SUPREME COURT OF QUEENSLAND

CITATION:	*R v BDJ* [2020] QCA 27
PARTIES:	**R** **v** **BDJ** (appellant)
FILE NO/S:	CA No 220 of 2018 DC No 429 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 3 August 2018 (Coker DCJ)
DELIVERED ON:	28 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2019
JUDGES:	Fraser JA and Lyons SJA and Boddice J
ORDERS:	**1. The appeal be allowed.** **2. The appellant's conviction on Count 12 be set aside and a verdict of acquittal entered on that Count.** **3. The appellant's convictions on Counts 1 to 4, 7 to 11 and 13 to 15 be set aside.** **4. There be a new trial in respect of Counts 1 to 4, 7 to 11 and 13 to 15.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where the appellant was found guilty of two counts of indecent treatment of a child, under 16 years, under 12, six counts of rape, one count of maintaining a sexual relationship with a child, two counts of indecent treatment of a child, under 16, under care and two counts of indecent treatment of a child, under 16, under 12, under care – where the appellant was found not guilty of two counts of common assault – where the appellant was sentenced to 14 years imprisonment for the count of maintaining a sexual relationship with a child and lesser concurrent periods of imprisonment for the remaining counts – where the appellant appeals the convictions on the ground that the trial Judge erred in ruling that the Crown could charge that the complainants were under 12 years of age – whether the acts of the appellant constituted an offence under s 11(1) of the *Criminal Code* (Qld) when the conduct occurred and at the

time the charges were preferred against the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant appeals the convictions on the ground that the trial Judge erred in ruling evidence of a conversation said to have taken place between the appellant and one of the complainants was admissible and capable of showing a consciousness of guilt by the appellant – where the trial Judge directed the jury as to the need to be satisfied that the appellant's words amounted to an admission – whether the trial Judge was required to address the jury as to what conduct the jury must be satisfied is the subject of any such admission – whether there was a material risk that the jury would improperly use the evidence in being satisfied as to reliability and credibility – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the appellant appeals the convictions on the ground that the Crown did not sufficiently or properly particularise each of the Counts – whether there was sufficient particularity in the allegations to demonstrate one identifiable transaction meeting the description of the charged offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant appeals the convictions on the ground that the convictions on Counts 1 to 4 and 7 to 15 are inconsistent with the acquittals on Counts 5 and 6 – whether there was no proper way by which an Appellate Court could reconcile the verdicts – whether the jury's findings of guilt were an unacceptable affront to logic and common sense

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR UNSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant appeals the convictions on the ground that there was insufficient evidence to support Count 12 – whether the evidence led in support of Count 12 was sufficient to establish guilt beyond reasonable doubt

Criminal Code (Qld), s 11(1)

Choudhary v The Queen [2013] VSCA 325, applied
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Caulfield [2012] QCA 204, cited
R v HXY [2017] QSC 108, cited
R v JAA [2018] QCA 365, cited

R v Nooryan [2019] QCA 294, cited
R v PAZ [2018] 3 Qd R 50; [2017] QCA 263, cited
R v R [1998] QCA 83, cited
R v SCQ [2017] QCA 49, cited

COUNSEL: S J Hamlyn-Harris for the appellant
D Balic for the respondent

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

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

[2] **LYONS SJA:** I agree with the reasons of his Honour Boddice J and the orders proposed.

[3] **BODDICE J:** On 3 August 2018, a jury found the appellant guilty of two counts of indecent treatment of a child, under 16 years, under 12 (Counts 1 and 7), six counts of rape (Counts 2, 3, 4, 11, 13 and 14), one count of maintaining a sexual relationship with a child (Count 8), two counts of indecent treatment of a child, under 16, under 12, under care (Counts 9 and 10) and two counts of indecent treatment of a child, under 16, under care (Counts 12 and 15). The appellant was found not guilty of two counts of common assault (Counts 5 and 6).

[4] On 28 August 2018, the appellant was sentenced to 14 years imprisonment for the count of maintaining a sexual relationship with a child and lesser concurrent periods of imprisonment for the remaining counts. Parole eligibility was set at 28 August 2025.

[5] The appellant appeals those convictions. In his amended Notice of Appeal, the appellant abandoned Grounds 5 and 6 and relied on the following remaining grounds:

1. The learned trial Judge erred in ruling, in relation to Counts 1 and 7, that the Crown could charge that the complainants were under 12 years of age.

2. The learned trial Judge erred in ruling that evidence from FM that: "I haven't spoken to BDJ since my mum passed away. I saw BDJ at my mum's funeral. Before the funeral, all us kids went out to the house to get some photos of us growing up and school photos. While at the house, I recall BDJ saying to JD, "why have you got to be such a bitch about this?" I heard JD say words to the effect of, "because of what you did to me when I was younger". BDJ said words to the effect of "do you want me to turn myself in right now? Come on, let's call them now" was admissible and capable of showing a consciousness of guilt by the applicant. Further, any probative value it might possess is outweighed by its prejudicial value.

3. The learned trial Judge erred in ruling that evidence from JD that: "BDJ saw the photos of himself that I had cut out and said "what about my family?" I turned around and said "you never had a family, and everything you've done – you don't even deserve to be here". BDJ said "well if you want me to go and turn myself into the police now, then I will do it". I said to BDJ "go

back to New Zealand" was admissible and capable of showing a consciousness of guilt by the applicant. Further, any probative value it might possess is outweighed by its prejudicial value.

4. The learned trial Judge erred in not discharging the jury in consequence of inadmissible and prejudicial evidence introduced by FM and JD despite attempts to prevent it.

