the police officer. And none of those matters that [SIS] said she told her were disclosed to the police officer. Now, there is this aspect in common with the evidence of the mother in that what was said by – [SIS's] evidence about what the complainant said to her, if you accept it, is only relevant to the complainant's credibility; it's not evidence that any of those things actually happened."

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102 Exhibit AB-1 to the Affidavit of Beard, page 3 lines 44-47.
103 Exhibit AB-1 to the Affidavit of Beard, page 4 lines 21-28.
104 AB2 37 lines 1-8.
105 Appellant's outline, para 46.
106 AB 47 line 3.
107 Exhibit AB-3 to the Affidavit of Beard, page 20 line 10.
108 AB1 51 lines 19-26.

[77] In my view, there is no reasonable possibility that the jury misunderstood what the learned trial judge said, especially when that statement was made very soon after the judge's direction as to preliminary complaint evidence, given in these terms:[109]

> "Now, in relation to that evidence, that has been described to you as preliminary complaint evidence, which is a technical term for it; it's referred to by those terms in the statute. What it means is simply that it is evidence of the fact that the complainant spoke to someone before she spoke to the police in particular terms about the incident which is the subject of the charge. Now, that evidence may only be used as it relates to the complainant's credibility. Consistency between that account of what she said – what the mother said that she said to her mother and the complainant's evidence before you is something you may take into account as possibly enhancing the likelihood that her testimony is true.
>
> However, you cannot regard the things said in those out-of-court statements as proof of what actually happened. In other words, evidence of what was said on that occasion may, depending on the view you take of it, bolster the complainant's credit because of consistency, but it does not independently prove anything."

[78] The learned trial judge immediately followed that up by reiterating that if the jury accepted SIS's evidence that things were said to her, they could take that into account when assessing whether they relied upon what COM said to the police, or in her evidence. His Honour continued: "That's the significance of that evidence; you can't treat that as evidence that any of those things actually happened".[110]

[79] The jury having been directed that the evidence referred to could not be used as evidence that the things actually occurred, in unequivocal terms, there were no uncharged acts that might lead to impermissible reasoning. Had the learned trial judge continued with the direction proposed under this ground of appeal, the jury were likely to have been confused. Such a direction was not required, in my view.

[80] This ground fails.

Ground 4 – admission of the appellant's response to MUM's accusation

[81] At the heart of the contention in relation to this ground is the evidence set out in paragraphs [51] and [52] above. It was submitted that the accusation made by MUM did not include any reference to sexual misconduct, and therefore even if it could be said that the appellant was, whether by speech, silence or conduct, admitting the truth of what was said to him, it was impossible in the circumstances for the jury to be able to conclude with sufficient precision what it was that the appellant was said to have admitted. Therefore, it was submitted, the response was incapable of amounting to proof of an admission to the charged act. The appellant's response was consistent with other things, such as a person acting out of frustration or sadness.

[82] The submission was that the learned trial judge erred in failing to consider the extent to which the evidence possessed probative force, and the risk of prejudice in

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109 AB1 49 line 43 to AB 50 line 9.
110 AB1 51 line 31.

the event that the jury speculated that the appellant's silence and conduct was, in fact, an admission to the charged act. Further, there was the risk that a jury would place far greater weight on the evidence of that response than that evidence properly deserved.

[83] The first thing to note in respect of this ground is that there is authority which establishes that it is for the jury to determine whether a statement, viewed as a whole and in context, constitutes an admission. In *R v Caulfield*[111] this Court dealt with a contention that a response by the accused person could not be shown to be in response to allegations of sexual misconduct, and was not therefore "unambiguous and unequivocal". The contention urged in that case, adopting *R v PV; Ex parte Attorney-General (Qld)*[112] was that the evidence of admissions were only admissible if they were "capable of being found to be an unambiguous and unequivocal apology for and admission to" the offending. The passage in *R v PV* referred to was as follows:

> "This is not a case where there is any rational possibility on the present evidence that the respondent was, for example, joking, or merely responding to his wife's stated intention to leave him, making the admissions ambiguous and therefore irrelevant and inadmissible. Although his statements to the girls' mother were not admissions to the specific offences charged, in context they were capable of being found to be an unambiguous and unequivocal apology for and admission to interfering sexually with the complainants."

[84] In dealing with that proposition, this Court in *Caulfield* said:[113]

> "*R v PV* is not authority for the proposition that an alleged admission is not admissible unless it is unambiguous and unequivocal in its terms. If words spoken by an accused are reasonably capable of being construed as an admission by the accused, they are admissible. It is for the jury to determine whether or not the words amount to an admission and what weight, if any, the admission should be given. That conclusion is implicit in the second sentence of the above quotation from the reasons in *R v PV*. There is ample authority supporting the proposition that it is for the jury to determine whether a statement, whether oral or written, viewed as a whole and in context constitutes an admission."

[85] An application to exclude the evidence was made at the start of the trial. The submission made by Counsel then appearing for the appellant was that the implied admission was "too equivocal in its nature to be properly admitted in evidence".[114] It was then submitted that the nature of the statement left open a number of possibilities for the response, and the two points relied upon were its equivocal nature and its prejudicial effect. When pressed to identify the prejudice, Counsel reverted to the argument that it was equivocal and not an admission against interest.[115] Ruling upon that issue the learned trial judge considered that it was a

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111 [2012] QCA 204.
112 [2005] 2 Qd R 325 at 329.
113 *Caulfield* at [18]; internal footnotes omitted.
114 AB2 98 line 13.
115 AB2 98 lines 28-30.

matter for the jury as to whether it would be interpreted as an implied admission, that being a question of fact. The evidence was therefore permitted.

