SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAG* [2004] QCA 397
PARTIES:	**R** **v** **MAG** (appellant/applicant)
FILE NO/S:	CA No 170 of 2004 DC No 179 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	29 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2004
JUDGES:	Williams JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – EVIDENCE OF SEXUAL EXPERIENCE, REPUTATION AND MORALITY – where appellant convicted of sexual offences against foster daughter – where learned trial judge refused to allow defence to cross-examine complainant about previous allegations of sexual abuse that she had made against other people – whether cross-examination on these matters would have a clear tendency to impact upon complainant's credibility CRIMINAL LAW – EVIDENCE – COMPLAINTS – GENERALLY – where complainant made preliminary complaint to subsequent foster carer before complaining to police – where preliminary complaint made some months after the last uncharged act of appellant – where learned trial judge directed jury that they could regard the complaint as establishing consistency in complainant's behaviour – whether learned trial judge properly directed jury as to use they could make of preliminary complaint

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – EXPRESSION OF JUDGE'S OWN OPINION – GENERALLY – where learned trial judge made comments during course of evidence – whether comments were prejudicial to appellant – whether learned trial judge's comments on facts rendered trial unfair to appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – OTHER IRREGULARITIES – where jury unable to agree on four counts and convicted on other counts – whether this outcome was suggestive of compromise on the part of the jury – whether clear inconsistency among verdicts – whether jury could be satisfied beyond reasonable doubt that complainant's evidence was correct – whether convictions unsafe and unsatisfactory

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant sentenced to seven years imprisonment – where no prior criminal history – where complainant was applicant's foster child and offences commenced when she was 13 years old – where applicant gave her money in return for sexual acts – where no remorse shown – where no violence or threats used – whether sentence imposed manifestly excessive

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4, s 4A

Black v The Queen (1993) 179 CLR 44, considered
Bull v The Queen (2000) 201 CLR 443, cited
M v The Queen (1994) 181 CLR 487, cited
Mackenzie v The Queen (1996) 71 ALJR 91, cited
R v AE [2001] QCA 136; CA No 19 of 2001, referred to
R v B [2003] QCA 68; CA No 374 of 2002, referred to
R v C; ex parte A-G (Qld) [2003] QCA 134; CA No 400 of 2002, 24 March 2003, referred to
R v F [2001] QCA 137; CA No 383 of 2000, 9 April 2001, referred to
R v Kochnieff (1987) 33 A Crim R 1, cited
R v Lawrence [2001] QCA 441; CA No 104 of 2001, 19 October 2001, considered
R v R [1998] QCA 268; CA No 152 of 1998, 24 July 1998, referred to
R v Tribe [2001] QCA 206; CA No 349 of 2000, 1 June 2001,

considered
RPS v The Queen (2000) 199 CLR 620, cited

COUNSEL: S J Hamlyn-Harris for the appellant/applicant
M J Copley for the respondent

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

[1] **WILLIAMS JA:** After a 10 day trial in the District Court at Townsville the appellant was convicted on 21 May 2004 of the following offences:

(i) Count 1: Maintaining a sexual relationship with a child under 16 with circumstances of aggravation;
(ii) Count 2: Procuring a child under 16 to commit an indecent act, with a circumstance of aggravation;
(iii) Count 3: Exposing a child under 16 to an indecent act, with a circumstance of aggravation;
(iv) Count 4: Exposing a child under 16 to an indecent video tape, with a circumstance of aggravation;
(v) Count 7: Unlawful carnal knowledge of a child under 16, with a circumstance of aggravation;
(vi) Count 8: Unlawful carnal knowledge of a child under 16, with a circumstance of aggravation;
(vii) Count 10: Indecent dealing with a child under 16, with a circumstance of aggravation.

[2] The jury was unable to reach a verdict on the following counts on the indictment, and the prosecution entered a nolle prosequi thereafter:

Count 5: Unlawful carnal knowledge of a child under 16, with a circumstance of aggravation;

Count 6: Indecent dealing with a child under 16, with a circumstance of aggravation;

Count 9: Unlawful carnal knowledge of a child under 16, with a circumstance of aggravation;

Count 11: Unlawful carnal knowledge of a child under 16, with a circumstance of aggravation.

