SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bickell* [2020] QCA 37
PARTIES:	**R** **v** **BICKELL, Stephen Roderick** (appellant)
FILE NO/S:	CA No 213 of 2019 DC No 1439 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 9 August 2019 (Rafter SC DCJ)
DELIVERED ON:	6 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2019
JUDGES:	Morrison and McMurdo JJA and Crow J
ORDERS:	**1. The appeal be allowed.** **2. The appellant's convictions be set aside and a verdict of acquittal entered on each Count.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL – ALLOWED – where the appellant was convicted of two counts of indecently dealing with a child under 12 years of age and attempted indecent dealing – where the appellant was acquitted of rape – where the appellant appeals the conviction on the basis that the verdicts of the jury were unreasonable or cannot be supported having regard to the evidence – where the appellant alleges the complainant cannot be considered a credible witness due to the inconsistencies between her preliminary complaints and the allegations in her evidence – whether the jury ought to have harboured a doubt as to guilt – whether the doubt persists notwithstanding the advantages of the jury – whether upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty *Criminal Code* (Qld), s 668E(1) *Hocking v Bell* (1945) 71 CLR 430; [1945] HCA 16, cited *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, considered

Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
Pate (a Pseudonym) v The Queen [2019] VSCA 170, cited
Pell v The Queen [2019] VSCA 186, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Chai (2002) 76 ALJR 628; [2002] HCA 12, cited
R v Coutts [2006] 1 WLR 2154; [2006] UKHL 39, cited
R v Holzinger [2016] QCA 160, considered
R v PBA [2018] QCA 213, considered
R v Sun [2018] QCA 24, cited
R v Tesic [2019] QCA 195, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: A J Glynn QC for the appellant
C N Marco for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** On 9 August 2019 a jury found the appellant guilty on two counts of indecently dealing with a girl under 12 years, and one count of attempting to do so.

[2] The complainant was the daughter of the appellant's friends, and the offending conduct occurred on two occasions when the appellant stayed over at their house while visiting from London. On each occasion the complainant was in bed, after her parents had gone to bed.

[3] Count 1 (indecent dealing) and Count 2 (rape) were alleged to have occurred on 31 January when the complainant had just turned eight years old. Count 3 (attempted indecent dealing) was alleged to have occurred on 15 March 2010, when the complainant was about nine.

[4] The appellant was convicted on Counts 1 and 3. He was acquitted on Count 2, but found guilty of the alternative count of indecent dealing.

[5] The complainant did not tell anyone about the events of 31 January 2009 until 2015 when she revealed a little to a friend, FFC. Then in 2016 she revealed some more information to another friend, SFM. Then in 2017 she told another friend, TFJ, her counsellor/therapist and her mother. Formal complaint was made to the police in 2017 after the complainant told her mother.

[6] The appellant challenges his convictions on two grounds:

(a) that the verdicts are unreasonable or cannot be supported by the evidence; and

(b) that there was an error in directing the jury that an alternative verdict was open on Count 2 (rape).

The legal test

[7] The principles governing how the first 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*[1] 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.

[8] This Court has often repeated the principles derived from *M v The Queen*,[2] which govern the role of an intermediate appellate court when the ground of appeal is that the verdict is unreasonable. The plurality said:[3]

> "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.**
>
> It was with those considerations in mind that some members of this Court have thought it necessary to qualify the statement by Barwick CJ in *Ratten v. The Queen* that: "It is the reasonable doubt in the mind of the court which is the operative factor". Barwick CJ went on to say:
>
> > 'It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.'
>
> The qualification was that no circumlocution was involved in speaking of a doubt which a reasonable jury ought to have entertained because account must be taken of the advantage which a jury has in seeing and hearing the witnesses. To ask only whether the court has a doubt may place insufficient emphasis upon the fact the jury, having seen and heard the evidence given, was in a position to evaluate that evidence in a manner in which a court of appeal cannot.
>
> But it is, we think, possible to make too much both of the view expressed by Barwick CJ and of the qualification suggested. **In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where**

---

1 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.
2 (1994) 181 CLR 487; [1994] HCA 63.
3 *M v The Queen* at 493-495; emphasis added; internal citations omitted.

> **a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the 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**. Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above."

[9] The High Court restated the pre-eminence of the jury in *R v Baden-Clay*.[4] As summarised by this Court recently in *R v Sun*,[5] 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",[6] 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."[7]

[10] Further, as was said by this court in *R v PBA*,[8] 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."

---

4 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
5 [2018] QCA 24, at [31].
6 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
7 *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.
8 [2018] QCA 213 at [80].

The complainant's evidence

Counts 1 & 2 – 31 January 2009

[11] Counts 1 & 2 occurred on 31 January 2009, when the complaint had just turned eight years old. The appellant, a friend of her parents, was visiting them from London. She said the appellant came into her room, and touched her through the bars of her bunk bed, firstly in a general way between the legs, on her genitals (Count 1), then a second time, including using his finger or fingers to penetrate her vagina (Count 2).

[12] In her s 93A police interview,[9] as is often the case with such interviews, the complainant's account took place in two parts, the first a relatively uninterrupted narrative, and the second consisting of responses under questioning. The narrative account included these components:

(a) "I woke up and … he was … standing up … kind of like next to the bunk bed and I was on the top bunk";

(b) "I can't fully remember but … I think I woke up from him moving the sheets";

(c) "he tried to move the sheets and I wasn't quite sure what he was doing and … I was facing towards the railing";

(d) "he put his hands through the bars and … moved the sheets out the way";

(e) "he put his hands … in through my … pants and then … he started trying to … touch me";

(f) "he tried putting his … finger in between … my genitals";

(g) "I can't remember how long that was going on for until I … decided to pretend as if I slightly woke up and moved";

(h) "he went down to the bottom bunk again";

(i) "he stood back up and I couldn't see him 'cause I was facing the other way and he put … his hands … back through the bars and tried … he put his hands like through … through my pants again and tried … touching me but … through my legs and he … put … like he … I don't know how to phrase it. He, like he just, he um, he put, he penetrated me through … with his hands";

(j) "I don't know how long that was until I decided to sit up and he put, he … got back down onto the bottom bunk"; and

(k) "I got out of the bed … and said … where my parents are and he said … he thought they were outside … in the … lounge room and I don't remember how long this whole period was because … by that stage my dad was … in the lounge room but he was passed out 'cause he'd been drinking and he was snoring … and the T-V was on and then I went and found my mum in her bedroom but … she was sleeping and I wasn't quite sure what to do so … I went back into my room and I went to sleep".

---

9 Appeal Book (**AB**) 491.

[13] The complainant's account under questioning then contained the following responses as to the events:

(a) she had woken up because someone moved her sheets;

(b) it "felt … like trying to pull my pants down";

(c) the appellant pulled down the pants but not completely;

(d) "he put his hands … in my underwear";

(e) "he was like … he's touching the front of my … genitals and then … he tried putting … one of his fingers in … further … in between my legs but … I think my legs were on top of, like rolled over or they were on top of each other so … he couldn't really … get far enough";

(f) "he just kept putting his finger further and further until I … moved over, moved around"; by "further and further" she meant: "I'm guessing until … he could … penetrate me I guess but … he couldn't, he couldn't really reach far enough"; he was not rubbing his hand up and down but: "I think he was just trying to get further until he could put his finger in, into me";

(g) she rolled over and he stopped;

(h) then: "he put his hand … in my underwear again and … he put his hand, his fingers back through … and tried and then 'cause he could, he put his fingers … through in between my legs and then … inside me. I don't remember … how many fingers";

(i) he "Put his … hand through … between my bottom and through and then … into my vagina"; and

(j) she didn't scream: "I don't think I … made any sounds because I don't know, I can't remember how long he did that for until I moved but … I don't think I said anything".

[14] When asked how she knew she had been penetrated the complainant said:[10]

(a) "I don't know how to answer that, I don't know what you mean";

(b) "I know it felt different then when he was trying to do it from the front";

(c) "I obviously didn't know anything about that stuff at eight but I know it felt different from the front and … yeah, just felt different"; and

(d) "I could feel him going further inside me then it was just on the front, … I could feel it going … it was in … I don't know I can't explain that very well but … I could feel it inside me".

[15] On the complainant's account to the police, during the appellant's first time of touching (Count 1) he did not penetrate her, but touched her on the vagina.

[16] As to the second time of touching (Count 2), she was asked what happened when he penetrated her. She responded: "… like I said I can't really remember how long it was but I did move and he noticed that I moved and … pulled his hand out straight away and … I seem to recall he ducked under because … I can't remember what

---

10 AB 500-501.

bed … he was on but I feel like … he was under on the bunk, underneath 'cause he ducked under pretty quickly".

[17] The complainant did not tell her mother about the incidents in 2009 until 2017. In the meantime she told a best friend, FFC, in 2015, and another best friend, SFM, in 2016. Then in 2017 she told another friend, TFJ, a counsellor/therapist, and finally her mother.

Count 3 – 15 March 2010

[18] The appellant was visiting from London. He stayed with the complainant's parents again, and slept on the lounge.

[19] In her narrative account in the police interview the complainant said these events were not comparable to those in 2010, "… it's nothing as bad though". She said:

(a) "I remember … a lot more about that night than any other night because … it was like, I was a bit older obviously but … because I knew him and I was wary of what … he had done so … he like stepped into my room to have a look at it with my mum or my dad and then walked back out and then that night … I like promised myself I wouldn't go to sleep. 'Cause I felt like he was going to do it again and this time I'd be awake for it. But I fell asleep and … I was on the bottom bunk this time … and I was facing towards the wall with the sheet over the top of me and … he'd walked in, I'm pretty sure I used to keep my door shut. … and I didn't hear the door open but he came in and he sat, he actually sat on the bed, … next to me and kind of … faced outwards but sitting on the bed and I woke up from him moving the sheets again. But I didn't … just like wake up, I woke up and I turned over and … I could see like a light … he had … a light on his phone or something. … moving around and he got up and then walked out like really fast";

(b) "I went into my parent's room and I … I told them that he was in my room and he'd sat on the bed and I saw a light and stuff and they went out and talked to him and I couldn't tell you what they said because … I had to stay in my room";

(c) "he had to go sleep in his car 'cause he was still … had alcohol in him"; and

(d) "I slept in my mum and dads room for the rest of the night".

[20] Under questioning the complainant maintained her account that the appellant did not touch her, but just moved the sheets.

Trial – complainant's evidence in chief

[21] In her evidence in chief, given when the complainant was 18 years old, she affirmed that what she told the police was the truth. She also said that her handwritten notes,[11] which had been given to police, were correct. She said those notes were written by her because "I'm not very good at talking" and "I'm really bad at talking and remembering things under pressure".

[22] Having identified various plans she had done for the police, she was then asked about those to whom she had spoken about the events. She said she did not

---

11 Exhibit 2, AB 457.

remember what she said to FFC, nor how much detail she went into. Though she said they spoke at school in about grade 8 or 9.

[23] The same was the case with SFM. She said they spoke in a carpark where SFM lived, but could not remember what was said, or the detail.

[24] She said she told TFJ in a Facebook conversation, which was reflected in a note which became Exhibit 6. However, she said the Facebook message was not completely accurate.

[25] She told her counsellor/therapist in 2017. She said she did not tell her much detail but could not remember much more than that.

[26] She told her mother that night after speaking to the counsellor/therapist. Once again she could not remember the terms of the conversation, nor the detail. Between then and when the complainant saw the police she wrote the notes that became Exhibit 2. Those notes were read to the jury. Relevantly they recorded her account much as she gave in the police interview.

Trial - complainant's cross-examination

[27] The complainant was subjected to a lengthy cross-examination, during the course of which it was put to her that:

(a) she had rote learned her account before speaking to police;

(b) it was not true that it was her idea to write down her notes in a book;

(c) she was a liar, who lied with SFM about wagging school, and lied to TFJ in her Facebook message;

(d) she tried to convince SFM to change her recollection of what she had been told by putting pressure on her; and

(e) she was an unmitigated liar about the events; this was put in various ways, but directly as "you knew it was a false story"[12] and "you have made up these allegations",[13] and that "you can't now admit that you lied to [your parents] … and made up this story".[14]

[28] The essential aspects of the complainant's evidence in cross-examination included the following.

[29] She had once messaged SFM about needing similar stories "for when we get in trouble about wagging" school. She spoke to her about how she and SFM could get away with wagging if they told lies.

[30] She knew after she spoke to police that they were going to speak to those people she had spoken to, i.e. the preliminary complaint witnesses.

[31] TFJ told her a "sordid tale" of his own sexual abuse. She responded that her experience was "nothing compared to yours". It was put to her that she lied to TFJ. She denied that but said that she "embellished the story" and "exaggerated" it. She

---

12 AB 244 line 23.
13 AB 245 line 20.
14 AB 245 lines 38-44.

agreed that she lied about certain details to TFJ: e.g. that the appellant would grab her and stroke her stomach; that she was scared by that; that he violently grabbed her; that he continued to do it for as long as her parents didn't know. And in what she said to TFJ, she did not mention that in 2010 he sat on her bed or shone a light.

[32] Asked whether she was trying to get sympathy from TFJ, she said: "Possibly. I was 16 and he had just told me that story. I guess I was trying to do the same – trying to make it …".

[33] She agreed she had not told her parents about what happened in 2009. Initially she said she did not remember whether she had said anything to them, then as to the events in 2010 she agreed that she told her parents that she had been woken by a light in her room, but not that he sat on the bed or moved the covers.

[34] She was asked about her evidence at the committal as to the 2010 events and what she told her parents. She agreed that she then said she had been questioned by her mother as to whether he had touched her, and said he had not.

[35] At the committal she had been asked about the mother's questioning as at the 2010 occasion. The next day she had been asked if he touched her that time, and she said she told her mother that he had not. She was then asked if she had "deliberately decided" not to mention the 2009 occasion, and she had said yes. She agreed that that answer was the truth, she had not told them about the 2009 occasion. She then explained why:

(a) "I was 10. I still had no idea what was going on";[15]

(b) "I wasn't sure of what had happened, and I didn't – I was scared to tell them. I didn't know what – didn't know what to say";[16]

(c) "I don't remember my exact feelings, but I was scared. I remember I was scared";[17]

(d) [answer at the committal]: "I was confused about the whole situation, and I didn't feel comfortable. And, again, I don't remember clearly what I was thinking, but I didn't tell her because I wasn't sure what was going on";[18] and

(e) she explained why she had not said she felt scared at the committal: "Both [answers] are true. It's just another emotion I was feeling, and I didn't mention it."

[36] Part of why she did not tell her parents the first time was: "I went to go tell her. Like I said in my statement, I went to get up and go find my parents, but, again, I just – I don't know what I was thinking at the time, but I didn't – because they were both asleep, I just went back to bed."[19]

[37] She was questioned about what she told FFC, and said she could not remember what she said or the details.[20]

---

15 AB 194 line 29.
16 AB 196 line 5.
17 AB 196 line 9.
18 AB 196 line 31.
19 AB 197 line 15.
20 AB 200 lines 10-14; AB 204 lines 40-45.