7. The Crown did not sufficiently or properly particularise each of the counts.

8. The learned trial Judge erred in finding that the Crown did sufficiently and properly particularise each of the counts.

9. The convictions on Counts 1 to 4 and 7 to 15 are inconsistent with the acquittals on Counts 5 and 6.

10. The learned trial Judge erred in rejecting the no case to answer submission and finding that there was a case to answer.

11. The conviction on Count 12 is unreasonable and unsupported on the evidence.

12. The learned trial Judge misdirected the jury in relation to the evidence of alleged admissions by the applicant.

Background

[6] The offences were all committed between 1986 and 1997. They concerned two female complainants, FM (**FM**) and JD (**JD**). The appellant was the stepfather of each of the complainants.

[7] The complainant in Counts 1 and 7 to 15 was FM. She was born on 2 February 1982. She was aged four years at the commission of the first of those offences and aged between six and 15 years at the commission of the remaining offences.

[8] The complainant in Counts 2 to 6 was JD. She was born on 30 October 1973. She was aged between 13 and 16 years at the commission of Counts 2 to 4.

Trial

[9] The Crown case was that the appellant, over a period of approximately 11 years, engaged in sexual conduct with two of his stepdaughters. This conduct only became the subject of complaint by each complainant in 2006. Their mother died in 2002.

[10] Whilst the complainants each made a complaint to police in 2006, police did not proceed with investigations in respect of those complaints until 2016. The appellant was charged with the offences in 2016.

[11] As the sexual conduct occurred years before and over many years, each of the counts contained a date period for the commission of the offence. The Crown provided further particulars said to sufficiently apprise the appellant of the case in respect of each count:

1. Count 1 – the appellant held FM's hand(s) and placed it on his penis, on an occasion identified as "naughty" time.

2. Count 2 – the appellant penetrated JD's vagina with his penis, without her consent, on an occasion identified as "age of sexual experimentation".

3. Count 3 – the appellant penetrated JD's vagina with his penis, without her consent, on an occasion identified as "hot chilli".

4. Count 4 – the appellant penetrated JD's vagina with his penis, without her consent, on an occasion identified as "sore eye".

5. Count 5 – the appellant held a knife to JD's throat, threatening her (the appellant was acquitted of this count).

6. Count 6 – the appellant pointed a loaded firearm at JD (the appellant was acquitted of this count).

7. Count 7 – the appellant touched FM's vaginal area with his tongue, on an occasion identified as "Lego" time.

8. Count 8 – between 3 July 1989 and 30 January 1997, the appellant maintained a sexual relationship with FM and FM was under 16 years and the appellant was an adult. The appellant did, on three or more occasions, the following acts:

   (a) performed oral sex on the complainant.

   (b) procured the complainant to perform oral sex on him.

   (c) penetrated the complainant's vagina with a finger.

   (d) penetrated the complainant's vagina with his penis.

9. Count 9 – the appellant showed FM indecent images, depicting males and females engaging in sexual intercourse, on an occasion identified as "you are a big girl now".

10. Count 10 – the appellant rubbed FM's vaginal area with his finger/s, on the same occasion as Count 9.

11. Count 11 – the appellant penetrated FM's vagina with his penis, without her consent, on the same occasion as Counts 9 and 10.

12. Count 12 – the appellant showed FM indecent images depicting males and females engaging in sexual intercourse, on an occasion identified as "they like it" time.

13. Count 13 – the appellant penetrated FM's vagina with his penis, without her consent, on the same occasion as Count 12.

14. Count 14 – the appellant penetrated FM's vagina with his penis, without her consent, on an occasion identified as "I am a whore" and "I'm a little slut".

15. Count 15 – the appellant touched FM's vaginal area with his hand, on top of her clothing, on an occasion identified as "migraine" time.

[12] The Crown called FM, JD and several other witnesses at trial. At the conclusion of the Crown case, the appellant elected to neither give nor call evidence.

Evidence

FM

[13] FM, a registered nurse, aged 36, met the appellant at about the age of three or four. He married her mother when FM was aged five or six. FM had three siblings, an older sister, JD, a younger sister, FP, and a brother, FL.

[14] FM first remembered living with the appellant in Mount Louisa. When she was aged three or four, the family moved to Hermit Park. She started school whilst living at that address. In about grade 2, the family moved to Deeragun. The family moved to Deeragun at the end of 1989, the year her brother turned 13.

[15] FM saw the appellant as her father. He worked for the local Council. Her mother did odd jobs, cleaning houses and running a smoko van.

[16] FM, from about the age of four, had a job of taking to the appellant his morning coffee. One morning, the appellant sat FM across his lap. The appellant said she was a naughty girl and sometimes naughty girls needed to be punished. He pulled down the sheet, exposing himself. He started touching himself and asked FM to touch him.[1] The appellant placed FM's hand on his penis and held her hand moving it up and down (**Count 1**). FM did not want to and was shaking her head. She could not remember if she had actually spoken those words. After about ten minutes, the appellant told FM it was their secret and that if she ever told anybody she would no longer have a daddy, her mother would not have a husband, it would be all her fault and she would not want that, because he would go to jail.

[17] FM said the appellant would also come into her room, in the night time, with just a towel around his waist. He would wake her up by whispering her name and make her touch his penis and make her perform oral sex on him. On occasions, he would lift up FM's nightie and push her knickers to the side. The appellant would touch her, sometimes putting his fingers inside her vagina. On other occasions, he would perform oral sex on FM.