[3] Some 17 grounds of appeal were stated in the original notice of appeal against conviction but at the outset of the hearing leave was sought and granted to amend by substituting the following grounds for the existing grounds of appeal:

Ground 1: The learned trial judge erred in preventing cross-examination of the complainant in relation to previous allegations of sexual interference or abuse made by her;

Ground 2: The learned trial judge erred in excluding evidence as to the reasons why steps were taken in the appellant's household to try to make

sure that the complainant was not left alone in the house with an adult male;

Ground 3: The learned trial judge erred in limiting the evidence of the appellant's generosity to that which related to his children and then only until they were eighteen years of age;

Ground 4: The learned trial judge misdirected the jury as to the use they could make of the evidence of the complaint made by the complainant to the witness MD in June 2002;

Ground 5: The trial was unfair to the appellant because of comments on the facts made by the learned trial judge in the summing up and in the course of the evidence;

Ground 6: Enquiries made by the learned trial judge to the jury as to the progress of their deliberations gave rise to a miscarriage of justice because there is a significant risk they had the effect of imposing pressure on the jury;

Ground 7: The verdicts of guilty on counts 1, 2, 3, 4, 7, 8 and 10 are inconsistent with the jury being unable to agree on Counts 5, 6, 9 and 11;

Ground 8: The convictions are unsafe and unsatisfactory because upon the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[4] All of the offences were alleged to have occurred between 1 November 1997 and 29 July 2001. The complainant, who was born on 30 July 1985, lived with the appellant and his wife as a foster child from about December 1995 to about the end of 2001. Throughout that period the family resided at C; other children in the family were a son and daughter of the appellant and his wife, and two younger foster children.

[5] In broad terms the complainant's evidence with respect to the charges was as follows.

[6] The events giving rise to counts 2, 3 and 4 occurred on the same day during the Christmas holiday period in December 1997. The family returned from a holiday at the Gold Coast and intended spending Christmas on Magnetic Island. Whilst at the home at C before going to Magnetic Island the complainant asked Mrs MAG for permission to make a phone call to break up a relationship with a boy she had been seeing; Mrs MAG said "no". The appellant approached the complainant later and said that she could make the phone call if she watched a pornographic movie with him. She made the phone call after which the appellant got a pornographic video and a vibrator from his room, played the video (count 4), got the complainant to use the vibrator on her vagina whilst naked on the living room floor (count 2), and while that was happening the appellant masturbated and ejaculated into a towel (count 3).

[7] The first time the complainant said she and the appellant had sexual intercourse was the subject of count 5. She put that occurring in 1998 when she was in grade 8 and

after her 13th birthday. She said they had sex "doggy style" between the bed and wall of the main bedroom of the house.

[8] Count 6 was based on an allegation that the appellant licked the complainant's vagina after school one day when she was in grade 9. Her evidence was that the appellant followed her upstairs, asked her if he could "lick her pussy", to which she said "yes" and took off her underclothes; thereupon the appellant licked her vagina.

[9] The complainant's evidence was that she wagged school in year 10 so she could get to know a boy she had met named Mark. She said the appellant agreed to assist her in organising a day off school if she would have sex with him in her school uniform. After spending the day with her friends at a park the appellant picked her up in his car, drove to a place called A Lane in his Datsun work utility, and they had sex "doggy style" in the front driver's seat. That incident was count 7 on the indictment.

[10] Count 8 related to an incident of unlawful carnal knowledge about a week after the events constituting count 7. The complainant said she wagged school a second time with a friend but they "got busted" by the school who phoned the complainant's mother. Not long after that the complainant wanted to spend a Saturday with the boy Mark and the appellant said she could if she had sex with him on the Friday night before. She said that on the Friday night she and the appellant had sexual intercourse "doggy style" in her bedroom. She said that was the first time such an incident occurred in her room.