[38] She could not remember what she told another friend ZNC,[21] but agreed that she did not mention telling ZNC in her notes or to the police.[22] She explained why she did not tell ZNC about the penetration: "There's no need to go into detail with that kind of information".[23]

[39] She could not remember what she had told SFM, either exact words or details.[24] As to the text messages between them, when it was put to her that she knew it was important that their stories line up, she responded: "No, I – I did – I said to her to say whatever she remembered."[25]

[40] In the course of the text conversation being put to her, and the part where SFM denied being told about penetration, she accepted that she had not told SFM that aspect.[26] In the texts, she told SFM to tell police that "I said he touched me", because "that's what she remembered".[27]

[41] She denied the suggestion of schooling: "I kept telling her that she tells what she remembers. I was telling her what was the truth and what I was – what I remember, and I told her to tell her story. I don't – aligning our stories doesn't help anything."[28]

[42] She explained why she did not tell the first psychologist she saw: "I didn't feel comfortable. He was a guy. I didn't really feel comfortable with that. And I couldn't – I was 15, 16. I couldn't do it to a stranger."[29]

[43] She did tell the counsellor/therapist, but she could not recall what she said or the exact words.[30] She did not mention penetration to her but explained why: "It's a very uncomfortable thing to talk to anyone about".[31]

[44] As a result of talking to the counsellor/therapist she told her mother. She had thought about doing so "many, many times".[32]

[45] She told her mother that on the 2009 occasion the appellant touched her with his hands: "He didn't rape me, but he put his hands in my pants".[33] She did not use the word rape "Because it was my mum. I had to very much clarify what he'd done. Using that word is quite broad",[34] but when her mother asked if he had put his fingers inside her, she responded "yes".[35]

[46] The complainant denied all suggestions that the events had not occurred or that the appellant had never touched her as she said in evidence.

---

21 AB 207.
22 AB 208.
23 AB 208 line 27.
24 AB 209 lines 1-34.
25 AB 209 line 45.
26 AB 213 lines 20-24; AB 221 line 6; AB 222 line 4.
27 AB 214.
28 AB 219 line 17.
29 AB 223 line 22.
30 AB 225-226.
31 AB 226 line 35.
32 AB 226 line 43.
33 AB 228 line 6.
34 AB 228 line 23.
35 AB 228 line 37.

[47] In re-examination the complainant maintained her account.

FFC's evidence

[48] FFC said she had a conversation with the complainant in 2015, when they were in grade 9. She could not remember the discussion. She gave a statement to police in 2017 in which she said what she could recall of what the complainant told her: "she just said that he touched her. I don't … That was it."[36]

[49] FFC's evidence was that they spoke about whether to see the school counsellor, but neither of them wanted to do so. When asked if the complainant did not wish to do so, FFC was unsure.[37]

SFM's evidence

[50] SFM described what she had been told in relation to the first occasion in 2009:[38] "She said that she was at home one night. She was in bed, and one of her parent's friends walked in, … he thought she was sleeping, but she wasn't, but she pretended to be asleep because she didn't know what to do. And he sat down on the bed, and he started feeling … over the top of the covers, and then he went under the covers, and started touching her. And she said that there was two different occasions … that this sort of thing happened to her."

[51] As to the second occasion in 2010, she recalled:[39] "I remember vaguely it was something to do with a photo, and she said that he had took a photo of her sleeping, or something, and said that it calmed him down because he had insomnia, or something like that."

[52] SFM added:[40] "I don't think after that we really had a conversation about it until she brought up that she was reporting it to the police. And at that point, she told me that I would need to make a statement, and she – she told me that it was going to be a rape charge, and I didn't understand how, if there was no penetration, because I didn't realize there was penetration until she said to me there was."

[53] SFM originally told police that she had been told about the first occasion in 2009: the appellant "… sat down right next to her on the bed, and was sort of moving hands, like, around her on top of the covers", and "when he started, like, sort of moving his hands around her, she pretended that she was, like, waking up".[41]

[54] She told police that she was told as to the 2010 occasion: "he came in and sort of did the same thing … her parents … saw a light … he told her parents that he had trouble sleeping … and it helped him to watch children sleep".[42]

[55] SFM was not told that the complainant had been touched on her vagina, or that the appellant put his fingers into her vagina. At the time of the text messages she had

---

36 AB 251 line 20.
37 AB 251 lines 28-35.
38 AB 253 line 19.
39 AB 253 line 28.
40 AB 253 line 37.
41 AB 256.
42 AB 256.

no idea that the complainant was saying she had been touched on the vagina and in the vagina.[43]

Counsellor/therapist

[56] She was told by the complainant that she had been sexually abused by the appellant.[44]

[57] She took notes of what she had been told about the 2009 occasion:[45]

> "A family friend had come to stay and she was sleeping in her bunk bed and this man was meant to be sleeping on the other bunk bed. She was on the top bunk and she woke to someone touching her between her legs and moving the blankets. This frightened her and she moved her legs and kept moving until he gave up and went back to sleep. … she did get up to go and tell her parents, but they were asleep and she decided to go back to her bed, feeling very scared and worried. She – when she awoke in the morning, she didn't know what to do and she just tried to block it out. … she didn't want to cause any upset, so she decided to try and keep it to herself what had happened."

[58] Her notes of what she was told as to the 2010 occasion were:[46]

> " … he came to visit again and she promised herself she would stay awake all night, so it couldn't happen again. However, she did fall asleep and, when she awoke, the same man was now sitting on her bed with his light on in his phone, which is what woke her up. She moved around, letting him know she was awake."

[59] The complainant did not tell her that she was touched on her vagina, nor penetrated.[47]

The complainant's mother

[60] At the time of the 2010 events the complainant told her that the appellant was on her bed and shining a light in her face.[48]

[61] The complainant's father questioned the appellant about what he was doing in the complainant's room. He kept changing explanations; one was that he was looking for sleeping pills, another that he liked watching children sleeping, as it calmed him.[49]

[62] In 2017 the complainant, speaking of the first occasion in 2009, told her that the appellant touched her with his hands. She asked where and the complainant

---

43 AB 263.
44 AB 266.
45 AB 267.
46 AB 267.
47 AB 274.
48 AB 279.
49 AB 281.

indicated her groin. She asked if he put his fingers inside and the complainant said "yes".[50]

[63] The mother said that on the morning after the appellant stayed over in 2009 she saw him asleep on the bottom bunk, in the complainant's room. As it was early she decided not to wake either of them.

[64] In her police statement, she said the complainant had pointed to her groin when explaining what occurred, and when she asked the complainant what he touched her with, the complainant said: "His hands. He didn't rape me, but he put his hands in my pants"; then she asked if he put his fingers inside, and the answer was "yes".[51]

The complainant's father

[65] He said that the complainant's account of the 2010 occasion was that the appellant was sitting on her bed with a light.[52]

[66] The appellant's explanation was that he needed a sleeping tablet which was in his wallet, he could not find the wallet, and it soothed him to watch the complainant sleep.[53]

[67] In his statement to police the father said the complainant did not say the appellant was sitting on her bed, just in the room with a light, and the appellant said that he was using his phone to look at the complainant sleeping.[54]

The appellant's evidence

[68] The appellant admitted sleeping over on the first occasion in the bottom bunk in the complainant's room. On the second occasion in 2010, he was looking for his wallet when he may have momentarily entered the complainant's room, being unfamiliar with the house. He denied that any of the alleged events occurred or that he had ever touched the complainant.

The defence case

[69] The defence opening highlighted the way the complainant's story had changed:

(a) "From 2009 when she made no complaint at all, in fact you'll hear evidence that she engaged in polite conversation with him the next morning. To 2010 when she simply told her parents, depending on which view you accept, that she was awoken by a light in a room. Denied that she was touched at all on that occasion. To 2015, 2016 and 2017 in which her story changed dramatically from when she told [FFC] something to when she told [SFM] something to when she told [TFJ] … something that she herself accepts is not true about what happened in 2009, 2010."[55]

(b) "… it's particularly important to pay close attention to the way her story's changed over the years".[56]

---

50 AB 299.
51 AB 307 line 3.
52 AB 321.
53 AB 321.
54 AB 333.
55 AB (Vol 1) 16-17.
56 AB (Vol 1) 17.

[70] The defence case that the complainant was a liar continued throughout the defence address, with the jury being urged, *inter alia*:

(a) "how could you possibly treat her as a witness of truth?";[57]

(b) "It's uncomfortable to talk of a young person telling lies or being a liar, yet that is what she has shown herself to be, not just about anything, but about the very subject matter of these proceedings";[58]

(c) "So either way you look at it, she's told lies. And these are only the lies we know about. Basic honesty isn't something that you need a lot of practice to get right. You don't need to do a university degree to learn how to be honest. It's something that you either are or you are not. And these are only the lies we know about that what we see here is a pattern of being prepared to say whatever she needs to say and whatever she thinks she can get away with";[59]

(d) "Unless you're satisfied that she's a truthful and reliable witness beyond reasonable doubt, you cannot convict [the appellant] on any count. It is as simple as that. The prosecution case depends upon her evidence, the evidence of a witness who admits lying and has been caught out lying about this very topic";[60] and

(e) the complainant did not have a good enough memory to be a successful liar.[61]

[71] On the appeal before this Court the appellant's Senior Counsel did not seek that the Court give any consideration to the appellant's evidence, nor did he make any submissions based upon it, as it was "clear that the jury rejected it".[62]

Consideration

[72] The appellant relied upon a number of matters to contend that the complainant's evidence should have been rejected by the jury, or there is a significant possibility that an innocent person has been convicted:[63]

(a) the complainant's admitted lies to TFJ about the charged acts;

(b) the complainant's inconsistent words and conduct in the aftermath of the alleged incidents;

(c) the extended delay in her complaint;

(d) her reasons for the delay;

(e) the remarkable variances in the complainant's accounts to the preliminary complaint witnesses; and

(f) the complainant's texts to SFM after she had been interviewed by police.

Chronology

---

57 AB (Vol 1) 26 line 21.
58 AB (Vol 1) 28 lines 7-9.
59 AB (Vol 1) 34 lines 16-21.
60 AB (Vol 1) 47 lines 11-14.
61 AB (Vol 1) 51 lines 12-17.
62 Appeal transcript T1-31 line 43.
63 Paras 35-36.

[73] The relevant chronology starts in 2009 with Counts 1 and 2 which occurred on 31 January 2009.[64] The complainant's evidence was that:

(a) she asked the appellant where her parents were, then went to find her mother and father but they were asleep;

(b) in the police interview she said "I wasn't quite sure what to do so … I went back into my room and I went to sleep";[65]

(c) at the trial she explained what she did: "I went to go tell her. Like I said in my statement, I went to get up and go find my parents, but, again, I just – I don't know what I was thinking at the time, but I didn't – because they were both asleep, I just went back to bed";[66] and

(d) she then said nothing about what had happened until 2015 when she spoke to FFC; then she told SFM in 2016; then in 2017, she told TFJ, her counsellor/therapist, and then her mother.

[74] Count 3 occurred when the complainant was just over nine years old. Her evidence as to what followed was:

(a) she went to her parents room;

(b) "I told them that he was in my room and he'd sat on the bed and I saw a light and stuff and they went out and talked to him and I couldn't tell you what they said because … I had to stay in my room";[67]

(c) in cross-examination she agreed that she told her parents that she had been woken by a light in her room, but not that he sat on the bed or moved the covers;

(d) according to her parents, she said the appellant was in her room and shining a light;

(e) there was an immediate confrontation between her father and the appellant, as a result of which the appellant was told to leave the house; and

(f) she agreed that she had been questioned by her mother as to whether the appellant had touched her in this incident, and she said he had not.

[75] At the committal she was asked if, at the time of the second occasion, she had "deliberately decided" not to mention the first occasion in 2009, and she had said yes. She agreed that that answer was the truth, i.e. she had not told them about the first occasion.[68] She explained why:

(a) "I was 10. I still had no idea what was going on";[69]

(b) "I wasn't sure of what had happened, and I didn't – I was scared to tell them. I didn't know what – didn't know what to say";[70]

---

64 She was born on 2 February 2001. Counts 1 and 2 were on 31 January 2009. Count 3 was on 15 March 2010.

65 AB 495.

66 AB 197 lines 14-18.

67 AB 509.

68 AB 194.

69 AB 194 line 29.

70 AB 196 line 5.

(c) "I don't remember my exact feelings, but I was scared. I remember I was scared";[71]

(d) [answer at the committal]: "I was confused about the whole situation, and I didn't feel comfortable. And, again, I don't remember clearly what I was thinking, but I didn't tell her because I wasn't sure what was going on";[72] and

(e) she explained why she had not said she felt scared at the committal: "Both [answers] are true. It's just another emotion I was feeling, and I didn't mention it."[73]

Mother's evidence about 15 March 2010

[76] The complainant's mother gave evidence as to what she asked the complainant after she was told that the appellant had been in the complainant's room in 2010. The complainant told her that he was on her bed and shining a light in her face.[74] She asked the complainant whether she had been touched, but the questions related only to that occasion and not to the events in 2009:[75]

> "Now, in fact, back on the night in 2010, you had questioned [the complainant] many times in the day or so after the incident to find out if [the appellant] had touched her in any way. Didn't she?---**We asked about that night in 2010**.
>
> All right. She had been adamant that he hadn't touched her at all?---**On that night he hadn't**.
>
> Right. Are you seriously suggesting that you didn't ask your daughter, "What about the only other time he slept over"?---I didn't know that anything had happened. How can I ask a question about a night I didn't know about.
>
> All right. Are you seriously suggesting that, given that you found him asleep on the bottom bunk in her room on that previous occasion – the only other occasion he'd stayed over, you didn't ask her, "What about the time at the other house"?---**I don't recall that I did, no.**
>
> You don't recall whether you did or you didn't?---No, I said I don't recall asking her about that particular night.
>
> Right?---I'm certain I would have asked, you know – I – **I don't recall that I asked about that night, because I had basically forgotten about that night**. There were many, many nights that [the appellant] had been at our house before he moved to London, so …"

[77] The mother's evidence on this aspect could hardly have been doubted by the jury, given that the complainant herself said she had not told her parents about what occurred in 2009, and that was not challenged. Indeed, the fact that she had not told them was at the centre of the defence case.

---

71 AB 196 line 9.
72 AB 197 line 1.
73 AB 197 line 1.
74 AB 279.
75 AB 307 lines 25-47; emphasis added.

Preliminary complaint evidence

[78] The preliminary complaint evidence as to what happened in 2009 came admittedly much later than the events in question. FFC was the first told anything, and that was in 2015, six years after the events. She could not recall much apart from the fact that the complainant had been "touched".