[18] FM remembered one occasion after Christmas 1987 when the appellant came into her room in the middle of the night. The corner of the bed broke whilst the appellant was performing oral sex on her (**Count 7**). The appellant tried to fix it unsuccessfully. He told her he would fix it in the morning. That incident happened on a morning she was getting up early to play with Lego she had received as a gift that Christmas.[2] It was a school day. When FM came home from school, the bed was fixed.

[19] FM said there were occasions when, after being woken up by the appellant, she could not go back to sleep. She could hear the appellant having sex with somebody at JD's end of the verandah. The noises came from JD's room. She could hear JD crying and sometimes asking the appellant to stop. FM accepted she did not know for sure it was the appellant. She could not see the person.

[20] One morning, after the family moved to Deeragun, the appellant told FM to tell her mother she was sick and could not go to school. The appellant said FM would get a day at home to do whatever she liked. FM told her mother she was sick and remained at home. Only FM and the appellant were at home. She thought the appellant had a rostered day off. FM estimated she was in grade two or three, aged seven or eight.

[21] The appellant told FM to go to his room when she had finished breakfast. FM heard the glass front door lock. The appellant came into the bedroom. He showed FM

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1 AB143/14.
2 AB148/10.

some pornographic magazines depicting men and women engaged in sexual intercourse. The appellant said FM was a big girl now and it was time she did big girl things. The appellant pointed out a picture of a man having sex with a woman and said they should try that out.

[22] The appellant put a pillow under FM's bottom while she was lying on her back on the bed with her legs apart. The appellant told her it would only hurt a little bit and that she needed to relax and to breathe. The appellant spat on his own fingers, rubbed them on the outside of her vagina and then put them into her vagina. The appellant then spat again and rubbed his fingers on his penis. The appellant gave FM a pillow and told her to bite it if she felt like screaming. The appellant then forced his penis into her vagina. He pulled his penis out just before ejaculating onto her belly (**Counts 9 to 11**).

[23] FM recalled biting the pillow as hard as she could and screaming because it hurt. The appellant kept telling her to breathe and relax. When he had finished, he gave her clothes back and told her to have a shower. FM suffered pain for ages afterwards. She recalled a little bit of bleeding.[3] This occasion occurred before a single mother with two young boys moved in next door. That neighbour moved in about 12 months after they moved to Deeragun.

[24] There was another occasion when the appellant told FM to tell her mother she was sick and could not go to school. Again, only the appellant and FM were in the house. FM and the appellant were in the appellant's bedroom. The appellant told FM they were going to try a certain thing. The appellant showed FM a pornographic magazine prior to getting FM down on her hands and knees on the bed. The appellant was kneeling behind her. FM had a pillow underneath her chest area, towards her head, to bite so that she did not scream loudly.

[25] The appellant held the magazine in FM's face whilst FM was on all fours. The appellant was leaning over the top of her and repeatedly told her to look at the magazine. The appellant said the girls liked it in the magazine and that FM should be used to it now. The appellant had sexual intercourse with FM from behind, placing his penis into her vagina (**Counts 12 and 13**). The image depicted the same as what the appellant was doing to FM. FM was biting the pillow because it hurt. When the appellant finished he told FM to take a shower.

[26] This was not the second time the appellant had sexual intercourse with FM. It was the second time she could remember in detail. On no occasion did FM consent to having sexual intercourse with the appellant.

[27] FM remembered another occasion when the appellant made FM perform oral sex on him in his bedroom. There was a sore on the underside of the appellant's penis. FM told the appellant she did not want to do the act with the sore there. The appellant told FM "that's what happens when you have to zip up in a hurry". FM did not know how old she was but recalled they were living in Deeragun.

[28] The appellant used to tell FM all the time to tell him that she liked it. She remembered wanting to have days off school so that she could play with the computer. She wrote him a letter telling him she wanted another day off school and put it on his bed. She got into "big trouble" because the appellant said her mother

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3 AB152/45.

nearly found it.[4] FM could not understand why she was in so much trouble. It was what the appellant wanted.

[29] FM said the appellant rode a motorbike. On occasions, FM ended up on the back of the motorbike. On one such occasion, the appellant drove really slowly and reached back with one hand, touching her on the outside of her clothes.

[30] FM said the appellant used paperback novels as well as pornographic magazines. The paperback novels had a hand-drawn picture on the front of people engaged in sexual activities. The appellant would make FM read to him. Sometimes, the appellant would read to FM. The appellant would be touching FM or would be making her touch him. The appellant put his fingers on the outside of FM's vagina and on the inside at times. On other occasions, the appellant would have his hand around FM's hand which was on the appellant's penis. These things occurred whilst they were living at Deeragun.

[31] The family moved to Purono Park in about 1995. Only her mother, the appellant and her younger sister lived with FM at that time. JD moved out when they were living in Deeragun. JD was aged 17 or 18. She moved out to live with her boyfriend and his parents.

[32] FM, recalled an occasion whilst living at Purono Park when only the appellant and FM were at home. FM was worried that if he had sex with her she would fall pregnant. The appellant told her "[d]on't worry, I always pull out before I come".[5] This conversation took place on the bed in the appellant's bedroom, which was a waterbed. FM's mother had hurt her back. The waterbed was supposed to be good for backs.

[33] On this occasion the appellant penetrated FM's vagina with his penis. He told FM to tell him she was "a whore" and that "I was a little slut and that I liked it".[6] The appellant was telling FM to say these things whilst he was inside her vagina (**Count 14**). This occasion occurred when a girl called NR was living with them. It was during 1996, the year FM was a school bus representative.