[11] Count 9 related to an incident when the complainant was working at a Shopping Centre. The appellant picked her up from work at about 9.30 pm on a Thursday night and drove to an isolated area where they had sexual intercourse "doggy style" in the middle seat of a four wheel drive vehicle which she thought was a Suburban.

[12] The complainant's evidence in relation to count 10 was that she wanted to sneak out one Friday night and asked the appellant if he would facilitate her doing so by the leaving the door unlocked. He said that he would if she let him finger her and have sex with him. He fingered her in the kitchen. According to the complainant this incident occurred in the period "May, June … April" 2001.

[13] The final count, count 11, related to an alleged further act of sexual intercourse said to have taken place within a week of the fingering incident. According to the complainant it occurred in the appellant's bedroom.

[14] Apart from those particular instances the complainant said that there were a large number of other sexual acts. Her evidence was broadly to the effect that she had sexual intercourse with the appellant on an average between two and four times a week from age about 14 and a half to 16.

[15] The appellant denied any sexual activity with the complainant prior to her 16th birthday and specifically while she was living in the MAG household. His evidence was that he began a sexual association with the complainant after 3 January 2002 by which time the complainant had moved out of the household.

[16] The appellant's evidence of the first occasion on which they had intercourse was as follows. In the course of a telephone conversation the appellant told the complainant that he had bought his wife a spa for Christmas and the complainant

asked if she could have a look at it. The appellant picked her up and brought her to the house; no-one was at home because his wife had gone away on holiday. According to the appellant the complainant said she'd been awake all night and asked if she could have a shower; whilst in the shower she called out to the appellant and asked him to scrub her back. The appellant's evidence was that he took off his clothes and got into the shower with her. After the shower the two went to the spa where they "started playing around". The appellant said he put her finger in the complainant's vagina and they then went upstairs and he put a pornographic video on. The appellant's evidence was that the complainant said to him: "For $100 you can have sex". He gave her $100 and they had sexual intercourse on the lounge room floor. The complainant then said that for $150 she would give him a head job; he gave her $150 and she performed oral sex on him.

[17] The appellant's evidence was then to the effect that a few weeks later he received a text message from the complainant saying she wanted $150 and would give him a head job. He withdrew $150 from the bank, picked her up in his Datsun, drove to A Lane, and there she gave him oral sex. He then gave evidence of having intercourse on about 12 February 2002 in return for $400 to buy a wig. He said that on a couple of other occasions they had sex in the school carpark on his giving the complainant money. He claimed the last time he had sexual contact with the complainant was about Easter 2002.

[18] It was on or about 8 June 2002 that the complainant made a complaint to MD and subsequently spoke to police. On 10 June 2002 the police arranged a pretext phone call between the complainant and the appellant. During that telephone conversation the appellant made statements clearly indicating that he had sexual intercourse with the complainant but no dates were mentioned. The phone conversation is a clear admission of the two having had a sexual relationship over a period of time, but there is nothing in it which specifically identifies any such incident occurring prior to 2002.

Ground 1

[19] In cross-examination the complainant admitted that she had told some false stories, including a story that she had killed a cat, and a story of being bashed and admitted to hospital. Subsequent to that, defence counsel sought a ruling that he could cross-examine the complainant by putting to her that she had previously made unfounded allegations of sexual abuse against her biological mother's then boyfriend, and that she had threatened to make sexual allegations against her grandfather. The first of those matters were said to have occurred in 1994. In the course of argument defence counsel indicated he wished to put to the complainant that when she was refused permission to attend a disco she alleged that her mother's boyfriend had rubbed his penis against her vagina and "engaged her in oral sexual behaviour". In relation to the second matter defence counsel indicated that he wanted to put to the complainant that when she was six her grandfather had seen her performing fellatio on a boy of seven. He smacked her for that but told no-one about it. Some time later when the grandfather refused to allow the complainant to go to a friend's house she threatened to allege that her grandfather had touched her sexually if he maintained his refusal.

[20] It appears that in relation to the first of those matters police charged the boyfriend but ultimately the prosecution entered a no true bill because the complainant could

not sufficiently particularise the allegations. The fact that the prosecution did not proceed was not due to any suggestion that the allegations were untrue.