[79] SFM was told next. As to the 2009 events, she was told the appellant touched her but she did not realise that the complainant was saying she had been touched skin on skin, on the vagina and in the vagina. SFM told police that she had been told about the first occasion in 2009 that the complainant had been touched but over the covers: He "sat down right next to her on the bed, and was sort of moving his hands … around her on top of the covers", and "when he started, like, sort of moving his hands around her, she pretended that she was … waking up". In her text messages she recorded that she had been told "he touched you over the blankets". But she went on to add that "you said more but it's too hard to type it all". In her text account she was told the appellant was trying to get his hand under the blankets. At the trial she said she was told "he started feeling … over the top of the covers, and then he went under the covers, and started touching her".

[80] The account given to TFJ was next in time, in early 2017. It included that the appellant had touched her including to penetrate her vagina.

[81] The account to the counsellor/therapist in 2017 was that he had touched her between her legs.

[82] Then the last account, to her mother, was that she had been touched by the appellant putting his hand in her pants, and she had been penetrated.

What was said to TFJ

[83] TFJ told the complainant that his mother was a drug addict and he had been abused mentally and physically by his mother, and others, since he was six or seven years old. Further, that he had been repeatedly raped by his mother's partner, and that he was psychologically harmed to the point of cutting himself.

[84] She told him (as to Counts 1 and 2): the appellant would try and grab her and stroke her stomach; he touched her and "started to finger me", and "violently grab me"; and he "continued to do it for as long as my parents didn't know".

[85] She told him (as to Count 3): she "woke up with him taking the covers off my bed, so I sat up and he left".

[86] In her evidence in chief the complainant said that her account to TFJ was not completely accurate.[76]

[87] It was put to her in cross-examination that she had lied to TFJ. She denied she had lied but did say that she "embellished the story" and "exaggerated" it.[77] She then agreed that she lied about certain details to TFJ: e.g. he grabbed her and stroked her

---

76 AB 170 lines 4-9.

77 AB 186 line 44; AB 187 line 45.

stomach; she was scared by that; he violently grabbed her; he continued to do it for as long as her parents didn't know.[78]

[88] She offered an explanation as to why she said what she said to TFJ. Asked if she was trying to get sympathy from TFJ, she said: "Possibly. I was 16 and he had just told me that story. I guess I was trying to do the same – trying to make it …".

The text messages with SFM

[89] The appellant submitted that these text messages evidence an attempt by the complainant to coach or school SFM in what to say, contrary to her own memory. I disagree with that contention. The text exchanges were between two teenage girls, then good friends who texted each day. The complainant had just finished her police interview which, it can hardly be doubted, was an upsetting experience for her. Their conversation started with a dispute about whether the complainant had mentioned penetration before, SFM saying not, and the complainant being sure she had. Their different memories over that issue does not suggest coaching or an attempt to suborn a witness, but rather a frank exchange at a time when the complainant was exhausted from the day's events.

[90] The texts start at 5.53 pm on 11 September 2017. The opening conversation, between texts 589-606,[79] commences with the complainant saying that the police "are going to classify it as rape", and that SFM and others will be interviewed. SFM responds "As rape? Why are they classifying it as that?" SFM was evidently not surprised by the contact or the subject matter, which compels the inference that there was a discussion between them prior to 589. Whether that was earlier that day, or before that day cannot be determined.

[91] In 592, SFM responds "Penetration ?????", and the complainant answers, "So it's called rape by penetration idk[80] something like that but they are classifying the case as a rape case". SFM then responded "… but there wasn't any penetration ??" In context SFM was asking the question, was there penetration, rather than stating the fact that there was not.

[92] The message in 597, "Dude you never said that. Not once. Ever.", drew the complainant's response as to what happened (the defendant "fingered me"), and her discomfort at discussing the topic, "I hate talking about this. It makes me so uncomfortable", and her response "But I'm sure I said that": 602.

[93] When SFM affirmed her memory that it had not been said, the complainant responded, "Oh okay well idk why I didn't say it but I think it's cause I didn't maybe want to say it so I just said he touched me": 606. The complainant thereby conceded to her friend that she may not have said there was penetration, even though that happened.

[94] It is at this point that SFM takes the conversation into new territory by asking, "Yeah okay but what do I say to them": 607. Plainly SFM was asking what she was to say to the police. It was not the complainant who raised that topic. The following texts, 609-612, show that the complainant told SFM that she should tell

---

78 AB 188 line 10; AB 189 line 14.

79 In what follows I shall refer to the texts by their assigned number in the Appeal Book.

80 The letters "idk" mean "I don't know".

the police "What I told you", "Yeah tell them that I said he touched me". The complainant here was not suggesting that SFM alter her recollection at all, but that she tell the police exactly what she recalled being told.

[95] The balance of that day's texts, 613-624, finishing at 10.09 pm, reveal exchanges about what was said originally, SFM saying that it was that the complainant had been "touched … over the blankets", and the complainant disagreeing that she would have said that.

[96] The text conversation resumed the following day at 7.45 am with SFM asking the complainant if she was okay: 628. The complainant said "Yeah just worried. What you remember could throw my entire case because it's wrong": 629 and 630. They resumed the debate about what the complainant had originally told SFM. The complainant said that she "would have never ever said over the blankets", in 633, and SFM maintained that she did, in 634, and "You said more but it's too hard to type it all", in 635.

[97] The complainant then said in 636-639:

> "Because I wouldn't lie to you. I understand if I didn't tell you in every detail or tell you about penetration because that's embarrassing and I didn't even tell [FFC] … But I would never say over the sheets because I know that's not true and would never say that ... I don't know if you should do a statement if you have a different story … People won't think I'm telling the truth"

[98] SFM responded by saying that they needed to talk at morning tea. The complainant responded in 641:

> "I don't want to talk about it that's the thing I just had to sit for two hours in front of a detective and tell them everything. I can't do it again I'll cry and I'm over talking about it. If you don't remember whatever if you think I said over the sheets they say that I don't care anymore he's not gonna get charged whatever"

[99] That the complainant was under stress is evident from that response, as it was to SFM, who said to the complainant "You sound like you're literally pissed at me": 642. The complainant responded: "I'm not sure don't make this about you … I'm pissed that the stories aren't lining up": 643-644.

[100] The complainant's response does indicate that she was worried because of the differing recollections, but the tenor of the exchange does not suggest an attempt to suborn a witness by getting them to change the story. SFM's next two responses put such a suggestion to rest: "Okay that's not my fault tho. You need to stop taking it out on me", in 645, and she immediately reiterated her version of what the complainant had told her: 646.

[101] In response the complainant reiterated her version, in 648-650, pointing out that the two incidents had been combined in SFM's response, and that on the first occasion the defendant had "touched me completely". She pointed out that she had not told her parents about the first occasion until "like a month ago on that Friday", and "That's why I was so upset and why when I told you you were saying I had to tell my mum but I didn't want to upset her": 650.

[102] The next exchange, in 651-652, is important in that it reveals there was no suggestion of an attempt to suborn SFM:

> SFM: "Okay but I'm supposed to tell them what you told me not what happened. So I will tell them that but I will say that I didn't realise until very recently that when you said 'touched' the first time you meant penetration"
>
> Comp: "Yeah tell them the truth because otherwise I'm fucked but yeah tell them what you remember me saying".

[103] In the exchange that followed SFM again set out her version of what she had been told, in 658 and 668, unwavering in the account. The exchanges ended with the complainant again telling SFM that she should tell the police what she (SFM) remembered "because u cant lie": 669 and 673. She also added:

> "Yeah well I explained everything on that Friday night over the phone bout my telling my parents and stuff and I said in detail because I knew you'd need to tell someone idk how it got lost in translation": 676; and
>
> "I understand if I didn't tell you the penetration part but everything else I dont understand how it got messed up": 677.

[104] In my view, the jury were entitled to see the text exchanges for what they were, a tense conversation between teenage friends about a matter deeply embarrassing to the complainant, who was under a great deal of stress as a result of telling her parents and upsetting them, and then undergoing the ordeal of a police interview in which she had to disclose details that were embarrassing to her, rather than an attempt to convince SFM that she should change her account. The complainant was, no doubt, scared and fearful of the events that had occurred, and took out her stress on her friend, but that does not mean she should be seen as having attempted to suborn SFM. I do not consider that the jury were compelled to form the view from the text exchanges that the complainant's credibility was so damaged that her evidence had to be rejected.

[105] The earliest preliminary complaint came about six years after the events in 2009. No notes were made except by the counsellor/therapist in 2017, and the only recording of any version by the complainant came in 2017, by the Facebook entries between the complainant and TFJ, and the text messages between the complainant and SFM. The jury had to assess the veracity of the preliminary complaint witnesses. Given the time that had elapsed between the events and what they were told, and between when they were told and when they had to recall that discussion, the jury were not compelled to regard either FFC or SFM as giving a reliable or complete account.

[106] Further, given the exchange between the complainant and SFM in the texts, it was open to the jury to conclude that there was likely a misunderstanding on SFM's part, or that the complainant intended to convey penetrative touching, but did not.

[107] It is true to say that there were differences between the accounts from the preliminary complaint witnesses. But there were consistent elements, namely that the complainant had been touched by the appellant's hand or hands, while she was in bed. The mode of touching was inconsistently given, but the jury might have

considered that to reflect the complainant's reluctance to reveal deeply personal and embarrassing matters even to friends, or differing recollections, rather than revealing any critical lack of reliability in the complainant. As the complainant said to SFM in her texts, "I hate talking about this. It makes me so uncomfortable", and she may not have mentioned the fact of penetration because "I didn't maybe want to say it so I just said he touched me". If the jury accepted that evidence as accurately reflecting how she felt when she was 16 and a half years old, and speaking to a best friend, they could reason that her reluctance to give details would likely have been more acute at earlier times when she was younger.

[108] I am not persuaded that the inconsistencies in the preliminary complaint evidence were such that the jury could not have accepted the complainant's evidence as credible and reliable.

[109] The appellant's central contention at the trial was that the complainant was not an honest witness, and that her evidence should be rejected on that basis rather than on issues of reliability. That contention was maintained before this Court on the appeal, it being submitted that the complainant's credibility was irretrievably damaged because her complaint history was "chequered with inconsistencies". It is therefore necessary to turn to the inconsistencies upon which the appeal relied.

[110] The first was that the complainant had denied that she had been touched by the appellant when she first spoke to her parents on 15 March 2010, after the events which constituted Count 3.

[111] As outlined above, when the complainant went to her parents on 15 March 2010 it was to tell them that she had been woken by the appellant shining a light in her room. Whilst her account to the police referred to him sitting on the bed and moving the sheets, at no time did she say to the police that he had touched her. In cross-examination at the trial she agreed that she had told her parents she had been woken by a light, but not that the appellant had sat on the bed or moved the covers.

[112] The contended inconsistency comes from the fact that on 15 March 2010, and the next morning when her mother questioned her, the complainant did not reveal the events that happened in 2009. In other words, when being questioned about whether she had been touched on the evening of 15 March 2010, she did not reveal that she had been touched in January 2009.

[113] A proper understanding of the evidence given by the complainant and her mother reveals that questioning about touching in 2010 was confined to whether the appellant had touched her on 15 March 2010. The questions did not extend to any other time. There is, therefore, no inconsistency in the complainant's evidence. What is left is a contention that the complainant should have spoken up and revealed the events of 2009, and her failure to do so somehow suggests that she has been dishonest in her account.

[114] That contention should, in my respectful view, be rejected. The complainant explained why she had not told them about the events of 2009. Her explanation included that she was young, had no idea what was going on, was not sure of what had happened, was scared to tell her parents and did not know what to say, was confused about the whole situation and uncomfortable in revealing it. Given that she was only eight years old at the time of the events in 2009, and nine years old at

the time of the events in 2010, the jury were entitled to conclude that the complainant would not necessarily react as an adult might, or even an older person might. Her account of confusion, uncertainty, fear and embarrassment was not inherently incredible, or unreasonable. The jury could well conclude that is exactly the sort of reaction one might expect from a very young girl confronted by a situation she did not understand.

[115] Part of this contention also centred on a question and answer in cross-examination, to the effect that the complainant had "deliberately decided" not to disclose the events of 2009. The passages concerning that question and answer are set out above: see paragraph [75].

[116] It is not obvious, in my respectful view, that the complainant's answer was necessarily an acceptance of a deliberate decision. When first asked,[81] the question had a number of components including the events that happened a year earlier, she had woken up with the appellant in her room, and had not told her parents. The latter was coupled with "deliberately decided not to". Added to that is the fact that within one or two questions later, it was evident that the complainant needed a break. When the trial resumed the topic was whether she had not told her parents because she was scared.[82]

[117] In that context she was reminded of a question asked at the committal which involved the phrase "deliberately decided not to mention". She was also reminded about her answer: "I was confused about the whole situation, and I didn't feel comfortable. And, again, I don't remember clearly what I was thinking, but I didn't tell her because I wasn't sure what was going on."[83] Once the answer is seen in context it becomes apparent, in my respectful view, that the complainant was not necessarily adopting the description that she had made a deliberate decision. In fact, she said she did not remember clearly what she was thinking at the time but remembers being confused, uncomfortable and scared. Her responses do not suggest that she, in fact, made a conscious or deliberate decision not to reveal the 2009 events.

[118] The same conclusion should be drawn about another aspect of the evidence upon which the appellant relies in this respect. That is, that the mother's evidence was to the effect that on 15 March 2010 the complainant was "adamant" that the applicant had not touched her.[84] That word was used in the question:[85] "She had been adamant that he hadn't touched her at all?" The answer was "On that night he hadn't". Seen in context the answer did not necessarily adopt the adjective "adamant". Even if it did, it adds nothing. The complainant did not say that she had been touched on 15 March 2010, and did not tell her parents that she had.

[119] The second inconsistency was said to be "prior inconsistent statements to her mother in 2011/2012".[86] This concerned a short piece of evidence that in 2011 or

---

81 AB 194 lines 25-27.
82 AB 196 lines 1-23.
83 AB 196 lines 33-35.
84 Appellant's outline para 20.
85 AB 307 line 29.
86 Appellant's outline para 16(b).

2012 the complainant and her mother were in a car when the complainant thought she saw the appellant. The complainant's evidence is as follows:[87]

> "Do you remember in around about 2011 or 2012, before you went to the Philippines, you were out and about in the car, and you thought you saw [the appellant]?---I don't remember that.
>
> Do you remember saying to your mum, "That's [the appellant], the man who came into my room. He looked at me"?---I – I was told that I did later on, but I don't remember.
>
> All right. Do you accept that you said that to your mum?---I guess so."

[120] The mother's evidence as to this incident was equally uncertain:[88]

> "Do you remember at that time, [the complainant] thought she saw [the appellant] in a car down at Redland Bay Road at Capalaba?---Sometime before we moved to the Philippines, you mean.
>
> Yes?---Yeah.
>
> You thought it was maybe in 2011?---Yeah.
>
> And do you remember [the complainant] said:
>
> > That's [the appellant] in that car. You know [the appellant]. The man who came into my room. He looked at me.
>
> Correct?---Something like that, yes."