[34] The family moved to Black River in 1996. Whilst living there, FM suffered from migraines. One day, when FM had a migraine, the appellant came into her room. He asked how she was feeling. He said "I know what will make you feel better"[7] before sliding his hand from her hip to her vaginal area between her legs. FM curled up into a ball and pushed him away. She extended her legs out and cried louder. The appellant left the room. This incident happened shortly before NR and the appellant had a yelling match at the front of their house. This was the last occasion of sexual conduct (**Count 15**).

[35] FM later went to live with JD. Whilst living there, JD told FM the appellant had molested her. JD asked if the appellant had done anything to FM. FM said "no".[8] FM was scared of her life being ripped apart. Later, after FM had moved back to live with the appellant and FM's mother, JD told FM she would not come inside the house because she could not stand the sight of the appellant and that she hated him. FM told JD she hated the appellant too. When JD replied that they hated him for

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4 AB155/35.
5 AB157/15.
6 AB157/30.
7 AB158/25.
8 AB160/5.

different reasons, FM said "no we don't". She did not explain that statement any further.[9]

[36] There was an occasion when FM disclosed to a medical practitioner that she had been abused and was offered anti-depressants and given some telephone numbers. FM declined the anti-depressants. FM also told her husband, just after meeting him in 2002, that the appellant had sexually abused her as a child. She did not give further details.

[37] Shortly after this conversation, FM's mother passed away. Her date of death was 8 August 2002. Prior to the funeral, FM went to the family home to collect some photographs JD had given to her mother. JD did not want the appellant to have those photographs. There was a heated discussion between JD and the appellant. The appellant was angry. The appellant said "[w]hy do you have to be such a bitch about this?".[10] JD responded "[b]ecause of what you did to me when I was younger".[11] The appellant said "[c]ome on then. Let's call them. Let's call them now."[12] The appellant said something along the lines that he would turn himself in.

[38] Some years later, in 2006, FM decided to make a complaint to police. FM had attended a birthday party with her husband. When she drove home, FM told her husband she needed to go to police and report the appellant. FM drove herself to the Mundingburra Police Station. It was locked up but a police officer came out. The police officer said FM needed to go to the city police station. FM attended that station the next morning. It was around 19 November 2006.

[39] A police officer took her statement. FM returned to the station the next day to finish that statement. FM left the matters in the hands of the police. Nothing further occurred, until some ten years later. FM thought police were investigating the matter in the intervening period. As time passed, she thought less about it. That situation changed in 2016 when FM's youngest child was born and she had a telephone conversation with JD.

[40] JD told FM she had seen the appellant. As a result of that conversation, FM attempted to make contact with the police officer. FM was angry and wanted answers. It was some weeks before she was able to make an appointment to see the police officer. The police officer provided her with the statement she had given in 2006. She was asked to read the statement and to make any changes.

[41] In cross-examination, FM accepted she did not sign the statement at that time she gave it in 2006. She did not take a copy of that statement. She did not do anything about contacting police in the next ten years. She contacted police in 2016 because of the state that JD was in and because JD had seen him driving a Police Citizens Youth Club bus full of children that could not speak. It upset her.[13] FM could not believe the appellant was allowed to work with children. FM did not understand how the appellant was able to get a position driving a PCYC bus full of children when her statement was on record from 2006.

[42] FM accepted it had occurred to her during that ten year period that the appellant could be mixing with other children. She did not do anything about it in that time as she was told by police that they would be in touch with her and she had uprooted

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9 AB160/20.
10 AB190/35.
11 AB191/7.
12 AB191/10.
13 AB198/35.

her own life and that of JD. FM was feeling a great deal of guilt because JD and her husband had sold their house after she made the original statement because they feared the appellant would come after JD.

[43] FM accepted she was not asked every single day to take the appellant his morning coffee. She believed her mother was at home when she took the coffee into the bedroom. It would have taken seconds to walk into the bedroom. Her mother could have walked in at any time if she was at home.[14]

[44] FM also accepted that, on the occasion her bed broke, her mother, sisters and brother were at home. At the time, she was sharing her bedroom with one of her sisters. That sister would have been in the bedroom at the time. On the occasions she heard JD crying softly, it was loud enough for her to hear but on no occasion did her mother arrive to see what was happening in the household. She accepted that in her statements to police she did not mention hearing JD crying or moaning or asking the person to stop.

[45] FM accepted the police officer asked her in 2006 to try to get JD to join in making complaints against the appellant.[15] FM told JD that police said her case would be stronger if other people came forward. JD had already told FM that the appellant had molested her. FM did not, at any stage, tell her mother about the appellant's conduct. She did not want to break her heart. After her mother died, she did not tell police as the appellant was out of her life. She accepted she gave the appellant a hug at her mother's funeral.

JD

[46] JD, a teacher's aide, met the appellant when he became her mother's partner. It was 1984, just before JD entered grade seven. JD was scared of the appellant. She did not like him. He gave her "the creeps".[16]

[47] Initially, they lived in Mount Louisa. The appellant lived with them at that address. After a period in Mount Louisa, the family moved to Hermit Park. That move took place towards the end of 1986 or early 1987.