[86] Given that the basis of the identified prejudice was simply that the evidence was equivocal, it is my respectful view that the learned trial judge was correct in leaving that as a question for the jury. The passage from *Caulfield* above amply supports that approach.

[87] When one looks at the relevant evidence, the position taken by the learned trial judge becomes even stronger. In examination in chief MUM said: (i) after speaking to COM she went and "confronted [the appellant] about it"; (ii) she told him that she "knew what'd happened between him and [COM]"; (iii) the appellant acknowledged it and put his head down, nodding and agreeing in his body language; and (iv) she said "I knew what he'd been doing to [COM], and … I didn't want him to deny it, because it took so much courage for her to stand up and say something to me".

[88] In cross-examination there was no challenge to the fact that the interaction between MUM and the appellant was a confrontation, nor any challenge to MUM's evidence of what she said, nor to the nature of the reaction. The questions were confined to establishing that MUM did not know what the appellant was then thinking, nor exactly what he meant by nodding his head.

[89] The evidence that was sought to put before the jury was therefore that immediately after speaking to COM the appellant was confronted by MUM, who referred to what he had been doing with COM and that MUM did not want him to deny it because it had taken a lot of courage for COM to come forward and say something. It was open on that evidence to conclude that the appellant's response was an admission either in respect of the charged act, or to sexual impropriety with COM.

[90] In my respectful view, no error can be demonstrated in respect of the learned trial judge's conclusion that the evidence was admissible. This ground fails.

Ground 5 – directions about the appellant's response

[91] This ground turned on the same evidence as for ground 4. In the summing up it was contended that there was an error in failing to properly direct the jury as to the use they could make of the appellant's response. First it was said that there was no direction that they could only act on the response if satisfied that it amounted to an acceptance of the truth of what had been said by MUM.[116] Secondly, it was said that there was a failure to direct that the jury should also consider whether there might be reasons, other than alleged sexual misconduct for the response.[117] Part of this submission was that there was a risk that the jury might have regarded the response as being in some unspecified way indicative of guilt. Thirdly, it was said that the direction should have included a requirement that the evidence could not be used as proof of guilt unless the jury was satisfied, beyond reasonable doubt, that the response acknowledged he was guilty of the charged act.[118]

[92] The submissions also contended that failure of defence Counsel to ask for those directions could not be explained by reference to any perceived forensic advantage.

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116 Relying on *R v ON* [2009] QCA 62 at [40], and *R v Cavalli* [2010] QCA 343 at [14].

117 Relying on *R v ON* at [41].

118 Relying on *R v BBQ* [2009] QCA 166 at [51]-[52]; *R v IE* [2013] QCA 291 at [38]-[42]; and *R v BCQ* [2013] QCA 388.

[93] In the prosecutor's address at the trial, the evidence was referred to, highlighting the fact that the appellant made no enquiry as to what MUM was talking about. It was said to the jury that they might expect the appellant to have at least enquired about that and therefore the nodding meant that he knew what MUM was talking about and that it was true.[119] Defence Counsel went through the evidence in detail, suggesting to the jury that it was not evidence of anything and they could not infer an admission of guilt. The jury were also invited to consider whether the response by the appellant might have been due to other emotions such as resignation, frustration or overwhelming sadness.[120] Defence Counsel highlighted the fact that there had been no challenge to the evidence of MUM as to what she saw, however, the point made was that MUM jumped to her own conclusions in the context of the breakdown of her marriage and therefore the evidence should be put to one side.[121]

[94] In that context one can examine the directions of the learned trial judge.[122] The learned trial judge commenced by reminding the jury about the evidence, which had been identified in the addresses. The Crown's position was summarised as being that the jury should treat the physical behaviour of the appellant, when MUM said those things to him, "as amounting to an implied admission that there had been at least some wrongdoing, inappropriate conduct involving the complainant".[123] The jury were then reminded of the Crown's address in which it was sought to attribute some significance to the lack of response by the appellant as to what was being spoken about. The learned trial judge went on:[124]

> "But the issue there is whether – firstly, whether you accept the mother's evidence that the incident occurred in the way she described and, secondly, whether you can treat – whether you could characterise the behaviour described of the defendant as being evidence of behaviour which indicates, specifically, an understanding that there has been inappropriate conduct towards the complainant in the past and an acknowledgement of that rather than simply an innocent reaction to the fact that he was effectively being told 'there's something happening' – 'something has happened and there's no point in your denying it'."

[95] The jury were then reminded of the defence address that the reaction might have been attributable to other feelings on the part of the appellant.[125] The learned trial judge added another possibility himself, namely that it simply amounted to an acknowledgement that there was no point in arguing, rather than an acknowledgement that anything in particular had happened.

[96] The learned trial judge then had the following to say:[126]

> "Unless you consider that what was – firstly, that this occurred in the way described by the mother and, secondly, that the interpretation of that points more towards an acknowledgement that there had been

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119 AB1 26 lines 11-21, AB 29 lines 21-25.
120 AB1 40 lines 4-11.
121 AB1 40 lines 13-24.
122 AB1 53-54.
123 AB1 53 line 24.
124 AB1 53 lines 31-39.
125 AB1 53 lines 41-44.
126 AB1 53 line 47 to AB 54 line 18.

> some wrongdoing towards the complainant than in some other direction you can't treat that as evidence at all. In other words if the evidence is, when assessed objectively, really ambiguous – it could have been one thing but it could have been the other – it might – and you can't say particularly that the interpretation … was likely to be that it was an acknowledgement of wrongdoing towards the complainant, unless you can draw that conclusion or adopt that interpretation of the behaviour, you can't treat it as any sort of implied admission.
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> Even then it does not amount to an admission of the particular offence because reference to the character of what … the complainant had said was not passed on. It would just amount to evidence of a generalised – that the defendant had something on his conscience, so to speak, about the complainant … it's not something that you could treat to any great significance but if you did interpret it in that fashion it might provide some support for the evidence of the complainant in a general way. It doesn't provide specific support for the specific version given by the complainant of the touching which is the subject of the charge."