[121] The appellant relied on those passages to contend that firstly the version was inconsistent in that she then said only that the appellant "looked at me", and secondly, that on that occasion she did not mention the events in 2009.

[122] I do not consider that the passage of evidence establishes either of those contentions. The occasion was not one, the jury would have understood, where a full account might have been expected. At best it was a passing moment as the complainant and her mother were travelling in a vehicle. Further, the complainant's reference to being looked at is completely understandable given her parents' evidence that the confrontation with the appellant involved him explaining that it calmed him to look at children sleep.

[123] If the jury accepted the parents' evidence, that had been overheard by the complainant and said by her later. Something to that effect had been said to SFM.[89]

[124] Finally, there was no suggestion from any witness that the mother had been told about the events in 2009 until 2017. If the complainant's comment in 2011 or 2012 is understood as referring to anything, it is to the events in 2010, the subject of Count 3.

---

87 AB 198 lines 19-26.
88 AB 309 lines 9-22.
89 AB 253 line 28; text 646 at AB 470.

[125] For these reasons the contended inconsistency would hardly have caused the jury to conclude that the complainant's credibility was irretrievably damaged, let alone that she was a dishonest witness.

[126] The third and fourth contended inconsistencies relate to the preliminary complaint evidence of FFC and SFM, and the text messages between the complainant and SFM.

[127] The first part of the contention concerned a conversation in about 2015 when each of the complainant and FFC were in grade eight or nine at school. At the trial the complainant could not remember what FFC said to her on that occasion, except that the conversation happened at school.[90] She said that she had not remembered the location of the conversation at the time of the committal, but that her memory of the location had been jogged when she watched her s 93A video.[91] However, the complainant could not remember what it was that FFC told her, except that it was "to do with her father" and "I don't remember it being about her".[92]

[128] As the evidence progressed, the complainant accepted that in response she had told FFC that she (the complainant) had been "touched". Other than that the complainant could not remember the conversation. She was asked whether she had told FFC that the touching happened when she was 10, to which the complainant answered "Possibly. I don't remember".[93] She accepted that at the committal she had said she told FFC it happened when she was "around aged 10", but explained that she had later found out that it was when she was about eight.

[129] FFC's evidence was that all she could remember of the conversation was that the complainant said she had been touched.

[130] At the end of the day the contended inconsistencies are of little consequence. The complainant explained her reluctance to reveal any details, and neither her evidence nor that of FFC's suggested that she had gone into any more detail than to refer to being touched. The jury were not compelled to conclude that the circumstances surrounding that conversation were such that the complainant's failure to mention greater detail meant that she was so lacking credibility, or dishonest, that her evidence had to be rejected. The fact that she told FFC that she was about 10 does not destroy her credit either. The complainant explained in her evidence otherwise that later the date had been fixed by reference to various facts that they were able to establish through her mother. There was no suggestion that in 2015, when she spoke to FFC, the complainant was attempting to give a full and accurate account. Further, the admissions which were made tied the date of the first occasion to 31 January 2009, and the second occasion to 15 March 2010. The basis of the questions and answers was that they related to the events in 2009, and not the later ones in 2010.[94]

[131] As for the exchanges between the complainant and SFM, a proper understanding of the evidence, in my respectful view, does not lead to the conclusion that the jury

---

90 AB 198-199.
91 AB 199.
92 AB 199 line 43.
93 AB 200 line 19.
94 AB 198 lines 28-29.

should have regarded the complainant's evidence as unreliable, dishonest or lacking credibility. That analysis is set out in paragraphs [89] to [104] above.

[132] The next inconsistency relied upon was a failure to complain to a psychologist in June-August 2016. There is nothing in this contention, as the complainant explained that she did not feel comfortable revealing issues relating to sexual abuse because the psychologist was a man.[95] The complainant's explanation that she did not feel comfortable and at age 15 or 16 she "couldn't do it to a stranger", was quite understandable and could not, in my view, compel the jury to reject her evidence.

[133] The next inconsistency related to the exchanges between the complainant and TFJ. The essential parts of that exchange are set out above in paragraphs [31] to [32] and [83] to [88]. The complainant offered an explanation that the jury could have accepted as to why she lied about the details. It was that TFJ had made deeply personal disclosures to her and she wanted to do the same and gain some sympathy. The explanation rings true when one considers the complainant's response to TFJ's disclosures. Told the sordid details of his childhood, and the sexual and other abuse he was subjected to, the complainant said "Holy fuck. I am so sorry ... Omg that's actually so shit. Thank you so much for telling me this." Then when TFJ said that the complainant was the only person who knew that much about him, the complainant responded "Thank you for trusting me. Mine is nothing compared to yours." TFJ then said that the complainant was important to him, and what she had been through was important to him, and he would like to know.

[134] Here, as elsewhere in the appellant's submissions, there was a tendency to expect a teenager talking with another teenager would have the reacted in a rational way that one might expect from an adult, or that the reactions to be expected would be the same as if the teenager was talking to authorities rather than a friend. That does not follow and the jury were not compelled to see it that way. I do not consider that this is such an inconsistency as would have been destructive of the complainant's credit in the eyes of the jury.

[135] Finally, the last inconsistency relied upon concerned the inconsistent statements made to the counsellor/therapist. That evidence is set out elsewhere in these reasons. It is true to say that the complainant did not reveal the digital penetration of 2009 but did reveal "touching her between the legs". Thus the inconsistency related to the fact of penetration, rather than touching on the genital area at all. The inconsistency becomes of little moment when one remembers that the appellant was acquitted on Count 2, the count of rape. Her account to the counsellor/therapist was otherwise consistent with Count 1 and the alternative verdict on Count 2. It was also consistent with what she revealed to her mother, initially saying that the appellant did not rape her but "he put his hands in my pants"[96] and only revealed the digital penetration under further questioning.

[136] Even if viewed as an accumulation of inconsistencies, I do not consider that the jury were thereby compelled to the view that the complainant's credibility was so damaged that her evidence had to be rejected, or was such that they could not be satisfied beyond reasonable doubt as to guilt.

---

95 AB 223 lines 13-25.

96 AB 228-229.

Conclusion

[137] There is no doubt that the jury had to consider evidence which revealed inconsistent accounts given by the complainant once she revealed the events in 2009 for the first time, starting with FFC, then SFM, TFJ, the counsellor/therapist and finally her mother. The fact that her accounts of digital penetration were such as to cause the jury not to be satisfied of the appellant's guilt on Count 2 (rape) does not mean that the complainant's credibility otherwise was so damaged that her evidence should have been rejected as dishonest. The main basis of the defence case run at trial and again on appeal was that the complainant was not simply unreliable, but actively dishonest in her evidence. The jury did not have to reach that conclusion, and could have accepted her explanation of why she did not reveal more in terms of detail, or reveal matters earlier than she did. It is not the least surprising to hear that a young girl was confused, scared, uncertain as to what to do, and uncomfortable or reluctant to reveal embarrassing personal details. It is equally not surprising to hear that a teenage girl might exaggerate or embellish her own account in an effort to appear sympathetic towards another abuse victim. And it is by no means apparent that in her exchanges with SFM the complainant was doing anything more than expressing teenage frustration at a time of great stress.

[138] In my view, it was open to the jury to accept the complainant's evidence, as they did, on Counts 1 and 3, and the alternative verdict on Count 2, whilst not being satisfied that there was digital penetration. The wholesale rejection of the complainant's evidence was not called for or necessary on the part of the jury. Such remaining inconsistencies as there were, apart from the question of digital penetration, were the subject of explanations and circumstances which the jury could accept.

[139] For these reasons ground 1 fails.

Ground 2 – leaving the alternative verdict on Count 2

[140] This ground contended that the learned trial judge erred in directing the jury that an alternative verdict of indecent treatment was open on Count 2 on the indictment, which charged the applicant with rape, by way of digital penetration. The essential contention here was that the obligation to identify the real issues in the case and to instruct the jury on so much of the law as is necessary to decide those issues did not call for the alternative verdict to be left on Count 2 for the following reasons:

(a) the complainant's evidence that penetration had occurred was unequivocal;

(b) the sole issue on which the trial was fought was whether the complainant was an honest witness, not whether she was reliable as to details of the events;

(c) there was no challenge to the reliability of her evidence of penetration, but rather the challenge on the basis that she was lying;

(d) therefore there was no rational explanation for the acquittal on Count 2, other than that the jury doubted the complainant's honesty;

(e) that being so, if the jury had a reasonable doubt about the truthfulness of the complainant's evidence as to penetration, that should have infected their assessment of her truthfulness generally, and the alternative should not have been left.

[141] It should be noted that Senior Counsel for the appellant conceded that success on this ground would affect the guilty verdict on Count 2, but would not affect Counts 1 or 3.

[142] In the discussion prior to the summing up, the question of whether an alternative verdict should be left on Count 2 was raised by the learned trial judge. His Honour said that the only scope for an alternative verdict would be based on there being a doubt about penetration.[97] Counsel for the appellant referred to the complainant's evidence that there was penetration, and the defence case that the appellant did not touch her at all. In those circumstances Defence Counsel did not seek that an alternative verdict be left. Counsel was at pains to make it clear that the decision was "a tactical decision on my part".[98] The learned trial judge raised that even if there was such a tactical decision, an alternative verdict would have to be left if fairness dictated that it should be. Counsel for the appellant expressed the view that there was no basis for it given the complainant's evidence that she felt penetration. In those circumstances the learned trial judge expressed the view that he would not leave the alternative verdict. The Prosecutor took the stance that if defence Counsel saw no issue warranting an alternative verdict, "I'm not going to contend for anything different".[99]

[143] The discussion at that point ended with the learned trial judge advising that if anyone had changed their mind before the summing up commenced, the issue could be raised again.[100]

[144] The following day the Prosecutor raised the issue again on the basis that "having been comprehensively through the preliminary complaint evidence" there was a body of evidence that might cause the jury to have some doubt about penetration on Count 2.[101] That was opposed by Counsel for the appellant because of the way in which the issues had been litigated, with the complainant giving clear evidence of penetration on the one hand and the appellant saying that he never touched her at all.[102]

[145] Defence Counsel went on to urge that if the learned trial judge was going to leave the alternative verdict, the jury should be told that it was not the defence case. He did so because he did not want the jury "thinking that I'm trying to have a bob each way on this".[103] Defence Counsel went on to urge that "the only issue in dispute is whether he touched her at all, not whether he penetrated her".[104] On that basis he urged that there was no requirement to leave the alternative verdict.

[146] The learned trial judge then referred to the complainant's age, observing that the jury "could think – well, we're inclined to believe the complainant, but, you know, it's a big step to conclude there was an actual penetration".[105] At that point Defence Counsel submitted:[106]

---

97 AB 379 line 30.
98 AB 379 line 47.
99 AB 380 line 36.
100 AB 380 lines 39-43.
101 AB 425 lines 14-19.
102 AB 428 lines 21-29.
103 AB 428 lines 41-46.
104 AB 429 line 25.
105 AB 429 lines 28-30.
106 AB 429 lines 32-35.

> "Well, if your Honour's going to instruct on the alternative verdict – and, as I've indicated, I've got no particular opposition to that, provided you tell them that this isn't the way the defence case was run. It's a matter that you have to instruct them on."

[147] The learned trial judge concluded that there was scope for the jury having a doubt about actual penetration, and that being the case, fairness dictated that the alternative be left.[107]

Consideration

[148] The relevant principles applicable to a consideration of this issue can be summarised in this way:

(a) the duty of a trial judge with respect to alternative verdicts does not require an alternative verdict to be left to a jury in every case; rather, the question is whether an instruction on an alternative verdict is necessary to secure the fair trial of the accused, according to the circumstances of the particular case;[108]

(b) the rationale for directing a jury about alternative verdicts comes from a broader perspective than a consideration of the interests of the accused; public interest in the administration of justice is best served if a trial judge leaves to the jury, subject to any appropriate caution or warning, that irrespective of the wishes of trial Counsel, any obvious alternative offence which there is evidence to support;[109]

(c) the conduct of a fair trial may require an alternative verdict to be left although it is not requested by Counsel for the accused;[110]

(d) it would not be conducive to a fair trial to leave an alternative verdict where the defence case may have been differently conducted had the possibility of that verdict been one which was raised at the outset of the trial;[111]

(e) the need to advise a jury about an alternative lesser offence comes from the risk, in the particular case, that a defendant who has committed only the lesser offence will either be wrongly convicted of the more serious offence or acquitted altogether;[112] and

(f) the facts and circumstances of the particular case need to be considered and the essential inquiry is on the fairness of the trial.[113]

[149] In the present case the complainant's evidence in relation to Count 2 was that after the appellant had put his hand under her pants and touched her, she pretended to wake up and the appellant desisted, heading to the bottom bunk. Then he stood up and put his hands through the bars, under her pants and was "touching me … through my legs". Under specific questioning in her police interview she described the appellant as putting his fingers "through **in between my legs and then** … inside

---

107 AB 431 lines 24-37.
108 *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, at 491 [38].
109 *James v The Queen* at 487 [27], adopting *R v Coutts* [2006] 1 WLR 2154, 2167 at [23].
110 *James v The Queen* at 491 [38].
111 *R v Holzinger* [2016] QCA 160 at [31].
112 *R v Holzinger* at [31].
113 *R v Holzinger* at [29].

me", and putting his hand through "**between my bottom and through and then** … into my vagina".[114]

[150] She was asked to explain how it was that she knew she had been penetrated, and described, with difficulty, that it felt different and she could "feel him going further inside me".

[151] In the preliminary complaint evidence she had referred to being touched when she spoke to FFC and SFM, only referring to digital penetration when she spoke to TFJ and her mother in 2017. She told her mother firstly that the appellant had touched her with his hands, by putting **his hands in her pants**. It was when her mother asked a direct question that she referred to penetration. In her text messages to SFM concerning the 2009 events, the complainant said the appellant "did it from the back **like in between my legs and fingered me**", "he touched me completely".[115]

[152] For the reasons explained in respect of ground 1, the jury were not put in the position where their non-acceptance of the evidence of penetration compelled the wholesale rejection of the complainant's evidence. Thus, there was a body of evidence upon which the jury, if it accepted the complainant's evidence, might be satisfied that the appellant had touched the complainant between the legs even if they were not satisfied that penetration had occurred. The complainant had described two distinct episodes which constituted Counts 1 and 2, separated by a break when she moved and the appellant withdrew to the bottom bunk. Her evidence as to the second occasion (Count 2) plainly referred to her being touched between the legs. If the jury were not satisfied that they could accept the evidence of penetration, there was nonetheless evidence upon which they could reach a conclusion about indecent dealing.

[153] In my view, the particular facts and circumstances of this trial, and the duty upon the trial judge to ensure the fairness of the trial, warranted the alternative verdict being left to the jury. Just because the battle lines between the parties were drawn by reference to whether the complainant was an honest witness, rather than a mistaken one, that does not mean that the jury were obliged to reject the totality of the complainant's evidence even if they were not satisfied about penetration.