[48] Whilst living at Hermit Park, the appellant would call JD into his bedroom. He would be lying naked on the bed. He encouraged her to touch his penis. He would say things like "come and play with playdough". The appellant wanted JD to give him hugs whilst he was naked. He always wanted her to kiss him on the lips. JD could not remember where her mother was at these times. Her mother would visit friends across the road, spending long periods of time chatting together. These occasions coincided with the times the appellant would be naked.[17]

[49] When JD was aged 12 or 13, the appellant spoke to her about coming to an age where she would be starting to experiment in having sex. He said her mother would not mind if he was her first sexual partner. The appellant explained to JD that if she sat down on his erect penis it would be less painful. This conversation took place in the appellant's bedroom.

[50] The appellant, who had already asked her to play with his penis, asked her to get on top of him. The appellant slowly guided her down onto his penis, which entered her vagina. It hurt and burned. He told her to keep breathing and it was okay. JD had

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14 AB211/30.
15 AB229/13.
16 AB255/45.
17 AB271/40.

her eyes closed because she was in pain. When JD finally stood up, she had blood running down her legs. The appellant told JD she was not a little girl anymore, she was a woman.[18]

[51] JD ran to the toilet. She used toilet paper to clean herself up. Whilst doing so, her mother came to the door and said the appellant had said she had got her period and that it was okay.[19] JD did not recall saying anything back to her mother. Her mother had not, at that stage, shared anything with JD about periods. She was unaware of what a period was so assumed what had happened to her was a period (**Count 2**).

[52] JD said other incidents occurred, always on Mondays. That was the appellant's rostered day off. The appellant would encourage JD to tell her mother she was sick. On one particular Monday, the appellant hired a video called "H C". It was a pornographic video. It depicted people having intercourse. One particular scene was of a woman on all fours. The appellant told JD to get onto her knees. He acted out the scene in the movie. The appellant proceeded to have sex with JD, entering her from behind. His penetration was matching the penetration of the movie (**Count 3**).

[53] On another occasion, after JD had attended the Townsville hospital for an injury to her eye, the appellant came into JD's bedroom. He was naked. The appellant said "I've got something that could make your eye all better". The appellant moved JD onto her side and had intercourse with her that way. JD was really scared because her sisters were in the area. She was scared of any noise. JD did not want her sisters to know what was happening and did not want them to be affected by anything they saw happening to her (**Count 4**).

[54] There were other occasions when the appellant had sex with JD. On one occasion, he used a vibrator. JD had not mentioned any of those other occasions in her statement to police.

[55] JD had several arguments with the appellant. On two occasions he used a weapon against her. One of those occasions was in the kitchen. JD was telling the appellant that what he was doing was not very nice. The appellant grabbed a knife off the bench and held it to JD's throat. He said "with one flick, it will be all over" pointing the knife towards her throat. JD described the knife as having a bony handle with a thick blade, with a slight bend. The knife was very sharp (**Count 5**).

[56] On another occasion, the appellant obtained a gun, which he pointed at JD. JD recalled pulling the trigger. The gun went off. JD ran to a house across the road, where she said to a woman, "You have to hide me. You have to hide me. He's got a gun. He's got a gun".[20] JD pulled the trigger because she knew he would have to reload the gun. JD believed the gun was a .22. The appellant used to keep it in the bedroom (**Count 6**). Both incidents occurred when they were living in Hermit Park.

[57] At the end of 1989, the family moved to Deeragun. JD lived there until she met her husband, when she was aged around 18. She went to live with her husband's parents. They married in 1995. JD remained in contact with her mother and sisters but did not have contact with the appellant. In 1998, not long after JD had her first

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18 AB274/20.
19 AB275/15.
20 AB281/10.

child, FM moved in with JD. JD told FM the appellant had abused her. She asked FM if anything had happened to FM. FM said no, nothing had happened to her.[21]

[58] Subsequently, after FM had moved back in to live with her parents, FM told JD the appellant had abused her. This conversation took place just before JD dropped FM home after taking her to the markets. FM said to JD "you know when you asked me, did [the appellant] do anything to me? He did".[22] This conversation took place close to 2000. It was before JD's mother passed away.

[59] On the day after her mother's funeral, JD was invited to go to the family home to collect some of her mother's items. JD attended with her siblings. She collected all of the photographs she had given her mother. If the appellant was in any of those photographs she used a pair of scissors to cut him out of the photograph. She left the pile of cut outs of him on the kitchen table.

[60] When the appellant returned to the home, he saw the photographs. He asked JD "what about me and what about my family?". JD replied "after everything you've done you don't deserve to have a family". The appellant replied "if you want me to hand myself into the police now I'll do it". JD said "go back to New Zealand … just go away".[23] The appellant was angry. JD felt scared and quickly left.

[61] In 2006, FM telephoned JD and told her she had gone to the police. JD then went to the police and gave a statement. She recalled signing the statement and being given a copy of it. The police officer gave her his card and said if she thought of anything else to contact him. JD took the statement home. She did not hear further from the police officer. In 2016, JD saw the appellant. He came to her school. He was driving a bus. After she had confirmed with others that it was in fact the appellant, JD went back to the police. She spoke to the same police officer.

[62] In cross-examination, JD accepted she spoke to police on 27 November 2006 after FM asked her to go to the police station to talk to a particular police officer. JD left the police station expecting police to proceed with her complaint. JD did not contact the police thereafter. She moved house a short time later. She did not receive any contact from police in the next ten years. She thought "no news is good news".[24] She assumed the police had done their job.

Other evidence

[63] John Robertson, a medical practitioner, attended upon FM on 5 March 2001. FM presented requiring a medical certificate for work. She complained of being unable to attend due to fatigue and stress. During the consultation, FM broke down in tears and disclosed a history of childhood sexual abuse. FM told him she had told her boyfriend and nobody else. The alleged perpetrator was her stepfather. The abuse occurred between the ages of six to 14. FM was, at the time, still living with her mother in the same house and there were obvious strains. Dr Robertson gave her counselling and telephone numbers for support services. FM was offered anti-depressant medication but said she would prefer to try counselling first.