[97] In the light of the directions actually given, I am unable to conclude that there has been any relevant misdirection. There are a number of reasons for that.

[98] First, the jury were directed that the first issue in relation to this evidence was "whether you accept the mother's evidence that the incident occurred in the way she described". The second was whether the jury could characterise the appellant's behaviour as indicating an understanding that there had been inappropriate conduct, and acknowledgment of it. A few minutes later, the jury were told again that unless they considered that it had occurred in the way described by MUM, and secondly that their interpretation of it pointed towards an acknowledgment that there had been wrong doing, rather than in some other direction, they could not use the evidence. In that respect it becomes evident that the learned trial judge did, in fact, give the direction at the heart of the first complaint under this ground.

[99] Secondly, the trial judge directed the jury that they had to be satisfied that it was an acknowledgment of inappropriate conduct, rather than some other reaction of the kind suggested by defence Counsel, or to resignation that there was no point in arguing. In addition, the learned trial judge highlighted the fact that the evidence did not identify the particular conduct and therefore at best their acceptance that it happened and their acceptance that it was an acknowledgment could only be as to general inappropriate misconduct, and not the specific charge. Therefore, there was no failure in the way intended in the second complaint under this ground. The learned trial judge directed the jury that the evidence could not amount to consciousness of guilt of the charged act, but only of generalised wrong doing in relation to COM. And, the jury were invited to consider all the alternative reasons for the response.

[100] Thirdly, there was, in my view, no need for the learned trial judge to direct the jury that the response could not be used as proof of guilt unless they were satisfied, beyond reasonable doubt, that by that response the appellant acknowledged he was guilty of committing the charged act. The authorities upon which this submission depends are cases where evidence was relied upon to indicate that an offender had a sexual interest in a complainant, and therefore the alleged admission was supportive

of the evidence of each of the offences.[127] The position is exemplified in *R v IE*, in which the response by the offender was relied upon as evidence of generalised sexual abuse. That being the case, the applicable standard of proof was beyond reasonable doubt.[128] However, the difficulty with this contention is that there was no evidence in this trial of generalised sexual abuse, and none of relied upon by the Crown. In other words, this evidence was not being advanced for the purposes identified in *BBQ*, *IE* or *BCQ*.

[101] The appellant's reliance upon *R v ON*,[129] is misplaced. In that case the prosecutor relied on conversations as evidence of a consciousness of guilt, but without identifying the statements constituting the admissions. That is not this case. Here the statements or conduct said to constitute the admission were clearly identified and the subject of appropriate directions. Further, the difficulty in *R v ON*, was that the equivocal responses were to accusations which were not confined to any particular period or any particular conduct. Here there was only one act referred to in evidence, and no other conduct which might fall within the head of uncharged acts or generalised discreditable conduct.

[102] *HML* was concerned with propensity evidence and the proof of "uncharged acts". That is to say, *HML* was concerned with the admission into evidence of acts not the subject of the charge before the Court, but showing discreditable conduct of the accused. In those circumstances, *HML* is authority for the proposition that proof of the uncharged acts has to be beyond reasonable doubt. That is not this case. There were no uncharged acts, and the evidence was not put forward to show discreditable conduct.

[103] There was therefore no need to give the direction for which this ground contends in its third complaint. This ground fails.

Ground 6 – failure to give a Robinson direction

[104] This ground contends that the learned trial judge was obliged to direct the jury in accordance with the principles derived from *Robinson v The Queen*.[130] In that respect a number of factors were relied upon as warranting a warning to the jury that it was dangerous to convict the appellant on COM's evidence alone, or at least a warning to carefully scrutinise COM's evidence. Those factors were: (i) COM's age; (ii) the inconsistency between her account to the police and her account to SIS; (iii) her evidence that she observed a hole in the ceiling at the time of the offence which, if the evidence of SOA and MOA were accepted, meant that COM's evidence excluded the possibility that the offence occurred in mid-2014; (iv) the evidence of MOA and SOA that COM did not stay in the house in 2013 or 2014; and (v) the delay which affected the appellant's opportunity to test questions relating to the size of the bed in SOA's house, and the extent to which the family had stayed overnight in SOA's house in mid-2013 or mid-2014.

[105] I am not persuaded that there is merit in this ground. A *Robinson* direction is not required in every case.[131] Neither Counsel at the trial submitted that a *Robinson* direction was required. Whether one is required depends not only upon the nature

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127 *R v BBQ* [2009] QCA 166 at [51]-[52]; *R v IE* [2013] QCA 291 at [38]-[42]; and *R v BCQ* [2013] QCA 388.
128 *HML v The Queen* (2008) 235 CLR 334 at [41], [63], [132], [196], [247] and [506].
129 [2009] QCA 62.
130 (1999) 197 CLR 162.
131 *R v TN* [2005] QCA 160 at [56]-[58].

of the case itself, but upon the danger of a miscarriage of justice if a required warning is not given. In my view, this case did not call for it:

(a) COM's age was obvious, and the jury could hardly have forgotten it in their considerations; not only were the jury directed that one of the elements of the defence was that COM was under 12, her age by reference to her birth certificate, as well as her age at the trial, were highlighted in the directions; similarly the jury were directed that they could take into account COM's age when assessing her evidence, and in that respect the learned trial judge ran through COM's age at the various times of interviews and the trial;