[21] In refusing to permit the cross-examination the learned trial judge largely based his reasons on provisions of the *Criminal Law (Sexual Offences) Act* 1978. He referred in particular to rules 2, 3 and 4 of s 4, and the reasoning in *Kochnieff* (1987) 33 A Crim R 1 and *R v Tribe* [2001] QCA 206. Relevantly Rules 2, 3 and 4 of s 4 provide as follows:

> "**2.** Without leave of the court—
>
> (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person;
>
> (b) evidence shall not be received as to the sexual activities of the complainant with any person.
>
> **3.** The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.
>
> **4.** Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons must not be regarded as having substantial relevance to the facts in issue only because of any inference it may raise about general disposition."

[22] Of particular relevance for present purposes is the observation of Mackenzie J (with whom the other members of the court agreed) in *Tribe* where he said:

> "However, the category of cross-examination prohibited without leave under s 4 is as to sexual activities of the complainant with any person. In the context of what the defence would wish to explore in cross-examination, it was an essential component of it that the complainant had been involved in sexual activity with the person complained about. It is therefore subject to the second rule in s 4 of the Act."

[23] The reasoning of McHugh, Gummow and Hayne JJ in *Bull v The Queen* (2000) 201 CLR 443 at 467 also supports that approach.

[24] It is also of significance in this case that there was nothing to suggest that the complaint about the mother's boyfriend was false and given the lapse of time between the alleged incident sought to be relied on by the defence and the events giving rise to the charges the proposed cross-examination was not likely to materially impair confidence in the credibility of the complainant.

[25] Counsel for the complainant relied heavily on a passage in the judgment of Thomas JA in *R v Lawrence* [2001] QCA 441. There it was said:

> "The making of false sexual complaints on other occasions may properly be the subject of an exception to the finality rule, provided that it has a clear tendency to support the view that the subject complaint is false. Such evidence is not limited to complaints or conduct directed against the accused. Of course matters such as remoteness in time and significant factual dissimilarity might well

> justify a decision in the trial court to exclude such evidence as not probative."

[26] Here it has not been demonstrated that cross-examination on the proposed matters would have a "clear tendency" to impact upon the complainant's credibility with respect to the charges in question. Further, because of the "remoteness in time" of the other matters in relation to the events constituting the charges, the proposed cross-examination would not come within the ambit of evidence of "false sexual complaints" referred to by Thomas JA in that passage.

[27] It follows that the learned trial judge did not err in preventing cross-examination of the complainant about previous allegations of sexual interference or abuse made by her. Leave to so cross-examine was required pursuant to s 4 of the 1978 Act and it has not been demonstrated that the learned trial judge erred in the exercise of the discretion thereby conferred on him.

Ground 2

[28] The appellant gave evidence that there was a rigid rule that the complainant would never be alone in the house with a male. Evidence to similar effect was given by the appellant's wife and other witnesses. A number of defence witnesses gave evidence to the effect that, to their knowledge, the complainant was never alone in the house with the appellant.

[29] At trial the defence sought to lead evidence that the reason for that rule was that it was known that the complainant had previously made complaints against others of sexual abuse; in particular that was a reference to the matters discussed under Ground 1. After hearing submissions the learned trial judge refused to allow that evidence to be led.

[30] The evidence as to the rule was led and was not challenged before the jury by the prosecution. If anything was relevant, it was the existence of the so-called rule, rather than the reason behind it. In any event a reasonable jury would draw the inference that the rule was designed to limit the opportunity for inappropriate conduct between the complainant and any male in the house.

[31] Further, as the appellant's own evidence of later sexual activity with the complainant amply demonstrates, it was easily possible to get around the "rule" if the appellant was minded to. The existence of the "rule" did not impact upon the opportunity for the appellant to have sexual contact with the complainant away from the house, for example in a motor vehicle.

[32] Against that background it is clear that the learned trial judge was correct in refusing to permit the evidence to be led because it would have, at least impliedly, infringed s 4 of the 1978 Act without being likely to materially impair confidence in the credibility of the complainant.