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21 AB285/18.
22 AB285/34.
23 AB287/5.
24 AB328/30.

[64] FD met FM in 2002. Within weeks, FM told him her stepfather had abused her in a sexual way when growing up. This conversation occurred as they were on their way out to FM's mother's house. FM did not give any further details. In 2006, after attending a friend's birthday party, FM said she was going to go to the police.

[65] Benjamin Hunter was the police officer in charge of the investigation of the complaints made by FM and JD. He obtained statements from both complainants in 2006. Investigations revealed the appellant provided a bond for the residence of Black River on 8 July 1996. That bond was finalised on 30 January 1997. Records also revealed that the appellant lived at Deeragun between 18 January 1990 and 23 June 1995.

[66] Hunter said that, at the time he took the statements from FM and JD in 2006, JD stated she wanted to move house prior to any further occurrence. As a result, Hunter placed the investigation on hold. Subsequent attempts to contact JD by telephone were unsuccessful. No further steps were taken by Hunter until contact was resumed in 2016. That contact was made by one of the complainants. Neither of the complainants had sought to contact him in the intervening ten years.

Appellant's submissions

[67] The appellant submits the trial Judge erred in ruling that Counts 1 and 7 were correctly framed by the inclusion of the circumstance of aggravation that the child was under 12 years. The offences, the subject of those charges, were committed against FM between 1986 and 1988. At that time, the relevant circumstance of aggravation for a count of indecent treatment was that the child was under 14 years.

[68] The appellant could not be lawfully convicted in 2018 of an offence of indecent treatment of a child under 16, under 12, alleged to have been committed between 1986 and 1988. That was not an offence at the time of the alleged offence. Section 11 of the *Criminal Code* did not affect that proposition. It is a provision about punishment. Accordingly, convictions of the offence of indecent treatment of a child under 16 should be substituted for the convictions on the existing Counts 1 and 7.

[69] The appellant submits the trial Judge erred in ruling admissible evidence of conversations with the appellant around the time of the complainant's mother's funeral; in ruling that those conversations were capable of showing a consciousness of guilt; and in failing to discharge the jury as a consequence of that inadmissible evidence. The appellant was charged with multiple sexual offences of differing kinds. Nothing in the conversation was capable of constituting an admission to any of those specific acts, let alone sexual impropriety in general.

[70] The appellant submits the trial Judge erred in finding the Crown properly particularised each count. As a general minimum requirement, particularisation must demonstrate one identifiable transaction meeting the description of the offence charged, distinguishable from any other similar incidents. In the present case, particularisation relied upon facts intrinsic to each of the alleged events, not by reference to anything which would enable the appellant to distinguish the occasion from any other occasion.

[71] The appellant submits the jury's findings of guilt are inconsistent with the jury's acquittal on Counts 5 and 6. All of the counts relevant to JD depended upon an acceptance of JD's evidence as reliable and credible. It is an affront to logic and common sense for the jury to have accepted JD's evidence of the three rape

offences as reliable and credible, but to have not accepted her evidence in relation to each offence of common assault.

[72] The appellant submits the trial Judge erred in rejecting a no case submission. The Crown particularisation was insufficient to properly apprise the appellant of the case to be met.

[73] The appellant submits the jury's verdict of guilty on Count 12 was not open on the evidence. That count relied upon the appellant showing FM a pornographic magazine to found the offence of indecent treatment of a child in care. The showing of a magazine in itself is not sufficient to establish the offence. FM gave no evidence of touching whilst being shown the magazine. Any inference to the contrary is speculative and insufficient to establish the offence beyond reasonable doubt.

[74] Finally, the appellant submits the directions given to the jury as to the use of any evidence found to constitute an admission were inadequate. The jury needed to be directed that they must be satisfied any admission was true; that it constituted an admission to the charged offence and that there was no other explanation for the statement other than a consciousness of guilt.

Respondent's submissions

[75] The respondent submits that Counts 1 and 7 were properly framed in the circumstances of this case. Whilst the offence at the time of commission had a circumstance of aggravation that the child was under the age of 14, the evidence established that FM was under that age as she was under the age of 12. No miscarriage of justice emanates from the framing of the charge.

[76] The respondent submits the appellant's statements to JD were properly admitted as constituting admissions evidencing a consciousness of guilt. The context in which the conversation took place rendered the words reasonably capable of being construed as an admission. The appellant's words constituted an acceptance that he was responsible for events said to have occurred to JD. Further, the trial Judge did not err in refusing to discharge the jury. Nothing in the evidence justified a conclusion that there was an unfairness warranting a discharge of the jury.

[77] The respondent submits the trial Judge properly concluded the particulars adequately apprised the appellant of the case to be met on each count. The particulars allowed the appellant to distinguish one transaction from another. Distinguishing features included not only the circumstances of the offence itself, but the surrounding circumstances such as the breaking of a bed or the use of pornographic material.

[78] The respondent submits the verdicts of not guilty on Counts 5 and 6 do not constitute inconsistent verdicts. Aspects of the evidence on Counts 5 and 6 may have caused the jury to doubt JD's reliability in respect of alleged offences of violence. JD was not alleging that acts of physical violence had been used in order to commit each act of rape. Those differences may properly cause the jury to give the appellant the benefit of the doubt in relation to Counts 5 and 6, whilst being satisfied beyond reasonable doubt as to JD's reliability and credibility in respect of each of Counts 2, 3 and 4.