[154] However, the jury were not just confronted with the decision as to whether the complainant was honest or not. The mere fact that she was only eight when the events of 2009 occurred, and the delay between then and the police interview, raised the question about the reliability of her evidence. Moreover, in address by Defence Counsel the question of reliability was raised as distinct from truthfulness.[116] That differentiation was reflected in the directions given to the jury, largely in standard terms, as to how to assess credibility and reliability, and deal with inconsistencies. Finally, the directions included one warning of the dangers of convicting upon the complainant's testimony alone, "unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt that it is truthful, accurate and reliable."[117]

---

114 Emphasis added.
115 Emphasis added.
116 AB (Vol 1) 28 lines 3-5; 42 lines 29-32; 47 lines 11, 28; 48 line 10 and 54 line 4.
117 AB (Vol 1) 86 lines 27-31.

[155] There was no suggestion here that the defence case might have been differently conducted, as Defence Counsel made clear to the learned trial judge. The opposition to the alternative verdict being left was purely a tactical decision on the part of Defence Counsel, rather than being based on any consideration of fairness.

[156] In my view, the learned trial judge was correct to leave the alternative verdict. Ground 2 therefore fails.

Conclusion

[157] Both grounds having failed, the appeal should be dismissed.

[158] **McMURDO JA:** I gratefully adopt the extensive discussion of the evidence in the judgments of Morrison JA and Crow J. My consideration of the evidence leads me to the conclusion that the verdicts were unreasonable, so that the convictions should be quashed and the appellant should be acquitted on all counts. In essence, the combined effect of the complainant's inconsistent versions of what had (and had not) occurred is that it was not open to the jury to be satisfied of the appellant's guilt beyond a reasonable doubt.

[159] The appellant was convicted of two offences of indecent dealing, said to have been committed in the one incident in January 2009, and an offence of attempting to indecently deal with the complainant, in an incident in March 2010. The proof of that third count required, amongst other things, the jury to be satisfied that on that occasion, the appellant intended to deal with the complainant in a way which would have constituted an offence of indecent dealing. At the trial, the prosecution accepted that, viewed in isolation, the evidence of count 3 would be insufficient to prove that intent. The prosecution case was that the necessary intent for count 3 was proved by the commission of the offences in 2009. Consequently, the trial judge directed the jury that if the appellant was not guilty of counts 1 and 2, they should acquit him on count 3.

[160] As for counts 1 and 2, the appellant agreed that he was in the complainant's bedroom on the night in question. His evidence was that he slept the night in the bunk bed below the complainant's bed, having moved to that room from another room where he had fallen asleep after a night of drinking. On all accounts, there was nothing about the complainant's behaviour on the following day, towards the appellant or otherwise, to indicate that there had been any improper conduct by him.

[161] The complainant's evidence was that immediately after the conduct charged by counts 1 and 2, she got out of bed to tell her parents of what had happened, but did not do so because they were asleep. Instead, she went back to sleep in her bed. She accepted that on the following morning she "… had a pleasant, polite conversation" with the appellant. Although she had meant to tell her parents during the night of what had occurred, she said nothing to them about these events on the following day, and indeed for many years until 2017.

[162] As for count 3, she did speak to her parents on the night in question about the appellant being in her room. Each of her parents testified that the complainant woke them up and said that she had been in her bed when she realised that the appellant was there and a light was shining on her face. On her evidence, as well as that of her mother, she then said that the appellant had not then touched her and

gave no indication that she had been touched or otherwise mistreated on the earlier occasion.

[163] On one view of the evidence, her mother's questioning of her on that night, and on the following day, as to whether she had been touched by the appellant, was an inquiry about what had happened on that night, without reference to any other occasion. But at one point in her evidence, the mother did say that although she had no specific recollection of asking the complainant whether she had been touched on any other occasion, she said that she was "certain" that she would have done so.[118] Notwithstanding that answer, the jury could have considered that the mother's questions to the complainant were expressed in a way which inquired only about what had just occurred.

[164] Either way, the complainant's omission to then tell her parents, or at least her mother, of what had happened in 2009 was significant. The complainant's evidence was that when she was repeatedly questioned by her mother in 2010, she made a deliberate decision not to say what had happened to her in 2009.[119] She said that she was "scared" to do so, and at another point she said "I was 10. I still had no idea what was going on."

[165] A jury could accept that such a young girl might not have the confidence to tell her parents of this 2009 conduct, when it occurred. But in the circumstance where the complainant had been so evidently disturbed by the appellant's presence in her room, in the 2010 incident, that she went straight to her parents to report it, her explanation for not then telling her parents of what had happened in 2009, in response to questioning as to whether he had touched her, was more difficult to accept. Her complaint to them had led to the father asking the appellant to leave the house.

[166] There was then the occasion, in 2011 or 2012, when the complainant was in a car with her mother, when she thought she saw the appellant and said that there was "the man who came into my room [and] looked at me". Of itself, that evidence was not as significant as the evidence of what was not said in 2010. Its significance, although limited, was adverse to the prosecution case.

[167] The first time that the complainant said anything which could have been a reference to the 2009 offences was in 2015, when talking to a school friend.[120] This witness said that she and the complainant were then "best friends", and that she recalled telling the complainant that she had been sexually assaulted by someone "in the family at their house". The complainant comforted her and said that she had had the experience of being in her house, when a "family friend had come into her room and touched her". She said that the complainant did not go into any "further details". Of itself, this evidence neither strongly supported, nor detracted, from the complainant's credibility.

[168] Of greater significance was the evidence of another school friend, to whom the complainant spoke about sexual abuse in late 2015 or early 2016.[121] This witness described the complainant as her best friend at school from grade 9 to grade 11. In

---

118 AB 307 line 44.
119 AB 194 line 19.
120 Called "FFC" by Morrison JA and Crow J.
121 Called "SFM" by Morrison JA and "Crow J.

her evidence in chief, she described this conversation with the complainant in, she thought, 2015:

> "Can you tell the court how and when that conversation, or those conversations occurred?---Yeah. So the first thing I ever heard about it was, I think in 2015, and she was staying at my place for the night, and we were downstairs in the parking lot of my units. And I don't know how the conversation came up, but she brought up that when she was younger – I don't know – I don't recall how old she was. I think between eight and 10, maybe. She said that she was at home one night. She was in bed, and one of her parent's friends walked in, and he – he thought she was sleeping, but she wasn't, but she pretended to be asleep because she didn't know what to do. And he sat down on the bed, and he started feeling over the top – over the top of the covers, and then he went under the covers, and started touching her. And she said that there was two different occasions that this – that this sort of thing happened to her. And I don't remember much else of what she told me.
>
> Okay. Now, you've described one occasion. Did she describe what happened on the second occasion?---I remember vaguely it was something to do with a photo, and she said that he had took a photo of her sleeping, or something, and said that it calmed him down because he had insomnia, or something like that.
>
> Okay. Now, you've indicated you're recalling vaguely. Can you remember the actual words that she used?---No. It was a long time ago."

[169] Also in evidence in chief, this witness said that she and the complainant had spoken shortly before the witness was interviewed by police in 2017. The witness said that she was then told by the complainant that "it was going to be a rape charge", to which she had responded: "How is that possible, if there was no penetration?". The complainant answered "there was", and that "[w]hen I told you that he was touching me, that's what I meant."

[170] In cross-examination, this witness revealed more of her conversation with the complainant in 2015. Parts of her statement to police, given in 2017, were read to her and she agreed that they were an accurate statement of the 2015 conversation. In those parts of the statement, the witness had said:

> "The first time, there was a man who was friends with her parents, went into her room, and sat down right next to her on the bed, and was sort of moving his hands, like, around her on top of the covers.
>
> …
>
> I remember her telling me she wasn't sure what to do, obviously, in that situation, so she was just not doing anything; not moving or anything, and sort of, like, pretending, I think, that she was asleep. But when he started, like, sort of moving his hands around her, she pretended that she was, like, waking up, so that he would maybe stop. That's what I remember, I think, from the first incident.
>
> …

> And the second one was sort of similar but he came in and sort of did the same thing but her parents were out in the lounge room, I think, and they saw a light coming from her room and they went into her room to see what it was and they found him. And that she said that he told them – [the complainant] said that he told her parents that he had trouble sleeping because he had insomnia and it helped him to watch children sleep."

[171] The witness agreed that the complainant had not told her that the appellant had touched her on the vagina or put his fingers into her vagina, or even that he had put his hands under the bedcovers. She said that it was only shortly before she was interviewed by police, that the complainant had said these things had happened.

[172] On 11 September 2017, the complainant was interviewed by police, and the video recording of that interview was tendered at the trial. At the conclusion of the interview, investigating police officers told the complainant that she should not speak to any other witnesses about their evidence. As is detailed in the other judgments, the complainant disregarded that instruction, and on that night and the following morning, exchanged SMS messages with this witness. The content of those messages is set out in the judgment of Crow J. Clearly from them, the strong recollection of the witness at that time was that the complainant had told her only that she had been touched "over the blankets." That was the recollection of the witness when interviewed by police on 15 September 2017. The witness had a different recollection in evidence in chief, saying that she had been told that "then he went under the covers, and started touching her". However, that evidence was discredited by the cross-examination to which I have referred.

[173] In her evidence, the complainant said that she could not remember the exact words which she used, or "how much detail I went into" when speaking to this witness in 2015.[122] But she said that "I didn't go into as much detail with her as I did with the police," and agreed that she had not told this friend in 2015 that the touching involved penetration. When it was put to her that all she had told this friend was that she had been touched over the blankets, the complainant answered that she could not "remember the conversation clearly" or "the detail I went into".[123]

[174] The effect of the evidence of this witness was that the most serious conduct which the complainant had revealed to her was a touching over the blankets. Plainly, that was the clear recollection of the witness in 2017, as can be seen from the SMS messages and her statement to police. Despite going further in her evidence in chief, the witness effectively returned to her 2017 recollection, when cross-examined. The complainant's evidence did not contradict the evidence of the witness about their conversation in 2015. The result was that the jury had compelling evidence that in 2015, the complainant had given to her best friend an account which was very different from that which the complainant gave at the trial. All of this should have damaged the complainant's credibility, in the jury's consideration. Further, the complainant's contact with the witness, against the instructions of police, betrayed her concern that the witness would not give an account which supported her case.

[175] In 2016, the complainant saw a psychologist on three occasions. She admitted that she did not tell the psychologist anything about sexual abuse. Her explanation, that

---

122 AB 209.

123 AB 219-220.

she did not feel comfortable in discussing that with a man, could have been accepted by the jury.

[176] In early 2017, the complainant exchanged messages on Facebook with another friend, who told her that an older man had raped him.[124] The complainant responded to that message by saying that she had been raped, by a family friend. But the description she gave of this man's offending was quite different from the version which she gave in her evidence. She said to this boy that she was repeatedly stroked by the man on her stomach and that on the occasion of the rape, he had violently grabbed her. She said to him that the man "continued to do it for as long as my parents didn't know". In her evidence, she conceded that she had "exaggerated the story", and that her communications with the boy contained a number of lies. Why she felt that she had to exaggerate and misstate what was done to her, was not explained. Another view of this evidence was that it betrayed the falsity of her claim that she had been raped at all. This evidence significantly affected her credibility.

[177] In August 2017, at the suggestion of her mother, the complainant went to see Ms Crawford, who described herself as the proprietor of a business described as "Counselling and Energy Healing". The complainant said to Ms Crawford that there had been two events involving "touching … between her legs and moving the blankets" on the first occasion, and "sitting on her bed with the light on in his phone" on the second occasion. The recollection of the witness was assisted by notes which she made shortly after the consultation, the content of which is set out in the judgment of Morrison JA. This version of the 2009 occasion was not inconsistent with what the complainant had said to her friend in late 2015, namely that there had been some touching above the blankets.

[178] After this consultation with Ms Crawford, the mother asked her whether the appellant "put his fingers inside you", to which the complainant said "yes". It was at that point that the police became involved.

[179] From this evidence, it is unsurprising that the jury acquitted the appellant on the charge of rape. The appellant abandoned the ground of appeal which contended that this verdict was inconsistent with the other verdicts. Nevertheless, the particular weaknesses in the complainant's version, that she had been raped, affected her credibility more generally.

[180] As already noted, the judge instructed the jury that the element of intent, for count 3, was not proved unless the jury was satisfied of the appellant's guilt on at least one of the other counts. It followed that the jury was not to use the evidence of count 3 to support the prosecution case on counts 1 and 2. If the evidence of the 2009 counts could not prove at least one of those offences, it could not be bolstered by the evidence of the appellant's presence in the complainant's bedroom in 2010.

[181] The prosecution case depended entirely upon the complainant being accepted as an honest and reliable witness about the 2009 occasion. The complainant's evidence that she was raped, by a digital penetration of her vagina, was inconsistent with what she had said to close friends over the years, even on the occasion of her Facebook exchanges in 2017.

---

124 This witness is described as "TFJ" by Morrison JA by Crow J.

[182] Her evidence was quite different from what she had told her friend, in 2015, which was that the only touching of her was above the bedclothes. It was not open to the jury to accept that a touching of that kind occurred, and that it constituted indecent dealing, because ultimately that was not the complainant's evidence or the way in which the prosecution particularised its case.

[183] For these reasons, there was a real possibility that the complainant's evidence about the 2009 occasion was not her actual memory of what occurred, and it was a possibility which could not be excluded beyond reasonable doubt.

[184] Like Crow J, I find it unnecessary to determine the remaining ground of appeal. I agree with Crow J that the appeal should be allowed, the convictions should be quashed and a verdict of acquittal should be entered on each count.

[185] **CROW J:** On 9 August 2019 the appellant was:

a) convicted on count 1 of indecently dealing with a child under 12 years of age;

b) acquitted on count 2 of rape of the same child;

c) convicted on an alternative to count 2, indecent dealing of the same child; and

d) convicted on count 3 attempted indecent dealing of the same child.

[186] The appellant was sentenced to 12 months' imprisonment in respect of counts 1 and 2, six months' imprisonment in respect of count 3. All the terms of imprisonment were concurrent and suspended after the appellant had served four months' imprisonment, with an operational period of two years.

Evidence at Trial

[187] The prosecution evidence at trial consisted of the evidence of six witnesses, a recording of police interview,[125] a photocopy of the complainant's diary entries,[126] floorplans of the A Street and W Road houses,[127] a photograph of the complainant's bedroom at W Road,[128] Facebook conversations,[129] text messages,[130] and a pre-text phone call to the appellant.[131] The appellant also gave evidence and called two witnesses.

Complainant's Evidence

[188] The complainant's evidence was presented in part by the playing of a 43 minute video recording of her police interview on 11 September 2017[132] and partly in closed court. In examination-in-chief, the complainant gave evidence of her initial complaints, and the crown tendered copies of the complainant's diary entries. The diary entries largely reflect her police interview and were read out to the jury as follows:[133]

---

125 Exhibit 1, AB2 491.
126 Exhibit 2, AB2 457.
127 Exhibit 3, AB2 462; Exhibit 4, AB2 463.
128 Exhibit 5.
129 Exhibit 6, AB2 464.
130 Exhibit 7, AB2 465.
131 Exhibit 8.
132 Exhibit 1.
133 AB2 181/29-47; AB2 182/1-14.