(b) the inconsistency between what COM told the police and what she told SIS was at the forefront of the defence address and the summing up; in this respect it was conceded that the evidence of COM's disclosure to SIS was led for the forensic purpose, on the defence's part, of establishing the inconsistency referred to; that inconsistency was expressly addressed by the learned trial judge in the course of his directions, and as part of the directions as to how the jury might deal with the inconsistencies generally in the evidence;

(c) the inconsistencies thrown up by the evidence of SOA and MOA were also highlighted specifically and the jury were told that if they accepted the evidence of MOA and SOA, to the effect that the family stayed at MOA's house, that necessarily meant that the offence could not have occurred in the way described by COM; however, the inconsistencies were all part of what the jury had to assess in terms of what evidence they accepted and from which witnesses; in that respect the jury were directed, in a way about which there is no complaint, that it was a matter for them as to what evidence they accepted, whether it was all or part of a witnesses evidence, and what weight they chose to give it; and

(d) the fact that the defence Counsel did not seek a *Robinson* direction suggests that there was no reason to conclude that any delay between the offence occurring and when the charge was laid had the effect of impairing the appellant's opportunity to properly test available evidence.

[106] It was suggested that COM's evidence was that she observed a hole in the ceiling "at the time of the offence". Reference to the evidence of COM does not bear that out. In the course of her police interview and soon after giving her own general description of what happened, but before any detailed questioning by the interviewer, COM was asked to identify where in Toowoomba the house was.[132] COM responded that it was SOA's house and two-storey, at which point she was asked to "describe the house to me".[133] COM's response was "it had, like, in the kitchen, there was like a square-hole in the roof". She then went on to describe the wooden stairs, a door under the stairs where the toys were, the rooms upstairs and the bunkbeds, a room downstairs, features to accommodate the family's kittens and then various comments about bathrooms, toilets and sinks.[134] It was only after that COM was asked to identify a year for when the offence happened, her only previous

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132 AB-3 to the Affidavit of Beard, page 4 line 49.
133 Page 5 line 5.
134 Page 5.

comment being that MUM was in Thailand at the time.[135] That evidence does not permit the reasonable conclusion that the identification of the hole was linked in some way to the occasion when the offence occurred, rather than part of a general description of the house.

[107] Finally, in this respect, the learned trial judge referred to the fact that the standard of proof was beyond reasonable doubt, and that was "the highest standard known to law".[136] His Honour went on to direct the jury that they "must scrutinise [COM's] evidence carefully before you can be satisfied of guilt according to that standard on the basis of her evidence"; his Honour the said, "Unless, after that careful scrutiny, you are satisfied beyond reasonable doubt of all the elements of the offence, you must acquit". It is true that his Honour did not use the word "dangerous" in that direction, but in the context of all of the other directions, an appropriate warning was given to the jury of the need for careful scrutiny before reasoning, on the basis of COM's evidence, to a conclusion of guilt.

[108] This ground fails.

Ground 7 – misdirection as to the time of offence

[109] The appellant contends that the evidence of SOA and MOA as to the lack of any opportunity for the offence to have been committed during the time periods charged, made the time period a material element of the charge. It was accepted that ordinarily the date on which an offence is alleged to have been committed, as particularised in the indictment, is not a material element.[137] It was submitted that because of that evidence it was necessary for the jury to unanimously agree as to whether the offence occurred in mid-2013 or mid-2014, and therefore a direction should have been given in a way consistent with the reasoning of the High Court in *KBT v The Queen.*[138] It was contended that the jury could not convict the appellant unless they were agreed upon the act which constituted the crime,[139] and it was possible that some jurors convicted the appellant on the basis that he committed the offence in mid-2013 whilst others did so on the basis of the offence occurring in mid-2014.

[110] In my respectful view, reliance upon *KBT v The Queen* is misplaced. That case involved a maintaining charge in respect of which the jury had to be satisfied beyond reasonable doubt that on at least three occasions within the specified timeframe the offender had unlawfully and indecently dealt with a child. What was absent in the directions was that the jury had to be satisfied of the same three offences on the same three occasions. A concession was made before the High Court that the trial judge should have directed the jury that they were required to be satisfied as to the commission of the same three acts before they could convict. The High Court examined s 229B of the *Criminal Code* and concluded that a conviction could not follow unless the jury was agreed as to the commission of the same three or more illegal acts.[140] This case is different. There was only the one act charged, albeit in a wide timeframe, namely between 31 May 2013 and 1 August 2014. There was no occasion whereby the jury could have been confused as to which act or offence they were considering, unlike the position in *KBT v The Queen*.

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135 Page 6.
136 AB1 48 lines 5-7.
137 *R v H* (1995) 83 A Crim R 402 at 410.
138 (1997) 191 CLR 417 at 422.
139 Relying on *R v Klamo* (2008) 184 A Crim R 262 at [76].
140 *KBT v The Queen* at 422.

[111] It is true to say that the evidence of SOA and MOA were key parts of the defence case, and that the evidence of SOA was to the effect that the offence could not have occurred on any occasion when MUM was in Thailand, as the appellant and his family did not stay at her home in 2013 or 2014.[141] However, that simply presented an inconsistency in the evidence between SOA and MOA on the one hand and COM, BRO and SIS, on the other. Therefore the jury had to make an assessment of what evidence they accepted as between those two positions. However, that did not mean that they were required to unanimously decide that it was 2013 as opposed to 2014. The learned trial judge directed the jury that whether it occurred in 2013 or 2014 was not an element of the offence and that if the jury "were satisfied that it did occur at some stage in that period, either 2013 or 2014 up to the time when the mother came back from Thailand, that it would still be an offence and you could still find the defendant guilty".[142] As his Honour directed the jury, the real issue was whether COM was mistaken about the date, and whether that caused them to have reasonable doubt about her evidence.