[33] Again I am of the view that the learned trial judge was correct in refusing to allow this evidence to be led.

Ground 3

[34] The prosecution led evidence of the appellant's generosity to the complainant at the time of the alleged offences; it could be said that such evidence was an important part of the prosecution case because it gave support to the complainant's contention that the appellant was generous to her in payment for sexual favours. In that regard it is not irrelevant to note that on the appellant's evidence with respect to later sexual activity there was a payment associated with it.

[35] Against that background defence counsel sought to lead evidence as to the generosity of the appellant to members of his family and other people. That was said to be an answer to the prosecution's allegation that the only reason he was generous to the complainant was because of the sexual favours associated therewith.

[36] The learned trial judge ruled that evidence that the appellant had been generous to persons who were not members of his family was irrelevant. That ruling was, to my mind, undoubtedly correct.

[37] With respect to evidence of the appellant's generosity towards members of his family the learned trial judge ruled that the defence could "lead evidence of generosity to each of these three children up to age 18, and that evidence ought to be led in short compass." On appeal counsel for the appellant submitted that the evidence should not have been so limited. It was submitted that the proposed evidence went directly to the question whether there was an alternative, innocent explanation for the generosity.

[38] Counsel for the respondent on appeal contended that the appellant's generosity towards his own children, which was not disputed at trial, did not tend to disprove or render improbable the complainant's evidence. Given the issues raised at the trial, in particular whether the appellant had a sexual relationship with the complainant when she was younger than 16, the only evidence of generosity to others which could possibly be relevant would be generosity to children (perhaps females) younger than 16.

[39] In my view the ruling of the learned trial judge was correct and this ground of appeal is not made out.

Ground 4

[40] Section 4A was inserted into the *Criminal Law (Sexual Offences) Act* 1978 by the amending Act of 2003. The legislation provided that s 4A applies to committal proceedings and trials which started or continued after 5 January 2004. Relevantly "preliminary complaint" was defined as being any complaint other than "the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence". The relevant provisions of the section are as follows:

> "**(2)** Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
>
> **(3)** Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.

> **(4)** If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> **(5)** Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice."

[41] Here the last charged incident occurred about July 2001, and on the appellant's evidence his sexual relationship with the complainant ended about Easter 2002. The complainant's evidence was that the appellant's conduct continued for some six months after she ceased to be a foster child which was about the end of 2001. It was on or about 8 June 2002 that a complaint was made to MD which clearly would be caught by the definition of "preliminary complaint".

[42] That complaint was referred to in the summing up in the following terms:

> "Now, members of the jury, there has come into evidence before you a complaint made by [the complainant] in June of 2002 to [MD], and that has been read to you, and I do not think it is necessary for me to repeat it. It goes along the lines that [MAG] had been interfering with her since about age 12 or so and a number of the sexual activities are referred to. Now, members of the jury, whatever was said by [the complainant] to [MD] in June of 2002 is not evidence of anything that actually happened between [the complainant] and the accused. That conversation may only be used as it relates to the credibility of [the complainant]. Consistency between the account given by [the complainant] to MD in June 2002 and the evidence of [the complainant] in this Court before you is something that you may take into account as possibly enhancing the likelihood that her testimony is true. But you cannot regard any of those things said in that out-of-Court statement by [the complainant] to [MD] as proof of anything that actually happened. In other words, evidence of what was said on that occasion by [the complainant] to [MD] may, depending on the view you take of it, bolster the credit of [the complainant] because of consistency, but it does not independently prove anything. It is not evidence of anything that actually happened between the accused and [the complainant]."

[43] Counsel for the appellant submitted that prior to the introduction of s 4A, evidence of the complaint to MD would not have been admissible because it did not satisfy the test for "fresh complaint" under the preceding law. That may or may not be so but further consideration of that point is not necessary; clearly the evidence was admissible pursuant to s 4A.