[79] The respondent submits the trial Judge correctly ruled there was a case to answer. The submission of no case was based on the alleged insufficiency of particulars. That contention is not made out.

[80] The respondent concedes the evidence in respect of Count 12 was insufficient to establish an offence of indecent dealing. A verdict of acquittal ought to be entered on that count.

[81] Finally, the respondent submits there were two misdirections by the trial Judge. First, in respect of Count 9. However, that misdirection did not result in a substantial miscarriage of justice. Second, the trial Judge erred in failing to expressly direct the jury, in respect of Count 8, that the pornographic offences and Counts 1 and 7 were not particulars of that maintaining count. However, there was no material miscarriage of justice. The jury's findings of guilt in respect of Counts 10, 11, 13, 14, and 15 mean the jury was satisfied beyond reasonable doubt of at least three offences. There is no material risk the appellant was denied a fair chance of acquittal.

Consideration

Ground 1

[82] Section 11 of the *Criminal Code* provides:

> "**Effect of changes in law**
>
> (1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.
>
> (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[83] The focus of section 11(1) is punishment for an act constituting an offence. The relevant criteria for consideration is whether the act constituted an offence when it occurred and at the time charges were preferred against the appellant.[25]

[84] There is no doubt that at the time each of the acts the subject of Counts 1 and 7 was committed by the appellant, that act constituted an offence of indecent treatment of a child, provided that child was under the age of 14 years. There is also no doubt that each of the particularised acts relied upon to constitute Counts 1 and 7 constituted an offence when the appellant was charged with those counts. That offence was indecent treatment of a child under 16 years.

[85] The difference between the respective offences is that, by the time the appellant was charged, there was in existence an offence with a circumstance of aggravation, namely that the child was under 12. That circumstance of aggravation, which did not exist when the offence was committed, had a consequence as to the maximum

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25 *R v HXY* [2017] QSC 108 at [30].

punishment that may be imposed upon an offender who committed the offence with the circumstance of aggravation.

[86] The consequence of a change to legislation is the subject of specific legislative provision in the *Acts Interpretation Act*. Section 20 of that Act expressly preserves repealed legislation for the purposes of a prosecution for an offence arising under the Act.[26]

[87] As the offence of indecent treatment of a child under 14 years was operational at the time of the commission of the act by the appellant and that act remains an offence under the legislation in effect at the time the appellant was charged with that offence, the appellant is liable to both prosecution and punishment for the offence. However, the offence committed by him was indecent treatment of a child under 14 years. The Verdict and Judgment Record should be corrected accordingly.

[88] The appellant does not contend that that correction ought to result in any alteration to the sentences imposed for each of Counts 1 and 7 (three years imprisonment). A consideration of the offending conduct in respect of each count supports a conclusion that a sentence of three years imprisonment was appropriate. Each offence involved an example of serious sexual offending against a very young child by her stepfather. Such a gross breach of trust deserved condign punishment.

Grounds 2, 3, 4 and 12

[89] It is appropriate that these grounds be dealt with together. Each concerns the evidence of a conversation said by both FM and JD to have taken place between JD and the appellant shortly after the death of their mother. Those conversations were admitted into evidence on the basis they were capable of constituting an admission by the appellant, showing a consciousness of guilt by the appellant that he had committed the sexual offences.

[90] Neither FM's nor JD's accounts of the conversation (which differ in content) contain words which could be said to constitute unambiguous and unequivocal admissions to sexual offending with either of them by the appellant. FM's account of the conversation included a specific assertion by JD to the appellant, in response to the appellant's question "why have you got to be such a bitch about this?", "because of what you did to me when I was younger". The account given by JD was more general, namely, that she said "after everything you've done, you don't deserve to have a family". JD gave evidence that the appellant specifically referred to going to the police. FM said the appellant said he would "turn himself in".

[91] In context, it was open to the jury to find that the words spoken by the appellant (on either version) were reasonably capable of being construed as an admission by the appellant to unlawful conduct and, on FM's account, of unlawful conduct perpetrated against JD. Once it is accepted that the words are capable of being construed as an admission by the accused, they are admissible.[27]

[92] The difficulty in the present case is determining what unlawful conduct is said to be the subject of any such admission. JD's allegations against the appellant dealt with a variety of unlawful conduct. Counts 2, 3 and 4 dealt with unlawful sexual

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26 *R v PAZ* [2018] 3 Qd R 50; [2017] QCA 263; and also *R v JAA* [2018] QCA 365; *R v Nooryan* [2019] QCA 294.

27 *R v Caulfield* [2012] QCA 204 at [16]-[18].

conduct. Counts 5 and 6 dealt with unlawful physical conduct. JD also gave evidence of being fearful of the appellant, due to his disciplinary behaviour when they were young. That behaviour, on JD's account, was itself capable of constituting unlawful conduct.

[93] The trial Judge dealt with this evidence in summing up to the jury in the following terms:

> "It is up to you to decide whether that was an accusation or an assertion or a question which required an answer as between stepfather and stepdaughter and whether the answer, or the lack of it given by the defendant, is an implied admission that he dealt with the complainants as alleged. It is a matter for you to decide whether those brief interchanges amount to an admission by the defendant that he dealt with the complainants as alleged, because he did not deny it expressly. You must consider whether an exchange of this nature at the time of the death of the complainants' mother, who was also the defendant's wife, calls for a denial if, in truth, he had not done so. And, of course, you must consider whether there was an answer given which amounted to a denial."