[112] It is true that Counsel then appearing for the appellant sought a redirection, somewhat diffidently, as to whether there should be a specific direction that the jury needed to be agreed on when they thought the offence happened.[143] The learned trial judge disagreed saying that the jury simply needed to be satisfied beyond reasonable doubt that the offence happened within the scope of the particulars. In my respectful view, the learned trial judge was plainly right. This is not a case like *R v Klamo*, where there were two discreet acts, each of which were said to be capable of constituting the crime charged.[144] Here there was only one act. If the jury were satisfied about the occurrence of that act, and that it occurred at any time within the charged period, they could convict. It was not necessary, in my view, for the jury to be agreed that the one charged act upon which they agreed occurred at any particular time within that period. The jury's consideration of the evidence leading to any such conclusion would, of course, involve their considering the conflicting evidence referred to above. But that did not make it an element of the offence that the jury decide whether it was mid-2013 or mid-2014.

[113] This ground fails.

Ground 1 – unreasonable verdict

[114] The principles governing how this ground of appeal must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[145] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[115] In *M v The Queen* the High Court said:[146]

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141 AB2 131 line 23.
142 AB1 48 lines 37-40.
143 AB 64.
144 *R v Klamo* at [76].
145 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.
146 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen*.

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[116] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[147] As summarised by this Court recently in *R v Sun*,[148] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[149] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[150] The High Court said:[151]

> "With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. ""

[117] Further, as was said by this court in *R v PBA*,[152] in the course of elucidating the applicable principles:

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

[118] The appellant's contentions are that there were a number of matters which should have led the jury to entertain reasonable doubt about COM's truthfulness and reliability. They are:

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147 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
148 [2018] QCA 24, at [31].
149 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
150 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.
151 *Baden-Clay* at 330 [66].
152 [2018] QCA 213 at [80].

(a) COM's disclosures to MUM were elicited as a consequence of a series of leading questions which included the question: "I asked if he had ever made her touch him, and she said yes"; COM was only eight years old at the time, and the manner in which that answer was elicited should raise doubts about its reliability;

(b) COM's disclosures to SIS, when compared with her disclosures to the police in her interview, cast serious doubt over whether COM was prone to exaggerating the appellant's conduct; the disclosure to SIS was so markedly different as to be incapable of being reconciled as an honest but mistaken recollection;

(c) the prosecution case stood or fell on the evidence of COM; in that regard the appellant's response to MUM's accusation was of no probative value;

(d) there had been a delay of six or 18 months between the date of the alleged offence and COM's first disclosure to her mother, followed by a further delay of five months until the police statement was provided; and

(e) the evidence of SOA and MOA, if accepted, excluded the possibility of the offence occurring as COM asserted.

[119] As to the first ground, I do not consider that the questions asked by MUM substantially eroded the possibility of acceptance of COM's evidence. They were only leading questions in one sense, namely that they nominated a type of conduct. They did not suggest the particulars of such conduct, nor locations or times. The relevant question was whether the appellant "had ever made her touch him". That question does not suggest the particular form of touching, for example her hand on his penis, as opposed to any other form. It is simply a generic question which is the natural sequence from the first question, did he touch you, then did he make you touch him. In any event, the assessment of COM's veracity and reliability were quintessentially jury matters. One of the matters that the jury probably took into account in making that assessment was the level of detail which COM was able to give to the police, first in her own recitation, and then in response to particular questions. Her account had these features about it which the jury might have found compelling: she was only young (eight and a-half years old); there was no embellishment to the recitation of the offence in the sense that she maintained it was only ever on one occasion and only one form of touching; it was surrounded by quite a deal of detail in terms of place, time and where the appellant was in relation to her; that account was maintained in the face of cross-examination; and there was no obvious reason why COM might have made the allegations up.

[120] It is true to say that there is a substantial difference between the disclosures which SIS said were made to her, and those which COM told the police she had disclosed to SIS. However, that does not mean that it was not open to the jury to have accepted the evidence of COM. According to the SIS police interview the disclosures made to her were at a time when COM was upset and crying because she had to go to the doctors "to get a mental health plan".[153] The police interviewer did not question SIS as to each of the component parts of the disclosure and there was

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153 Exhibit AB-1 to the Affidavit of Beard, page 3.

no cross-examination of any level of detail during SIS's pre-recorded evidence. Further, there was one discrepancy between SIS's police interview and her pre-recorded evidence, namely as to whether COM had revealed to her that the appellant made her watch naughty videos. To the police, SIS said that that was a disclosure by COM. In her pre-recorded evidence she denied that and said it was a revelation to MUM. On that basis the jury might have had some doubt as to whether SIS was giving an accurate or full account of what she had heard, as opposed to what might have been said to MUM.

[121] In any event, the fact that there were discrepancies in evidence does not mean that the jury could not accept COM. The jury, properly instructed on the law, was in a good position to evaluate those discrepancies and conflicts, and perform their duty.[154]

[122] As to the third point, it is true to say that the prosecution case stood or fell on the evidence of COM. However, the jury were appropriately instructed to exercise careful scrutiny of her evidence before accepting it and reasoning to a conclusion of guilt. The fact that there was little support in the appellant's response to MUM's accusation, does not add greatly to the matter.

[123] As to the fourth point, such delay as there was does not, in my view, compel the rejection of COM's evidence. First, COM's evidence was that the appellant had told her not to reveal it. Secondly, a complaint about delay might have had more substance if there had been any cross-examination of COM about the failure to complain earlier, or why she did reveal the offence when she did. Once possible explanation was that in SIS's police interview, namely that the revelation occurred at a period of stress in COM's life.