[44] The principal submission advanced on the hearing of the appeal was that the evidence of the preliminary complaint here was not capable of showing consistency of conduct on the part of the complainant primarily because it did not satisfy the criteria of being "fresh" under the preceding law. It was said that at most it explained the circumstances in which the matter came to the notice of the police. In my view nothing is to be gained since the introduction of s 4A by considering whether or not the complaint would have been "fresh" under the pre-existing law.

Here the lapse of time from the last uncharged act to the complaint was not great, and it was not wrong, in my view, for the learned trial judge in the course of his summing up to indicate to the jury that they could regard the complaint as establishing consistency in the complainant's behaviour. There was nothing inconsistent between the complaint and the complainant's evidence at trial, and the learned trial judge properly directed the jury about how they could not use the evidence of the complaint.

[45] In the circumstances there was no misdirection with respect to the use the jury could make of the evidence of fresh complaint.

Ground 5

[46] One comment made by the learned trial judge during the course of evidence is particularly relied on in support of this ground. When defence counsel was cross-examining the complainant suggesting that there was insufficient room for intercourse to have occurred in the driver's seat of the vehicle (count 7), the learned trial judge interposed:

> "Members of the jury, ... I'll just say this and I'm not intending to be facetious, because this is a very serious matter, ... it's commonly said the only place where sexual intercourse may not occur is on the ceiling of a room, but these are matters of fact for you to decide."

Regardless of whether or not it was appropriate for the trial judge to make that comment it could not be regarded as prejudicial. Ultimately the thrust of defence counsel's cross-examination of the complainant in that regard was totally negated by the appellant's subsequent evidence that, albeit on a later date, he had intercourse with the complainant in the Datsun vehicle in question.

[47] At the outset of day 6 of the trial, when the appellant was still in evidence-in-chief, defence counsel asked for the jury to be discharged on the ground that the appellant was denied a fair trial because of interventions by the trial judge in the course of the appellant's evidence. In refusing to accede to that application the learned trial judge in his reasons noted that "the examination-in-chief of the accused proceeded in a most laborious fashion"; he indicated he was endeavouring "to try to direct attention to what are real issues in the case".

[48] A perusal of the appellant's evidence prior to that application being made does not to my mind demonstrate that the learned trial judge unduly interrupted the flow of evidence or asked questions demonstrating an unfavourable view of the appellant's evidence. In the main the judge's questions were directed to obtaining a specific answer from the appellant rather than allowing him to give an answer which evaded the critical point.

[49] A reading of the transcript of the appellant's evidence does not satisfy me that any questioning by the trial judge resulted in the trial being unfair to the appellant.

[50] Counsel then referred to a number of passages in the summing up which it was submitted were disparaging of the defence case. The learned trial judge correctly directed the jury that the facts were a matter for them, and that was something that was referred to from time to time throughout the summing up. It has frequently been observed that a trial judge may comment, even strongly, on factual issues,

provided the division between the functions of judge and jury is maintained: (see for example *RPS v The Queen* (2000) 199 CLR 620 at 637).

[51] Counsel for the appellant particularised comments suggesting reasons for delay in the making of a complaint; comments tending to counter the evidence of witnesses called by the defence as to the mendacity of the complainant; and further observations, negative to the defence, on the witnesses called by the defence on the complainant's mendacity. In my view on each occasion the learned trial judge did no more than raise a legitimate matter for the jury to consider; on no occasion was the jury told what the answer should be.

[52] The observation that the jury might consider the appellant's account of the pretext phone call "a very curious story" was a comment on the facts but again one which did no more than highlight what any reasonable observer may have thought. The comment was balanced by the fact that the jury was also reminded of the defence evidence with respect to the phone call.

[53] The learned trial judge's observations on the comparability of the complainant's evidence of sexual incidents with the appellant's evidence of later sexual activity was not, in the light of all that was said in the summing up, objectionable. The comment was made as another matter for the jury to evaluate when deliberating on their verdict.

[54] Finally, the remarks about the good character evidence were not unfair. It seems reasonably clear that none of the witnesses as to good character were aware of the extent to which the appellant had had a sexual relationship with the complainant.

[55] A reading of the summing up as a whole does not establish that comments on the facts made by the learned trial judge rendered the trial unfair to the appellant.