> "When: 2009, eight years old. Mum found a picture of her hair from the night on Facebook. What I remember: I was sleeping on the top bunk of my bed and heard when Steve came upstairs for a towel or to get changed. I don't remember if I went back to sleep, but I remember he was sleeping in my room either on the floor or on the bottom bunk. I woke up and was facing towards him, but it was dark and I don't think he could see my eyes open. He was standing on the floor with his head looking onto the top bunk. While I woke up, I could see his hand in between the bars of the bunk. I can't remember what I was wearing, but I know it seemed easy to get his hand in my pants. He was really slow and careful as I'm guessing he didn't want to wake me up. He started touching the front of my genitals, but I can't remember how long he did it for until I decided to pretend I woke up. I rolled over and acted if I wasn't completely awake, but awake enough to move. I rolled over towards the wall and thought he would stop because it's hard to touch my genitals if I was facing the other way. He paused for a bit as I think he thought I was awake. He then tried touching me again. He put his hand between my legs and penetrated me. I didn't know what was going on so I didn't do anything. I don't know how long it was, but eventually – don't know how long it was, but I eventually moved and sat up. He was really fast at ducking so I couldn't see him. I got out of bed and looked at him and said, 'Where are my parents?' He said, 'Out there,' I think, or something similar to that. I went out to the lounge room and Dad was asleep on the couch, so I went to Mum's room and she was asleep, too. I went back to sleep and never talked about it. Next time, he came into my room, sat on my bed and moved my sheets. I woke up and he left, so I went and told my parents he was on my bed. I remember trying to stay awake that night before he came in because I thought he would do it again."

[189] In cross-examination the complainant denied having received any assistance writing the statement prior to speaking with police[134] and initially denied having assistance in preparing for the interview but later admitted that she had.[135] The complainant admitted to exaggerating and lying about details of the event to a male friend, TFJ, who she confided to on Facebook messenger.[136] The complainant gave further evidence of the initial description of the event to her parents[137] and was cross-examined about the fact that those initial complaints did not allege she had been 'touched'.[138] Furthermore, the complainant was cross-examined as to her initial complaints to her friends FFC, SFM and Z and the various inconsistencies arising from them.

FFC's Evidence

[190] FFC gave evidence that at school in 2015, the complainant had told her that a family friend that had come into her room and touched her.[139] FFC said that the

---

134 AB2 183/10.
135 AB2 183/10-44.
136 AB2 186/45-46; AB2 188/15-34.
137 AB2 192/21-22.
138 AB2 191-194.
139 AB2 249/10-15.

complainant did not go into any further detail because there were other people in class.[140] In cross-examination, FFC was questioned whether the complainant had said that the man had put his finger in her vagina and FFC stated "she just said that he touched her".[141] FFC also gave evidence that the complainant did not want to go and see a guidance counsellor.[142]

SFM's Evidence

[191] SFM gave evidence that in 2015, when the complainant was staying at SFM's house, the complaint told her that when she was younger, a family friend walked into her room and "sat down on the bed, and he started feeling over the top … of the covers, and then he went under the covers, and started touching her".[143] SFM said that the complainant told her that there were two different occasions that this sort of thing happened to her.[144] In cross-examination SFM agreed that the complainant had not told her that the appellant had touched her on the vagina or put his fingers into her vagina until SFM gave her statement to police in 2017.[145]

Marie Crawford's Evidence

[192] Ms Crawford runs a business called 'Marie Kaye Counselling and Energy Healing',[146] which offers counselling and meditation services.[147] Ms Crawford gave evidence that the complainant started to visit her in August 2017 and in the second session disclosed to her that she had been sexually abused.[148] Specifically, Ms Crawford said that the complainant had told her that "she was on the top bunk and she woke to someone touching her between her legs and moving the blankets. This frightened her and she moved her legs and kept moving until he gave up and went back to sleep".[149] Ms Crawford also gave evidence that the complainant had told her that on another occasion, two years later, the same man visited again, and the complainant awoke to him sitting on her bed with his light on his phone.[150] In cross-examination, Ms Crawford confirmed that the complainant had not told her that the man had touched or penetrated her vagina.[151]

TP's Evidence

[193] TP is the complainant's mother. TP gave evidence that around 1 am on the morning of 15 March 2010, the complainant came in and woke up her and the complainant's father, and explained that the complainant had woken up to the appellant sitting on her bed, shining a light on her face.[152] TP also gave evidence that when the complainant's father questioned the appellant as to why he was in the complainant's room, the appellant's first explanation was that he was looking for sleeping pills,

---

140 AB2 249/10-14.
141 AB2 251/20-21.
142 AB2 251/32-39.
143 AB2 253/23-25 (emphasis added).
144 AB2 253/24-25.
145 AB2 257/15-31.
146 AB2 265/18-19.
147 AB2 265/19.
148 AB2 266/3.
149 AB2 267/11-13.
150 AB2 267/33-35.
151 AB2 274/27-31.
152 AB2 279/34-37; 279/43-45.

and that he liked "watching them sleeping" because it calmed him.[153] TP gave further evidence that she asked why the appellant was in their daughter's room, to which the appellant replied "I don't know why".[154] TP was cross-examined extensively about the complainant's initial reporting of the incident to her and about the night she and the complainant's father approached the appellant as to why he was in the complainant's room.[155] TP conceded that although she had not been aware that the complainant had been sexually abused until 18 August 2017,[156] she nonetheless made a complaint to police on 16 March 2010.[157] TP made the pre-text phone call to the appellant on 17 September 2017.

MP's Evidence

[194] MP is the complainant's father, and was best friends with the appellant for about ten years.[158] In examination-in-chief, MP gave evidence that he was awoken by the complainant who said that "Steve or someone was sitting on the bed with a light".[159] He gave further evidence of confronting the appellant about the incident and asking the appellant to leave.[160] In cross-examination, MP gave evidence that he never accused the appellant of doing anything wrong, rather "asked him why he was in the bedroom" and "why he had the light on".[161]

Appellant's Evidence

[195] The appellant elected to give and call evidence. In examination-in-chief, the appellant gave evidence that on 31 January 2009, he fell asleep on the sofa at the complainant's parents' house in A Street, VHN after a night of drinking.[162] The appellant said that he woke up in the middle of the night, and moved into the bottom bunk in the complainant's bedroom and denied the actions alleged by the complainant.[163] The appellant said that the next morning, the complainant looked over the top bunk, saw him on the bottom bunk and said "[w]hat are you doing here?" to which the appellant replied "I slept here last night".[164] The appellant gave evidence that MP drove him back to his parents' house, and having realised he forgot his wallet, returned to the house, where the complainant was waiting to hand the appellant his wallet.[165] The appellant gave further evidence that on 14 March 2010, he stayed at the complainant's parents' house at Wimborne Road, and attempted to go to sleep in the lounge room at around midnight.[166] The appellant had flown in from overseas and could not fall asleep.[167] The appellant said that he had sleeping tablets in his wallet and searched the house to find his wallet by using the screen on his mobile phone.[168] After finding his wallet on the computer desk, he said he returned to the lounge room, and after about half an hour was confronted by

---

153 AB2 281/36-47.
154 AB2 297/43-45.
155 AB2 305-315.
156 AB2 315/39-40.
157 AB2 315/39-40.
158 AB2 318/45-46.
159 AB2 321/14-15.
160 AB2 327/31.
161 AB2 331/25-27.
162 AB 2 341-342.
163 AB2 342-3/36-47; 343/2.
164 AB2 343/7-10.
165 AB2 343/40-47; 344/3-6.
166 AB2 345/27-42.
167 AB2 346/5.
168 AB2 346/7-18.

MP, asking why he was in the complainant's room.[169] He denied saying to MP that watching children helped him sleep.[170] The appellant further said that he slept in the car and called up the complainant's parents the next day "to apologise for any disturbance that [he] may have caused".[171]

[196] In cross-examination, the appellant denied making contact with the bed when looking for his phone or moving the bed sheets around.[172] The appellant conceded that he had asked the complainant's parents to keep what had happened to themselves but "only after [TP] had claimed that she was going to be telling my circle of my friends that I had been trying to take photographs of [the complainant]."[173] In cross-examination, the appellant repeated the denials of the incident and claimed that he was only in the complainant's room because he saw a spare bed and was uncomfortable where he was sleeping in the lounge room.[174]

Gregory Pink's Evidence

[197] Mr Pink works in the financial sector and is a school friend of the appellant.[175] He gave evidence that the appellant "has always been regarded – and regarded as an honest gentleman".[176]

Katherine Harris

[198] Ms Harris is a family friend of the appellant.[177] Ms Harris gave evidence that "all of my dealings and what I know of [the appellant's] general reputation and honesty is that he is honest".[178]

The Appeal

[199] On 19 August 2019 the appellant filed a notice of appeal against his convictions. Ground 2 of the appeal was abandoned, and leave was granted to amend the notice of appeal such that the grounds of appeal are:

(1) that the verdicts of the jury were unreasonable or cannot be supported having regard to the evidence;

(2) [abandoned]; and

(3) the learned trial judge erred in directing the jury that an alternative verdict on indecent treatment was open on count 2 of the indictment.

Appeal Ground 1 – Unreasonable Verdict

[200] Section 668E(1) of the *Criminal Code* 1899 (Qld) provides:

"**668E Determination of appeal in ordinary cases**

---

169 AB2 347/1-14.
170 AB2 347/22.
171 AB2 348/7-10.
172 AB2 365/12-18.
173 AB2 369/7-10.
174 AB2 371/26-33.
175 AB2 374/38-40.
176 AB2 375/12-14.
177 AB2 376/35.
178 AB2 377/7-9.

> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

[201] With specific reference to *M v The Queen*[179] and *MFA v The Queen*,[180] Fraser JA said in *R v Shoesmith*:[181]

> "Ground 1 raises the question whether, in terms of s 668E(1) of the *Criminal Code* 1899 (Qld), the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. The test is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The court must conduct an independent review of the evidence, but it must also bear in mind that the jury had the benefit of seeing and hearing the witnesses give their evidence and it must accord respect to the jury's resolution of the contested factual questions reflected in the guilty verdict."

[202] In *Ratten v The Queen*,[182] Barwick CJ said of a Court of Appeal's duty to set aside a conviction on the basis that it was unreasonable that: "It is the reasonable doubt in the mind of the [appellate] court which is the operative factor … if the [appellate] court has a doubt, a reasonable jury should be of a like mind."[183]

[203] Of that passage from *Ratten*, the plurality in *M v The Queen*[184] said "to ask only whether the [appellate] court has a doubt may place insufficient emphasis upon the fact that the jury, having seen and heard the evidence given, was in a position to evaluate that evidence in a manner in which a court of appeal cannot".[185] In *R v Baden-Clay*,[186] the High Court emphasised that a court of criminal appeal is not to substitute a trial by an appeal court for trial by jury and that "… the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without 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".[187]

[204] In *M v The Queen* the plurality said:[188]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where

---

179 (1994) 181 CLR 487 at 493 - 495.
180 (2002) 213 CLR 606 at 624 [59].
181 [2011] QCA 352 at [30] (footnotes omitted).
182 (1974) 131 CLR 510.
183 *Ratten v The Queen* (1974) 131 CLR 510 at 516.
184 (1994) 181 CLR 487.
185 *M v The Queen* (1994) 181 CLR 487 at 494.
186 (2016) 258 CLR 308.
187 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].
188 (1994) 181 CLR 487 at 494-495 (footnotes omitted) (emphasis added).

> a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the 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."

[205] The principle in *M*,[189] may be applied by an analysis of the four specific categories referred to:[190] evidence lacking credibility, evidence displaying discrepancies, evidence displaying inadequacies or evidence which is tainted or otherwise lacks probative force. In considering these principles, particular regard must be placed upon the advantages of the jury.[191]

[206] In *Pell v The Queen*,[192] it was concluded that the plurality reasons in *M v The Queen* envisage a two stage test to answer the overarching question of whether the appellate court thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the accused's guilt.[193] The first stage requires the court to carefully consider the whole of the evidence and to reach a conclusion as to whether a reasonable doubt exists as to the guilt of the appellant. If such a doubt exists, then the second stage requires the court to determine whether the jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by an appellate court. If not, the conviction is unreasonable and the duty of the court is to allow the appeal.

[207] It often occurs in cases where it is alleged that a violent or sexual criminal offence has occurred, there are only two persons present, the alleged perpetrator and the alleged victim. Uninstructed, a juror may consider it their task simply to determine guilt or innocence depending upon whose version of the facts they accept, whether this be based on the evidence offered by the alleged victim or the evidence, if any, offered by the alleged perpetrator. That is not the correct approach because it equates a criminal trial with a civil trial in terms of the standard of proof. The primary judge correctly addressed the jury on this important principle.[194] As Weinberg JA explained in *Pell*:[195]

---

189 *M v The Queen* (1994) 181 CLR 487 at 494-495.
190 *R v Tesic* [2019] QCA 195 at [136] per Lyons SJA.
191 *M v The Queen* (1994) 181 CLR 487 at 494-495; *R v Tesic* [2019] QCA 195 [136] per Lyons SJA.
192 [2019] VSCA 186.
193 *Pell v The Queen* [2019] VSCA 186 at [25] – [26] per Ferguson CJ and Maxwell P and at [1034] per Weinberg JA.
194 AB1 76-77.
195 *Pell v The Queen* [2019] VSCA 186 [966] – [969] (footnotes omitted) (emphasis added).

"*Conflicts between the complainant's evidence and that of various witnesses supportive of the defence*

[966] As the High Court made clear in *Liberato v The Queen*, when a case turns on a conflict between the evidence of a prosecution witness and that of one or more defence witnesses, a jury should never be told that their task is to consider who is to be believed. That is quite simply the wrong question.

[967] Yet, it is a question that a jury, uninstructed, would almost certainly be inclined to ask. Whatever the answer to that question might be cannot legitimately conclude the issue of whether the prosecution has proved its case beyond reasonable doubt.

[968] That is why juries are told that even if they prefer the evidence led on behalf of the prosecution (and indeed, positively disbelieve any witnesses called on behalf of the defence), they cannot convict the accused unless they are satisfied beyond reasonable doubt of his or her guilt. In addition, juries are told that they cannot convict if there is a 'reasonable possibility' that the defence case put forward as a complete answer to the prosecution case has substance. Such a state of mind, on the part of a juror, equates as a matter of law, to a reasonable doubt.

[969] An appellate court dealing with a challenge to a conviction, which contends that the verdict was unreasonable or cannot be supported having regard to the evidence, must approach the matter of conflicting evidence in exactly the same way. Accordingly, it is not now, and never has been, a question of whether the complainant was to be preferred as a witness to, for example, Portelli, Potter, McGlone, Finnigan, or any other particular witness who gave exculpatory evidence."