[124] The evidence of SOA and MOA was contradictory of the other witnesses. COM's account was supported by the evidence of BRO and SIS. The jury may well have considered that there was a level of corroborative detail in BRO's interview with the police, sufficient to enable them to accept his evidence. For example, BRO said that he had never stayed over at SOA's house without the appellant, SIS and COM, and that they had only stayed over on the one occasion, which was when they were on their way to the snow. He tied that to a year in which he received an iPhone from the appellant and MUM.[155] Further, the description by each of SIS and BRO as to who slept in what room had a degree of consistency about it that may well have encouraged acceptance of COM's evidence.

[125] In examining this question, as in examining the whole of the evidence for this ground of appeal, the importance of the jury having had the benefit of observing the witnesses cannot be understated. The role of the jury as the constitutional arbiter of facts is clear and this Court must have particular regard to the advantage enjoyed by the jury, an advantage it does not enjoy. SOA's evidence was that the staying over at her house could have been no later than 2011, years out of alignment with the evidence of COM, BRO and SIS. Further, any occasion in 2011 was not one, on the evidence, when the family was driving to the snow. That may have afforded one reason for the jury to doubt SOA's evidence. Another reason may have been the manner in which SOA's evidence was elicited. As mentioned above, it is plain that SOA was, in truth, a defence witness whose evidence was given to a long series of

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154 *MFA v The Queen* (2002) 213 CLR 606 at 624.

155 Exhibit AB-2 to the Affidavit of Beard, page 16.

leading questions and in circumstances where what was said could not be properly tested.

[126] Having reviewed the whole of the evidence at the trial, and looking at the five factors in combination, I am unable to conclude that it was not open to the jury to accept COM's evidence, even if there was some doubt about whether she was correct in her recollection of the year in which the event occurred. The jury were properly directed as to the discrepancies and inconsistencies in the evidence, particularly that between the evidence of SOA and MOA on the one hand and COM, BRO and SIS on the other, and were warned that they needed to examine COM's evidence with careful scrutiny before accepting it. It should not be presumed that the jury ignored those directions.

[127] This ground fails.

Conclusion on the conviction appeal

[128] For the reasons I have given above, there is no merit in any of the grounds of appeal, and the appeal should be dismissed.

Application for leave to appeal against sentence

[129] The appellant was sentenced to three and a-half years' imprisonment with a parole eligibility date fixed at 28 April 2019, that is after serving 11 months in custody. He seeks leave to appeal against that sentence on two grounds, the first being that it is manifestly excessive, and the second being that the learned sentencing judge failed to give sufficient weight to the principle of totality.

[130] The circumstances of the offending are revealed above. By way of antecedents the appellant was 44 to 45 years old at the time of the offending, and 49 at the date of sentencing. He had a previous criminal history which included the following:[156]

(a) 1987 – possession of dangerous drugs and a pipe;

(b) 1990 – wilful exposure – probation for two years; this involved the appellant (then 21) sitting in a vehicle, naked from the waist down, and exposing his penis to three school girls;

(c) 2001 – wilful exposure – fined but no conviction recorded; this involved the appellant (then 23) masturbating while driving, and being observed from an adjacent car;

(d) 2016 – indecent treatment of two children under 16, one of which was his daughter (SIS) – two years and six months' imprisonment in respect of the offence against his daughter, the conviction being declared to be a domestic violence offence; on the other charges, two years' imprisonment and a declaration that they were a domestic violence offence.

[131] The offences for which he was convicted in 2016 occurred over various dates between 25 October 2005 and August 2014. Consequently, the offending against COM occurred within that period of offending.

[132] The offences in 2016 involved SIS and one of her friends. There were four occasions where the appellant caused SIS to watch pornographic films, three

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156 AB2 254.

occasions where he masturbated in front of her, one occasion when he ejaculated in SIS's presence while sitting in the car, another offence of masturbating in the lounge room and another while masturbating while SIS and her friend were close by. Some of that offending involved the appellant restraining SIS to prevent her from leaving.

[133] Under the sentence imposed for the 2016 offences, the parole eligibility date was 28 January 2018, and the fulltime date of the sentence was 27 April 2019. At the time of the sentencing for the offences against COM, the appellant was still in custody.

[134] The learned sentencing judge had two victim impact statements, one from COM and the other from MUM.[157] These documents related the psychological, emotional and financial damage caused by the offending conduct. Part of the damage felt by MUM was having to watch COM suffer because of what the appellant did. As for COM, she related her anxiety at being reminded of the appellant, difficulties with concentration, nightmares and being scared of what might occur when the appellant gets out of custody.

[135] Counsel then appearing for the appellant put forward some further facts as to the appellant's position. Whilst in custody he had been employed as a residential cleaner in a trustworthy position, and he had been exemplary in his behaviour. As a result of having been incarcerated in 2016 his previous printing business had failed. The appellant had supportive family and would likely live in Toowoomba in the future.

Approach of the learned trial judge

[136] The learned trial judge reviewed the circumstances of the offending, having noted that the conviction followed a trial.[158] His Honour then took into account the following factors:

(a) the offending conduct not only involved "an extremely serious breach of trust", but also a degree of manipulation to procure COM's silence;

(b) the offending also involved some escalation because of the previous offending against SIS and her friend; that offending, in his Honour's view, was something he could take into account because it involved a continuation and escalation of previous sexual mistreatment of the appellant's children; it also involved an escalation in the sense that the 2016 convictions were for masturbation with no direct physical sexual assault, whereas the current offending involved placing COM's hand on his penis;

(c) the fact that the appellant had shown no remorse;

(d) the appellant's personal circumstances and history;

(e) the appellant's criminal history which exhibited offences of wilful exposure in 1990 and 2001, and then that sort of conduct in the offending against SIS and her friend, leading his Honour to conclude "It seems, therefore, that you are a recidivist paedophile and that is a

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157 Exhibit 12 and 13, AB2 276-277.
158 AB2 212.

matter of considerable concern"; his Honour also considered that it suggested personal rehabilitation was going to be very challenging;

(f) the appellant's medical history and its management whilst in custody, together with his good behaviour in prison;

(g) the purposes of the sentencing, including punishment that is just, assistance to rehabilitation, and both personal and general deterrence; that personal deterrence was "a matter of some significance", and the general deterrence was a matter of importance in sexual offences against children; the need for denunciation was also taken into account;

(h) the factors in s 9(6) of the *Penalties and Sentence Act* 1992 (Qld), and in particular the "continuing significance in the element of need to protect children generally from you and the risk of further offending by you in the future"; and

(i) the fact that because of its circumstances this was a domestic violence offence, and therefore an aggravating factor.