Ground 6

[56] The summing up concluded at 7.15 pm on Thursday 20 May 2004, the ninth day of trial. There was a brief redirection and the jury again retired at 7.35 pm; they were subsequently locked up for the night. At 10.25 am the following day, Friday 21 May, the jury asked for a redirection which was given. Shortly after that they were given another redirection which concluded at 10.51 am.

[57] According to the transcript at 2.44 pm the trial judge had the jury brought into the court room and asked "are you likely to reach a verdict in this case?" The jury speaker indicated that "we will reach a verdict today, probably if we could have maybe another hour." Without further comment the jury retired to give further consideration to their verdict. The judge had them brought into the court room again at 3.33 pm and asked "have you made any further progress in the matter?" The speaker indicated that they had made further progress and asked for another hour. Again the jury retired without further comment. Then at 3.58 pm the trial judge received a note from the jury saying: "We have reached a verdict on seven counts unanimously, but we cannot reach a verdict on the remaining four counts. What do we do?" In the absence of the jury the trial judge indicated to counsel he proposed to take a verdict on the counts on which there was agreement, and discharge the jury on the other counts. Both counsel acquiesced in that course, and verdicts were taken as indicated above.

[58] The contention of counsel for the appellant is that against that background the jury was likely to have "felt under pressure" with respect to reaching verdicts. Reference was made to the observation in *Black v The Queen* (1993) 179 CLR 44 at 46 that it is a "fundamental rule that the jury must be free to deliberate without any form of pressure being imposed upon them." Counsel for the appellant submitted that in the circumstances there was a significant possibility that the appellant was wrongly convicted and a miscarriage of justice occurred because the jury was placed under that pressure.

[59] I am not persuaded that in the circumstances the jury was placed under pressure. On each occasion when the jury asked for another hour the trial judge made no further comment. There was no suggestion that a verdict had to be reached within that time. The jury had been deliberating for many hours when the first question was asked of them and if there had then been any indication that the jury was facing some difficulty in reaching a unanimous verdict it may have been appropriate to give a direction of the kind approved in *Black.* But as the jury indicated a likelihood of arriving at unanimous verdicts no such direction was called for.

[60] Further, there is substance in the submission of counsel for the respondent that if the jury had compromised as counsel for the appellant contended then it would be more likely that they would have returned verdicts on all counts. Indeed, if a *Black* direction had been given at 3.58 pm it may be that after a further retirement agreement could have been reached on the remaining four counts.

[61] In the circumstances this ground of appeal has not been established.

Ground 7

[62] The contention here on the behalf of the appellant is that there is no rational explanation for the failure to agree on counts 5, 6, 9 and 11 when they convicted on the other counts. It was submitted that the outcome was suggestive of compromise (see, for example, *Mackenzie v The Queen* (1996) 71 ALJR 91 at 101).

[63] Counsel for the respondent pointed out that counts 7, 8 and 10 upon which guilty verdicts were returned were associated with events that were independently verified. The complainant's evidence was that count 7 occurred on the occasion she wagged school with F. The complainant's absence from school was proved by the witness O, and F testified that she did wag school in November 2000 with the complainant and that the appellant collected the complainant on that day. Count 8 was referable on the complainant's evidence to the second occasion she wagged school. This was a week after she wagged school on the day on which the events constituting count 7 occurred. The evidence of O established that the complainant was absent on 15 November 2000. Count 10 occurred on the occasion when the complainant wanted to sneak out to a friend's house. F said the complainant attended her house at midnight and her brother drove her home; that confirmed evidence given by the complainant.

[64] The jury could well have been influenced by the evidence which confirmed matters peripheral to the events which constituted the charges. Also some detail, for example the events constituting count 6, were not included in the initial statement to police.

[65] In any event there is no clear inconsistency between the verdicts. As already noted, if the jury had been given more time, and had been given the *Black* direction, they may well have reached unanimous verdicts.

[66] This ground is not made out.