[94] Whilst the trial Judge's summing up directed the jury as to the need to be satisfied that the appellant's words amounted to an admission, the trial Judge did not address the jury as to what conduct the jury must be satisfied is the subject of any such admission. In circumstances where there was a variety of alleged unlawful conduct asserted by JD and FM, it was incumbent upon the trial Judge to give the jury such an instruction. The jury was also not instructed that the evidence could only be used in support of the Crown case if the jury were satisfied that the appellant, by his words, had admitted the truth of JD's allegations.

[95] In context, it was incumbent upon the trial Judge to remind the jury that JD had made allegations of varying kinds of unlawful conduct by the appellant and that the jury would need to be satisfied that the appellant's response was an implied admission by him as to the commission by him of the sexual offences before it could be used by them as an implied admission to that conduct. An admission to the commission of other unlawful conduct would not suffice.

[96] As was observed in *Choudhary v The Queen*:[28]

> "As a minimum, the judge will need to direct the jury that before they can use it (or them) in proof of guilt, they must be satisfied that in the first place the appellant in fact made the claimed admission they are considering … and that it was true. As part of any such direction, the trial judge will need to instruct the jury as to what might be … that the appellant, in one form or another, allegedly has acknowledged as true."

[97] At trial, defence counsel did not seek such directions or seek any redirections in respect of this issue. It cannot be said the failure to do so was a forensic decision. The appellant's trial involved limited evidence. His guilt was dependent upon the jury being satisfied beyond reasonable doubt as to the reliability and credibility of FM's evidence and JD's evidence. There is a material risk that the jury, not having

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28 [2013] VSCA 325 at [56].

been properly directed as to the use to be made of the evidence said to constitute an admission, improperly used that evidence in being satisfied as to their reliability and credibility. There has, in such circumstances, been a miscarriage of justice sufficient to set aside the appellant's convictions. There is a material risk the appellant was denied a fair chance of acquittal.

Grounds 7 and 8

[98] Particularity of criminal conduct is essential to eliminate the risk of duplicity and to give an accused person sufficient indication of the allegations.[29] A minimum requirement is that there be sufficient particularity in the allegations to demonstrate one identifiable transaction meeting the description of the charged offence, which is distinguishable from any other similar incidents contained in the evidence.[30]

[99] The Crown particulars identified a specific transaction meeting the description of each offence, which was distinguishable from other similar incidents. Those distinctions were established not merely by assertions such as the room in which it occurred or the time of day. They included specific circumstances, such as requests that they seek their mother's permission to remain at home from school, the use of specific materials and unusual circumstances such as the breaking of the bed or an injury to an eye.

[100] Those circumstances could not be said to be so common place as to fail entirely to provide useful, distinguishing information.[31] They were sufficient to properly apprise the appellant of the case to be met. They were reasonably sufficient for the purposes of allowing the appellant to make a proper defence. These grounds fail.

Ground 9

[101] An inconsistency of verdict sufficient to warrant the setting aside of a conviction by a jury only arises if there is no proper way by which an Appellate Court may reconcile the verdicts. The test is one of logic and reasonableness.[32]

[102] Applying those principles, there is a proper way to reconcile the jury's verdicts of guilty on Counts 2, 3 and 4 and of not guilty on Counts 5 and 6. Whilst each of those counts involved the one complainant, JD, and proof beyond reasonable doubt in respect of each count was dependent upon an acceptance of JD's evidence as reliable and credible, there were material differences in the cogency of the evidence given by JD in respect of the counts of rape and the counts of assault.

[103] First, the allegations of physical abuse arose in circumstances where there was no assertion by JD that physical abuse was used in any of the counts of rape. Second, there were inconsistencies in JD's accounts of the assault offences and her responses in cross-examination were on occasions non-responsive or argumentative.

[104] Those circumstances provide an explanation for why the jury may have given the appellant the benefit of the doubt in respect of the counts of assault, whilst being satisfied as to JD's reliability and credibility in respect of each offence of rape.

[105] The jury's findings of guilt in respect of Counts 2, 3 and 4 are not an unacceptable affront to logic and common sense. This ground fails.

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29 *R v SCQ* [2017] QCA 49 at [30] – [32].
30 *R v R* [1998] QCA 83.
31 *R v R* [1998] QCA 83, 1.
32 *MacKenzie v The Queen* (1996) 190 CLR 348, 366.

Ground 10

[106] This ground was premised on an acceptance of the appellant's contention that there was insufficient particularity of each of the counts, such that the trial Judge erred in rejecting a no case submission. As those contentions have not been made out, this ground also fails.

Ground 11

[107] The evidence led in support of Count 12 was insufficient to establish guilt beyond reasonable doubt. There was no evidence of indecent touching at the time of the showing of the pornographic material. The jury's verdict in respect of Count 12 ought to be set aside and a verdict of acquittal entered in its place.

Conclusion

[108] The appellant has established material misdirections warranting a finding that the appellant's convictions on Counts 1 to 4, 7 to 11, and 13 to 15 ought to be set aside and a new trial ordered. The appellant's conviction in respect of Count 12 should also be set aside, with a verdict of not guilty entered in its place.

Orders

[109] I would order:

1. The appeal be allowed.
2. The appellant's conviction on Count 12 be set aside and a verdict of acquittal entered on that count.
3. The appellant's convictions on Counts 1 to 4, 7 to 11 and 13 to 15 be set aside.
4. There be a new trial in respect of Counts 1 to 4, 7 to 11 and 13 to 15.