[137] The learned sentencing judge also referred to comparable cases, the most helpful of which his Honour found to be *R v RAK*.[159] His Honour then turned to the question of totality and the sentence to be imposed, in these terms:[160]

> "I do accept that the principles of totality do apply to the sentence and that it is relevant to take into account the fact that you have been in prison – you have, in fact, been serving a sentence of imprisonment already for some time, and I will take that into account in relation to the head sentence in two ways: by, firstly, making this new sentence served concurrently; and, secondly, by moderating … the sentence that I propose to impose to avoid producing a sentence which is overall disproportionate to the overall level of criminality.
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> I will also fix a parole release date which is halfway through the overall sentence, taking both periods of imprisonment into account. But in view of the serious nature of the offending and in the light of your personal circumstances, there is certainly no reasonable alternative to a significant term of imprisonment to achieve the purposes to which I have referred before. You are convicted and the conviction is recorded and regarded as a conviction of a domestic violence offence. You are sentenced to three and a-half years imprisonment; the sentence is to be served concurrently; and I fix a parole eligibility date of 28th of April 2019."

Submissions on the sentence

[138] On behalf of the appellant it was contended that the appropriate sentence was a term of up to two and a-half years' imprisonment, to be served concurrently with the existing sentence, and a parole eligibility date at halfway of the overall period of imprisonment. It was said that the principle of totality had been applied in error because the total period imprisonment, namely five years and one month, was disproportionate to the appellant's overall criminality. The learned sentencing

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159 [2012] QCA 26.

160 AB2 214, lines 27-42.

judge was obliged to take into account the appellant's existing sentence so that the total period to be spent in custody adequately and fairly represented the totality involved in all of the offences to which that total period was attributed.[161] It was submitted that the total period of imprisonment that was justified for the offences for which he was to be sentenced and for which he had been sentenced, was a period of no greater than four years' imprisonment, which commenced when the appellant went into custody on 28 October 2016. That would have meant a parole eligibility date at halfway during the total period of imprisonment, namely two years from 28 October 2016.

[139] It was submitted that the learned sentencing judge failed to have regard to the total period of imprisonment that the appellant was liable to serve, and the imposition of three and a half years' imprisonment for the current offence resulted in a total period of imprisonment to be served by the applicant of five years and one month, with an eligibility date of two and a-half years from the commencement of his incarceration in October 2016. That period of imprisonment was disproportionate to the total criminality.

[140] The course of oral submissions before this Court made it plain that the ground based on manifest excess depended upon the success of the totality contention.

Discussion

[141] There can be no doubt that the learned sentencing judge considered the question of totality when fixing the sentence. His Honour said so expressly and nominated the two ways in which the new sentence was to be ameliorated by application of that principle. The first was to make the sentence concurrent, and the second was to moderate the head sentence to avoid producing one which was disproportionate overall to the overall level of criminality: see paragraph [137] above.

[142] Once that is understood, the challenge to the sentence then becomes a contention that there was not enough moderation, for whatever reason. At the centre of that consideration is the overall criminality. The appellant's contentions, in my view, suffer because they do not adequately acknowledge the unchallenged findings that are relevant to the consideration of the sentence, and the contentions based on the totality principle:

(a) COM had pulled away from the appellant initially, but the appellant persisted, and put her hand on his penis;[162]

(b) the appellant's warning to COM, that her mother would get really angry if she said anything, was effective in deterring prompt complaint;[163]

(c) it was "an extremely serious breach of trust";[164]

(d) it involved a continuation and escalation in offending from the offences concerning the appellant's other daughter, SIS, and her friend, because it concerned COM, SIS's sister;[165]

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161 Relying on *R v Beattie*; *Ex parte Attorney-General* [2014] QCA 206 at [19].
162 AB2 212 line 13.
163 AB2 212 line 18.
164 AB2 212 line 20.
165 AB2 212 line 34.

(e) it was also an escalation because the 2016 convictions did not involve "direct physical sexual assault";[166]

(f) the appellant's pattern of offending revealed he was "a recidivist paedophile" and personal rehabilitation was 'going to be challenging";[167]

(g) he had shown no remorse;[168] and

(h) the previous convictions were aggravating factors under s 9(10) of the *Penalties and Sentences Act*, and the fact that the current offence was a domestic violence offence was a further aggravating factor.[169]

[143] The sentence under consideration here was imposed after a conviction at trial, for indecent dealing with the appellant's daughter, then a child under 12. The maximum penalty for that offence was 20 years' imprisonment. By contrast the sentence imposed for the 2016 convictions was two and a-half years' imprisonment, but that was imposed without regard to the present convictions.