First stage – is there reasonable doubt upon review?

[208] The appellant argues that the first stage of the *M v The Queen* test has been satisfied, as this Court ought to conclude for itself that there is a reasonable doubt that the accused is guilty of the offences alleged been convicted of. The appellant submits that the complainant cannot be considered a credible witness because there are marked discrepancies and inconsistencies between the terms of her preliminary complaints and her allegations in her evidence.

[209] The appellant alleges seven inconsistencies.

Background

[210] In order to understand the first inconsistency it is necessary to closely examine the allegations which were brought against the appellant. Count 1 concerns the evening of 31 January 2009, when the appellant was a guest of the complainant's parents at their house in A Street, VHN. At the time the complainant was eight years of age and it was alleged that after her parents had fallen asleep, the two having been affected by alcohol, the appellant entered into the complainant's bedroom and touched the complainant's genital area with his hands and fingers.

[211] Count 2 alleged that shortly after count 1, the appellant penetrated the child's vagina with his finger(s).

[212] Count 3 was alleged to have occurred on 15 March 2010 when the child was aged nine. Again, at the invitation of the child's parents and after the child's parents had gone to sleep, the appellant approached the complainant child in her bed and moved the blankets or bed sheets with the intent to deal with the child in a sexual way. The child woke and the appellant desisted.

[213] The appellant gave evidence that at the time he was a 39-year-old married male with children, in full employment and no convictions. The appellant admitted that he did attend the residence of the complainant's parents on the evening of 31 January 2009 and consumed alcohol with the complainant's parents before sleeping in the bottom of a bunk bed, it being the only bed available in the house, with the complainant aged eight sleeping in the top bunk bed. The appellant thus admitted his presence in the room but denied that anything occurred. The complainant's mother observed that the accused was asleep on the bottom bunk and the complainant was asleep on the top bunk.[196] The complainant's mother did not wake either the appellant or the complainant up as it was 1.30 am. Later that morning the complainant and the appellant had a "pleasant, polite conversation" in the kitchen; the complainant was not upset.[197]

[214] Similarly, with respect to 15 March 2010, the appellant admitted that he had returned to VHN recently from overseas and accepted the invitation of the complainant's parents to reside at a house in W Road, VHN on that evening. As a result of being jetlagged, the appellant claimed he could not sleep. The appellant had sleeping pills in his wallet which he left on a desk. Accordingly, in the middle of the night he turned on his phone and attempted to search the complainant's house to find the desk where he had left his wallet. The appellant explained this to the complainant's father in a conversation shortly after the complainant woke up and told her parents she was 'scared'.[198] In the course of searching for his wallet, the appellant admitted that he entered into the child's bedroom for two to five seconds using the light from his phone while searching for his wallet.[199] The appellant said he entered the bedroom by accident. This caused the complainant to become distressed. The appellant was then asked to sleep in a car outside the house as the child was 'scared'.

First Alleged Inconsistency

[215] The first alleged inconsistency was that, following the incident on the evening of 15 March 2010, the complainant's mother on a number of occasions that night and the following day directly asked the complainant whether the appellant had touched her in any way,[200] to which the complainant repeatedly said of the appellant "he hadn't touched me".[201] The complainant told her mother that the appellant had not touched her on a number of occasions and told her father on at least one occasion

196 AB2 301/17-18.
197 AB2 191/35-45.
198 AB2 314/45-46.
199 AB2 365/5.
200 AB2 192/45; AB2 196-198.
201 AB2 193/4.

that the appellant did not touch her.[202] On 15 and 16 March 2010, when asked the complainant "wasn't sure of what had happened"[203] on 31 January 2009 at A Street, VHN. Yet, 7 and a half years later, aged 16, the complainant gave a detailed account to police of what had happened on 31 January 2009 at A St, VHN.[204]

[216] The complainant's mother confirmed in evidence that on the evening of 15 March 2010, the complainant was adamant that the appellant did not touch her.[205] Despite the complainants multiple denials, the complainant's mother went to police on 16 March 2010.[206]

[217] More importantly, the complainant's mother swore that she was "certain I would have asked"[207] about the prior night on 31 January 2009. Given the complainant's mother's certainty that she would have asked about the prior night and her inability to recall what was said, it is highly likely that the complainant said nothing had occurred on the 31 January 2009. It would be incredible, and quite out of keeping with the complainant's mother's actions of 15 and 16 March 2010, that had the complainant told her mother that she was digitally raped on 31 January 2009, that the complainant's mother would have simply forgotten about it. This also accords with the complainant's own evidence[208] that she "deliberately decided" not to disclose to her parents the appellant's indecent treatment and rape of her on 31 January 2009.[209] The complainant could not explain why she deliberately decided to tell her parents that the appellant did not touch her.

[218] In my view, the first issue being the multiple denials of 15 and 16 March 2010 is a serious inconsistency. The complainant's repeated statement that the appellant had not touched her may also be viewed as a strong corroboration of the appellant's version of what actually occurred.

[219] In particular, on the evening of 15 March 2010, the complainant and the complainant's father recalled that the complainant simply said that the appellant had been in the complainant's bedroom and had woken her up with the bright light and then had left.[210] That is consistent only with the appellant's evidence.

Second Alleged Inconsistency – Inconsistent statements in 2011/2012

[220] On the evening of 15 March 2010, the complainant had denied that she had been touched by the appellant, but did state that the appellant had woken her up in her bedroom with a bright light.[211]

[221] In 2011 or 2012, the complainant was "out and about in the car" with her mother when she thought she saw the appellant and said to her mother "that's Steve, the man who came into my room. He looked at me."[212]

---

202 AB2 198/1-2.
203 AB2 196/5.
204 Exhibit 1, AB2 491.
205 AB2 307/29.
206 AB2 276/37-38.
207 AB2 307/44.
208 AB2 192-193, 196, 198.
209 AB2 194.
210 AB2 198; AB2 330/1-2.
211 AB2 198.
212 AB2 198/23 - 34; AB2 309/19–20 (emphasis added).

[222] In the timeline therefore, on 15 and 16 March 2010, the complainant denied that she had been touched by the appellant, however, she did allege to her father that the appellant had been in her bedroom and woken her up with a bright light. That was admitted by the appellant. The allegation in 2011 or 2012 moved a step further. The complainant then in 2011 or 2012 aged 10 or 11 advanced the allegation to an allegation of "looking" at the complainant. That again is seriously inconsistent with the latter allegations made of touching of her genital area or digital penetration.

Third Alleged Inconsistency – Prior Inconsistent Statements to FFC in 2015

[223] The complainant's evidence upon this issue is rather vague.[213] The complainant said of her conversation with her class mate "I remember telling her what happened. I don't remember the details I went into."[214]

[224] The complainant did agree with the question put to her "[FFC] told you that she'd been molested and then you told her that you'd been touched."[215] As pointed out by defence counsel[216] at trial this was the same situation as had occurred with TFJ in early 2017 (alleged inconsistency 6 discussed below), namely after FFC told the complainant that she had been sexually assaulted, the complainant replied in kind that the complainant had also been sexually assaulted. In early 2017, when TFJ said he'd been raped the complainant responded that she also had been raped.[217] The early 2017 complaint of digital rape was the first time the complaint made such a complaint.

[225] With respect to FFC, it was put in cross-examination to the complainant:[218]

MR EBERHARDT:	Well, do you remember that she told you that her father had molested her?
COMPLAINANT:	I don't remember. I know it was to do with her father. I don't remember it being about her."

[226] The complainant then said she couldn't remember what she told FFC about her age.[219]

[227] In her committal evidence on 13 February 2019, the complainant could not recall where the conversation with FFC occurred. However, about six months later, in August 2019, during the trial, the complainant said that she recalled the conversation between herself and FFC occurred at school, and more recently remembered that because "it jogged my memory once watching the video."[220] The "video" being the complainant's pre-recorded evidence.

---

213 AB2 198 - 200.
214 AB2 200/14-15.
215 AB2 200/7-8.
216 AB2 200/1.
217 AB2 187-188.
218 AB2 199/42 – 45.
219 AB2 200/19.
220 AB2 199/35.

[228] The evidence of FFC was that a conversation occurred between herself and the complainant in 2015 when they were both in Grade 9. During a class at school, FFC "went first" and told the complainant:[221]

> "[T]hat, a while back, that I was sexually assaulted by someone in the family at their house and the whole story… she was comforting me and told her that she said that that [sic] something else had happened, the same thing. And she said that she was in her house and that a family friend had come into her room and touched her [The complainant] didn't go into any further details because we were in class with other people."

[229] The complainant had told FFC that she was touched at "around age 10".[222] FFC was not told by the complainant that the accused had put his finger in her vagina, rather was told "that he touched her… that was it."[223]

[230] The only inconsistency which may be maintained, was that the touching complained of by the complainant to FFC in 2015, occurred four to five years earlier when the complainant would have been in Grade 5 and consequently 10 years old. Whereas the allegations at trial concerning touching occurred on 31 January 2009, that is at the commencement of Grade 3, when the complainant was seven years of age.

[231] Whilst that is undoubtedly an inconsistency, it is not an inconsistency of great moment. Furthermore, the fact that the complainant did not disclose to FFC that she had been digitally raped, but rather that she had been "touched" is of no great consequence. Although FFC may have been able to share her whole story of abuse, it does not follow that the complainant would also want to share her whole story with FFC. The concerning feature is, however, that it shows a progression of the complaint of 15 March 2010 of no touching but being awoken by a light shining in the complainant's face through to the second allegation in 2011 or 2012 that the appellant "looked at me" to a complaint made in or about 2015 that the appellant had "touched" the complainant.

Fourth Alleged Inconsistency – Statements to SFM in late 2015 or early 2016

[232] In late 2015 or early 2016, the complainant and her school friend, SFM had a conversation about allegations of the sexual abuse. On 11 September 2017, the complainant gave her s 93A interview which was video recorded. After the conclusion of the video recording, the complainant was advised by investigating police officers not to speak to other witnesses about their evidence[224] (clearly and properly to avoid contamination of evidence). The complainant did not adhere to that advice. To the contrary, from 5.53 pm on 11 September 2017 until 8.54 am on 12 September 2017[225] the complainant and SFM communicated by SMS on 92 occasions which are set out in the 10 pages of transcript which forms Exhibit 7. It is in this document that SFM's first recording of a conversation occurs during SMS 613 which occurred at 10.09 am on 11 September 2017 in which SFM said of the complaint made in late 2015, early 2016 "[l]iterally all you ever told me was he

---

221 AB2 249 (emphasis added).
222 AB2 200/28.
223 AB2 251/20 – 23.
224 AB2 209/21 - 23.
225 Times converted from GMT to AEST.

touched you over the blankets."[226] That, of course, is seriously inconsistent with the complainant's allegations.

[233] Relevantly, as provided by Exhibit 7, the content of the SMS messages on 11 to 12 September 2017, is as follows:[227]

> "589 *Complainant*: So they are going to classify it as rape. You and FFC will be contacted soon and so will your parents and then they will ask you two to come in for a statement and will have to do it will FFC because you're the same age and then it will go to arrest. TFJ also has to do a statement separately because I told him once he told me about his situation at home. And I'm so exhausted.
>
> 590 *SFM*: As rape? Why are they classifying it as that? And dude you need to sleep honestly if you're not already asleep rn [sic] you should go to bed.
>
> 591 *Complainant*: It's rape because of penetration.
>
> 592 *SFM*: Penetration ?????
>
> 593 *Complainant*: So it's called rape by penetration idk something like that but they are classifying the case as a rape case.
>
> 594 *Complainant*: Yeah you know what that means right
>
> 595 *SFM*: Yeah obvs but there wasn't any penetration ??
>
> 596 *Complainant*: Yeah there was dude
>
> 597 *SFM*: Dude you never said that. Not once. Ever.
>
> 598 *Complainant*: When I rolled over he did it from the back like in between my legs and fingered me
>
> 599 *Complainant*: I hate talking about this
>
> 600 *Complainant*: It makes me so uncomfortable.
>
> 601 *SFM*: Okay I know but never once did you tell me that
>
> 602 *Complainant*: But I'm sure I said that
>
> 603 *SFM*: At all.
>
> 604 *SFM*: Nope
>
> 605 *SFM*: Trust me dude I'd deffs [sic] remember that
>
> 606 *Complainant*: Oh okay well idk why I didn't say it but I think it's cause I didn't maybe want to say it so I just said he touched me
>
> 607 *SFM*: Yeah okay but what do I say to them
>
> 608 *Complainant*: Idk but when I told mum she said it was rape and I didn't believe her but apparently it is

---

226 Exhibit 7, AB2 467 (emphasis added) (times converted from GMT to AEST).

227 Exhibit 7, AB2 465-474.

609 *SFM*: Because I'm supposed to tell them what you told me

610 *Complainant*: What I told you

611 *SFM*: Yeah well if it was penetration it is. I just never knew it was.

612 *Complainant*: Yeah tell them that I said he touched me

613 *SFM*: Literally all you ever told me was he touched you over the blankets

614 *Complainant*: Over the blankets?!

615 *Complainant*: I never said that dude

616 *SFM*: Dude come on why would I lie about that

617 *SFM*: And it's not something that I just forget

618 *Complainant*: I legit would have never said that because that it so off what I said

619 *SFM*: Dude

620 *Complainant*: Maybe you can't remember properly dude I promise you I wouldn't have said over the blankets why would I lie

…

630 *Complainant*: What you remember could throw my entire case because it's wrong

631 *SFM*: We'll talk at morning tea but it's not wrong dude. I remember what my best friend told me about being touched. It's something I can forget

632 *SFM*: Not*

633 *Complainant*: I know but I would have never ever said over the blankets like ever

634 *SFM*: Okay but you did

635 *SFM*: You said more but it's too hard to type it all

636 *Complainant*: Because I wouldn't lie to you. I understand if I didn't tell you in every detail or tell you about penetration because that's embarrassing and I didn't even tell [FFC]

637 *Complainant*: But I would never ever say over the sheets because I know that's not true and would never say that

638 *Complainant*: I don't know if you should do a statement if you have a different story

639 *Complainant*: People won't think I'm telling the truth

640 *SFM*: Dude we need to talk at morning tea stop stressing

641 *Complainant*: I don't want to talk about it that's the thing i just had to sit for two hours in front of a detective and tell them everything. I can't do it again I'll cry and I'm over talking about it. If you don't remember whatever if you think I said over the sheets then say that I don't care anymore he's not gonna [sic] get charged or whatever

642 *SFM*: Dude what the actual fuck. You sound like you're literally pissed at me

643 *Complainant*: I'm not sure don't make this abiut [sic] you

644 *Complainant*: I'm pissed that the stories aren't lining up

645 *SFM*: Okay that's not my fault tho [sic]. You need to stop taking it out on me.