Ground 8

[67] The submission here on the behalf of the appellant was that the convictions were unsafe and unsatisfactory (in the sense explained in *M v The Queen* (1994) 181 CLR 487 at 494-500) because, on the whole of the evidence, the jury could not be satisfied beyond reasonable doubt that the complainant's version of events, rather than the appellant's account, was correct. Against that it has to be said that the pretext telephone conversation and the admission on oath by the appellant that he had a sexual relationship with the complainant at a later point of time could properly be used by the jury as evidence supporting the version of events given by the complainant. Against that background the jury was entitled to accept that the complainant was a truthful and reliable witness. The jury may also have found some support for the complainant's evidence in other evidence, such as the finding of a vibrator in the appellant's bedroom and the appellant's admission that he possessed pornographic videos.

[68] Having regard to the whole of the evidence it cannot be said in my view that the convictions were unsafe and unsatisfactory. Given the whole of the evidence a jury was clearly entitled to conclude that the appellant was guilty of the counts on which convictions were recorded.

Sentence

[69] The appellant also seeks leave to appeal against the sentence of seven years imprisonment imposed on him with respect to count 1.

[70] The appellant was born on 14 January 1953 meaning that he was aged between 43 and 47 when the offences were committed, and aged 51 when sentenced. He had no prior criminal history.

[71] The aggravating features of this case were that the complainant was the appellant's foster child and the offences commenced when she was about 13 years old. The sentencing judge also regarded it as a disturbing feature that the appellant struck a deal with the complainant that there would be a sliding scale of payments for various sexual acts; as he put it: "... you treated the young girl as a prostitute. This was a gross abuse of trust."

[72] It also appears that the sentencing judge acted on the basis that there were "a great many sexual acts committed by you upon her during this period"; that was not inconsistent with the jury's verdicts.

[73] It was also noted that the appellant had not shown any remorse. The complainant was cross-examined at length both at committal and at trial.

[74] In the appellant's favour it was said that there was no violence or threats of violence used; this was not a case of rape. Reference was made during the trial, and again on sentence, to the appellant's previous good character and standing within the community as indicated by the witnesses who gave character evidence. It appears

that the appellant has brought up a number of children (both his own and foster children) appropriately and properly, and there was evidence of his generosity towards those children.

[75] Counsel for the appellant referred to *R v R* [1998] QCA 268 and *R v B* [2003] QCA 68 in support of his submission that the sentence was manifestly excessive. In *R v R* this court imposed a sentence of five and a half years imprisonment with respect to a charge of maintaining an unlawful sexual relationship with a circumstance of aggravation. In *R v B* this court upheld a sentence of seven years imprisonment on two counts of maintaining an unlawful sexual relationship with circumstances of aggravation. Counsel for the respondent referred to *R v C; ex parte A-G (Qld)* [2003] QCA 134, *R v F* [2001] QCA 137 and *R v AE* [2001] QCA 136. *C* was a worse case of maintaining because rapes were involved. He was initially sentenced to nine years imprisonment with a recommendation for release after four years, but that was increased on appeal to 10 years with a serious violent offence declaration. *F* pleaded guilty to a charge of maintaining an unlawful relationship of a sexual nature with a child under 16 years of age who was in fact his stepdaughter. The offending commenced when the girl was aged 11 and involved actual sexual intercourse. He was sentenced to eight years imprisonment with a recommendation for eligibility to apply for parole after serving three years. An application for extension of time within which to appeal against the sentence was refused on the ground that an appeal against sentence had no prospects of success. *A* was convicted after a trial of maintaining a sexual relationship with a 12 year old girl. He was sentenced to eight years imprisonment and this court dismissed an application for leave to appeal against sentence.

[76] Those cases demonstrate that the sentence in fact imposed here was well within range. The application for leave to appeal against sentence should be refused.

[77] The orders of the court should therefore be:

(i) Appeal against conviction dismissed.

(ii) Application for leave to appeal against sentence dismissed.

[78] **CULLINANE J:** I agree with the reasons of Williams JA and the orders proposed by him in this matter.

[79] **JONES J:** I agree with the reasons of Williams JA and with the orders he proposes.