[144] The 2016 convictions were for offending which did not, as in the present case, occur on an isolated occasion or in respect of one victim. That offending involved SIS, the older sister of COM. It also involved one of SIS's friends. Similarly to the current offence, there was no remorse exhibited as the 2016 convictions were the product of a trial. The learned sentencing judge took what might be seen as a somewhat charitable view of those offences when his Honour accepted that there was no direct physical assault on those occasions. That is true in the sense that the 2016 offences largely involved masturbation, however on one of those occasions the ejaculate struck SIS's shirt and face,[170] on one SIS could feel his penis against her clothes,[171] and on others he restrained SIS by holding her wrist to prevent her leaving.[172]

[145] The learned trial judge correctly characterised the current offending as involving a continuation and escalation, in the sense that there was now direct physical contact. There was no challenge to that characterisation, nor to his Honour's conclusion that the history of offending demonstrated the appellant to be "a recidivist paedophile". That circumstance, together with the general history, warranted his Honour's conclusion that personal rehabilitation was going to be very challenging. Further, his Honour correctly concluded that the purposes of sentencing included not only general deterrence but the protection of the Queensland community.

[146] That characterisation of the level of criminality, together with the fact that this was yet another domestic violence offence, demonstrates the correctness of the learned sentencing judge's conclusion that *R v RAK*[173] was of guidance. That involved offending between a father and his biological daughter, and a conviction after trial. The victim was slightly older (10 years) and the actual physicality of the offending was more serious, both in its nature and in the fact that there were two occasions. However, the offender in *RAK* had no criminal history. The three year sentence in

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166 AB2 212 lines 37-40.
167 AB2 213 lines 15-25.
168 AB2 213 line 1.
169 AB2 214 lines 5-7.
170 AB2 258 line 39.
171 AB2 259 line 24.
172 AB2 258 line 25, 259 line 36.
173 [2012] QCA 26.

RAK was not disturbed. Balancing those matters, as the learned sentencing judge did, *RAK* supplies a guidepost to judge the current sentence.

[147] The totality principle was explained in *Mill v The Queen*:[174]

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp 56-57 as follows (omitting references):
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> > 'The effect of the totality of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ['']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.'
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> … Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

[148] *Mills* made it clear that the principle does not only apply to a consideration of the non-parole period, but also the head sentence:[175]

> "The principle is not confined in its operation to the fixing of a non-parole period. It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances. In the absence of statutory provisions enabling the new sentence to be backdated to a time when the offender was in custody serving the earlier sentence in the other State, it is not correct for the second sentencing court to determine the head sentence by reference to the normal tariff applicable to the offence for which he is then being sentenced, leaving the fixing of a non-parole period alone to reflect the principles laid down in *Todd*. The long deferment of the trial or punishment of an offender, with the

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174 [1988] HCA 70; (1988) 166 CLR 59 at [8].

175 *Mill* at [14].

> consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence."

[149] The learned trial judge explained that he would take the principle of totality into account by: (i) making the new sentence run concurrently with the previous sentence; and (ii) "moderating … the sentence … to avoid producing a sentence which is overall disproportionate to the overall level of criminality".[176] That approach accords with that referred to as the preferred approach in *Mill*: see paragraph [147] above.

[150] That the seriousness of the offending was the critical factor in the application of the totality principle is made plain by his Honour's explanation: "But in view of the serious nature of the offending and in the light of your personal circumstances, there is certainly no reasonable alternative to a significant term of imprisonment to achieve the purposes to which I referred before".[177]

[151] The sentence imposed in 2016 was two and a-half years, effective from 28 October 2016, with parole eligibility set at the halfway mark, 28 January 2018. At the time of the sentencing (25 May 2018) the appellant had not been released, having then reached 19 months in custody. He was then 11 months off the full time release date, 27 April 2019.

[152] The sentence imposed for the current offending was three and a-half years' imprisonment, to be served concurrently, and a parole eligibility date set at the halfway mark of the overall sentence, namely 28 April 2019.

[153] The practical effect of making the new sentence concurrent was to add two years and seven months to the existing sentence, and set parole eligibility at the previous full time release date, that is, 11 months into the new sentence. Given the seriousness of the offending as found by his Honour, the appellant's previous criminal history, lack of remorse, and dim prospects of rehabilitation, had the current offences been sentenced alone it could not be said that a sentence of two years and seven months, with parole eligibility set at less than the halfway mark, was just and appropriate. The effective sentence therefore demonstrates a considerable moderation, both of the head sentence and the non-parole period, in conformity with the totality principle.

[154] Even considered in the way urged by the appellant, for several reasons I am unpersuaded that the totality principle had been misapplied. That approach adds the original two and a-half year sentence to the three and a-half years on the new sentence. Thus it is said[178] that the total period to be served is five years and one month, which is disproportionate to the appellant's overall criminality across the 2016 and 2018 convictions, "given that the offences for which the applicant was sentenced on 4 November 2016 did not involve direct contact with the complainant and the present offence occurred on a single occasion and did not involve contact by his hand with intimate parts of the complainant's body".

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176 AB 214 lines 29-33.
177 AB 214 lines 36-39.
178 Appellant's outline, paragraph 13.1, page 20.

[155] First, that approach does not take into account the fact that the 2018 sentence was ordered to be served concurrently with that remaining of the 2016 sentences. It is that which effectively moderates both the head sentence and the non-parole period. Secondly, it mischaracterises the 2016 offences, one of which did, in fact, involve direct contact: see paragraph [144] above.

[156] Thirdly, it runs against the unchallenged findings about the seriousness of the offending, and overall offending: see paragraph [142] above.

[157] In my view, the sentence imposed cannot be demonstrated to have been the product of a misapplication of the totality principle. I would refuse the application for leave to appeal.

Conclusion and orders

[158] For the reasons above I propose the following orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[159] **McMURDO JA:** I agree with Morrison JA.

[160] **APPLEGARTH J:** I agree with the reasons of Morrison JA and with the orders proposed by his Honour.