646 *SFM*: I remember what I remember. You told me he sat down next to you and started moving his hand over you on top of the blankets and you felt him trying to move the blankets away so you rolled over so he would think you were waking up and stop. And then you said he did it again but your parents saw a light coming from your room and they went in and found him and he said he dropped something and then he changed his story and said he had insomnia and was watching you sleep.

647 *Complainant*: Okay well shit

648 *Complainant*: There is enough in that story to tell I was telling the truth. However it is muddled up and not really in the right order. You described the second time. The first time was the one that I didn't tell my parentd [sic] about which was like two years earlier

649 *Complainant*: Fuck

650 *Complainant*: The second time when I was around 10 or so I said that he touched the blankets and moved them but I woke up and he left the room. The first time was the worst when I was moving around and he touched me completely and I got up and went to tell mum and dad but they were asleep and do I didn't say anything until like a month ago on that Friday night. Mum and dad knew he sat on the bed the second time because I told them and they kicked him out but I never mentioned the first. That's why I was so upset and why when I told you were saying I had to tell my mum but I didn't want to upset her

651 *SFM*: Okay but I'm supposed to tell them what you told me not what happened. So I will tell them that but I will say that I didn't realise until very recently that when you said 'touched' the first time you meant penetration.

652 *Complainant*: Yeah tell them the truth because otherwise I'm fucked but yeah tell them what you remember me saying

653 *SFM*: Okay. I told you not to stress it will all be fine I promise

654 *Complainant*: Do you remember me telling you there were two incidents

655 *SFM*: Yes

656 *Complainant*: Okay good

657 *Complainant*: What do you know from the first one

658 *SFM*: You told me he sat down next to you and started moving his hand over you on top of the blankets and you felt him trying to move the blankets away so you rolled over so he would think you were waking up and stop.

659 *Complainant*: That's the second one

660 *Complainant*: Not the right story but that's the second one

661 *SFM*: The second one is the one your parents saw him

662 *Complainant*: I was on a top bunk in the first one

663 *Complainant*: The second time my parents didn't see him I told my oarents [sic]

664 *SFM*: Dude the aren't gonna [sic] expect me to remember every little detail

665 *Complainant*: Yeah but still dude

666 *SFM*: How was he able to touch completely on top bunk

667 *Complainant*: Through the bars in the railing

668 *SFM*: Okay well anyway what I remember is that the first time, you told me he felt over you and was trynna [sic] get his hand under the blankets so you moved so he would think you're waking up and then he stopped. And the second time he did it again but your parents came in and saw him and kicked him out.

669 *Complainant*: Okay well I guess you'll have to tell them that

670 *SFM*: That what I remember you telling me so I will tell them that and make it clear that it is was like two years ago so I don't remember everything. And that obvs I didn't realise you meant penetration when you said he touched you the first time.

671 *Complainant*: Yeah well I didn't tell [FFC] that. When I told [Z] the other week I still didn't say it because it's embarrassing and hard to physically say to someone

672 *SFM*: Yeah so I'll say that.

673 *Complainant*: Okay just make sure you stick to what you remember because u can't lie

674 *SFM*: But in the future dude please making things more explicit. I don't me something like this I mean in general. Because I can't be expected to automatically assume things you know

675 *SFM*: I know

676 *Complainant*: Yeah well I explained everything on that Friday night over the phone bout my telling my parents and stuff and I said it in detail because I knew you'd need to tell someone idk how it got lost in translation

677 *Complainant*: I understand if I didn't tell you the penetration but everything else I don't understand how it got messed up."

[234] The transcript above is of concern; it shows that, as was aptly described by the complainant in text 644 of 12 September 2017 at 8.18 am, "the stories aren't lining up".[228] The intent of the complainant to coach SFM in her evidence appears to have succeeded. In her evidence given at trial on 6 August 2019, SFM said of the contents of the telephone conversation in 2015 or 2016 with the complainant that the complainant told her:[229]

> "She said she was at home one night. She was in bed, and one of her parent's friends walked in, and he – he thought she was sleeping, but she wasn't, but she pretended to be asleep because she didn't know what to do. And he sat down on the bed and he started feeling over the top – over the top of the covers, and then he went under the covers, and started touching her. And she said that there was two different occasions that this – that this sort of thing happened to her. And I don't remember much of what else she told me."

[235] The contents of SFM's evidence given on 6 August 2019 does not accord with that which is contained in the text messages above on 11 to 12 September 2017. In my view, it is reasonable to accord more weight to the contents of the fresh complaint evidence of the complainant said to have occurred in late 2015 or early 2016 in accordance with the SMS messages of 11 September 2017 rather than SFM's evidence on 6 August 2019. That is consistent with a complaint of touching over the blankets with no penetration. The evidence of the fresh complaint is inconsistent with the complainant's allegations with respect to digital penetration the subject of count 2. The complaint was of no penetration but rather the moving of the hands over the top of the blankets whilst the appellant was sitting down on the bed.[230] It is also inconsistent with count 1.

Fifth Alleged Inconsistency – Lack of complaint to psychologist Barton in 2016

[236] In June and August 2016, the complainant consulted a psychologist, Lincoln Barton, of Headspace on three separate occasions. The complainant was then aged 15 to 16 years. The complainant admitted that she did not tell Mr Barton about any issues relating to sexual abuse because "I didn't feel comfortable. He was a guy. I didn't really feel comfortable with that."[231]

[237] The opportunity to tell the psychologist Barton of sexual abuse arose, however, it is unsurprising that the complainant did not volunteer the sexual abuse. Perhaps the

---

228 Exhibit 7, AB2 470.
229 AB2 253/20-25.
230 As per text messages at [232].
231 AB2 223/22-23.

only relevant evidence from the psychological sessions in 2016 is the complainant admitted that she could talk to her mother about most things.[232]

Sixth Alleged Inconsistency – Facebook complaint to TFJ in early 2017

[238] In early 2017 when the complainant was aged 16 years and approximately 6-7 months before her police complaint, the complainant made disclosures concerning the appellant via Facebook which is recorded in Exhibit 6.[233]

[239] TFJ, a male friend of the complainant, sent a Facebook message to the complainant telling her that when he was a boy an older man had raped him for three years.[234] The complainant responded to TFJ's Facebook message by stating that she also had been raped as a child.

[240] In Exhibit 6, the complainant said that when she was 10 an old family friend would try and grab me and stroke my stomach and later when she was asleep the appellant started touching her, started to finger her, and violently grabbed her. The complainant said of that conduct:[235]

> "He continued to do it for as long as my parents didn't know. He tried again when I was 11 or so and came to stay again. I actually promised myself to stay awake the entire night and not do anything. but [sic] I fell asleep and woke up with him taking the covers off my bed, so I sat up and he left. I told mum and dad about him in my room and they called the cops but I never mentioned that he raped me a year ago."

[241] Exhibit 6 contains inaccuracies that the first occasion of abuse was at age 10 and the second at age 11 which are perhaps understandable. Exhibit 6 also contains deliberate lies, namely, the allegation that the appellant stroked the complainant's stomach on a regular basis, and that when the digital penetration occurred, it occurred after the appellant had violently grabbed the complainant. The complainant lied that the appellant "continued to do it for as long as my parents didn't know." When cross examined on her Facebook allegations the complainant said "I didn't lie". The complainant then admitted she "exaggerated the story" and later agreed the statement contained a number of lies.[236] It is important to note that the Facebook message of January 2017 was the first time the complainant alleged she had been digitally raped.

Seventh Alleged Inconsistency – Statements to Ms Crawford in August 2017

[242] In August 2017, the complainant, at the suggestion of her mother, commenced counselling with, Ms Crawford. The complainant accepted that Ms Crawford had persistently questioned her about a "memory of being sexually abused". Despite this persistent questioning, the complainant did not tell Ms Crawford that the complainant had been touched on or in her vagina[237] but rather disclosed two instances involving "touching her between the legs and moving the blankets" on the

---

232 AB2 222/44-45.
233 Exhibit 6, AB2 464.
234 Exhibit 6, AB2 464.
235 Exhibit 6, AB2 464.
236 AB2 188/22 & 31; AB2 189/39; AB2 190/3.
237 AB2 274.

first occasion, and two years later "sitting on her bed with the light on in his phone".[238]

[243] Later that evening after the consultation with Ms Crawford, the complainant was again questioned by her mother who directly asked the complainant "what did he touch you with?" to which the complainant answered "His hands. He didn't rape me, but he put his hands in my pants".[239]

[244] Another concern is the lack of consistency in recall of important matters between the committal on 13 February 2019 and at trial on 5 August 2019, such as the content of the conversations on 15 March 2010.[240]

Conclusion on stage 1

[245] Inevitably the inconsistencies damaged the complainant's credibility. This is made plain by the jury's acquittal of rape. By their acquittal, the jury must be taken to have rejected the complainant's evidence that the appellant had digitally raped the complainant on the evening of 31 January 2009. The jury could only have come to this conclusion if the jury did not accept the complainant as a credible witness in respect of the allegation of rape. The jury were right to reject the complainant's evidence to the requisite standard of beyond a reasonable doubt.

[246] Having rejected the complainant's evidence on the rape allegation, which plainly is based upon a rejection of the evidence of the complainant as being credible, the question arises whether it was logical for the jury to be satisfied beyond reasonable doubt of count 1, the indecent treatment, the alternative indecent treatment, the subject of count 2, and the attempted indecent treatment charge, the subject of count 3. This is particularly so in respect of counts 1 and 2 which were said to have occurred within moments of each other. In *Pell v The Queen*, with reference to *Jones v The Queen*,[241]Weinberg JA said:[242]

> "If, as I think, it was not open to the jury to be satisfied, beyond reasonable doubt, of the guilt of the applicant regarding the second incident, that is a factor that would, ordinarily, be expected to impact significantly upon the complainant's credibility overall. In other words, a doubt about that matter would ordinarily cast real doubt upon the complainant's credibility and reliability in relation to the first incident as well."

[247] The jury having rejected the complainant's evidence of rape by digital penetration ought ordinarily have had a "real doubt upon the complainant's creditability and reliability". Sadly, there is nothing inherently improbable about a young female being the subject of sexual abuse. There is also nothing improbable about a child being somewhat inconsistent in the child's evidence. However, where there are sufficiently serious and weighty inconsistencies a reasonable doubt may exist. In any case, it is a matter of degree as to when the level of inconsistency raises a reasonable doubt.

---

238 AB2 266 – 267.
239 AB2 228 – 229.
240 AB2 192/28.
241 (1997) 191 CLR 439.
242 *Pell v The Queen* [2019] VSCA 186 at [1097].

[248] In the present case, it has been demonstrated on "the record itself" that there are several serious inconsistencies (inconsistencies 1, 2, 4, and 6 as detailed above), a tainting of evidence (by reference to the evidence of SFM in paragraph 51 above), a growth in the allegations of sexual assault over a period of time and an improvement in memory from denial and uncertainty in 2010 to certainty in 2017. Even ignoring the evidence of the appellant, Mr Pink and Mr Harris, the combination of the above factors compels a conclusion that the complainant's evidence on all three counts lacks sufficient credibility, so that a reasonable doubt must logically be held by an objective observer.

[249] Additionally, the appellant was subjected to an assertive, emotive, and lengthy pretext telephone call from the complainant's mother on 17 September 2017[243] where he gave his version of what had occurred on 31 January 2019 and 15 March 2010. That version is fundamentally consistent with the appellant's evidence[244] but more importantly it was fundamentally consistent with the complainant's original (15 and 16 March 2010) versions as provided to her mother on numerous times[245] and to her father at least once that the appellant never "touched her". The appellant was subject to a careful and thorough cross-examination, which was appropriate to a case of this type, yet his evidence remained consistent.

[250] A careful review of the whole of the evidence in the present case leads me to conclude that the first stage of the *M v The Queen* test has been satisfied. In other words, I harbour a doubt as to guilt and therefore consider in terms of stage one that the jury ought to have harboured a doubt as to guilt.

Stage 2 – consideration of jury advantage

[251] The second stage of the test is to ask whether that doubt persists, notwithstanding the advantages a jury possess over an appellant court. In the past it was suggested that the "demeanour" of a witness would reveal whether the witness was truthful or not. If that were so, a juror who observed a witness's demeanour would have an unassailable advantage over an appellant court in assessing credit. Nowadays, evidence is routinely recorded in video or audio visual medium. In the present case, the complainant's principal evidence was recorded by audio-visual means and the audio of her cross-examination was recorded.

[252] This court was not asked to view the s 93A video evidence or listen to it, or the audio of the evidence at trial. That is understandable as a witnesses' demeanour is not an infallible indicator of truth.[246]

[253] With respect to the second stage of the test, the present case differs from many insofar as the jury have, by their rejection of the digital penetration rape allegation implicitly rejected the complainant's evidence in respect of that count. Conversely by their guilty verdicts on the alternative count 2, and counts 1 and 3, the jury must be taken to have accepted the complainant's evidence with respect to those counts as being credible. Whilst it is true that any tribunal of fact may reject a portion of a witness's evidence and accept a portion of that witness's evidence, there ought to be a discernible logical basis by which to do so.

---

243 AB2 480 – 490.
244 AB2 339-349.
245 AB2 197/30-35.
246 *Pell v The Queen* [2019] VSCA 186 [917]-[924].

[254] In the present case, the inconsistencies as detailed above, moving from a reported denial of any allegation of any type of touching on 15 and 16 March 2010, graduating to an allegation of "looking at me", graduating to a version of "touching me", graduating to a version of "digitally penetrating" me coupled with the attempt by the complainant to coach the witness SFM, cannot be overcome by reference to the complainant's video recorded evidence as contained in the s 93A statement, nor the transcript of the complainant's cross-examination.

[255] This is particularly so when the cross-examination of the complainant contains numerous responses to questions as "I don't remember" and "I don't know" being a common response throughout the entirety of the complainant's cross-examination from AB2 183 to 226. The cross-examination was not lengthy. The complainant was cross-examined for only 36 minutes on the first day of trial and for only 54 minutes on day two. It was not suggested, on appeal that the viewing of the video evidence or hearing the evidence of the complainant would assist in explaining why the jury could logically reject the complainant's principal allegation of rape and accept the balance of her allegations in the face of identified inconsistencies.[247]

[256] In the circumstances I conclude that even making full allowance for the advantages enjoyed by the jury that reasonable doubt still persists.

Ground 1

[257] For the reasons I have expressed, I consider that upon the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of counts 1, 2, and 3.

Ground 3

[258] As I consider the appellant has succeeded in respect of ground 1, it is unnecessary to determine ground 3.[248]

Conclusion

[259] I consider that the appeal ought to be allowed on ground 1, the convictions of the appellant ought to be quashed and a verdict of acquittal be entered on each count.

---

247 *SKA v The Queen* (2011) 243 CLR 400 [411] per French CJ, Gummow and Kiefel JJ and *Pate (a Pseudonym) v The Queen* [2019] VSCA 170 at [70] – [77] per Priest JA.

248 *Jones v The Queen* (1989) 166 CLR 409; see also *R v Chai* (2002) 76 ALJR 628.