SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBM* [2014] QCA 331
PARTIES:	**R** **v** **HBM** (appellant)
FILE NO:	CA No 64 of 2014 DC No 289 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	16 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2014
JUDGES:	Holmes and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of numerous sexual offences against two minors – where the appellant claimed each complainant was not a credible or reliable witnesses – whether the jury's verdict was unsafe or unreasonable in light of the evidence *M v The Queen* (1994) 181 CLR 487, [1994] HCA 63, cited *Michaelides v The Queen* (2013) 87 ALJR 456; [2013] HCA 9, cited *R v PAH* [2008] QCA 265, cited *R v Thaiday* [2009] QCA 27, cited
COUNSEL:	S Holt QC for the appellant B J Power for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Applegarth J and the order he proposes.

[2] **GOTTERSON JA:** I agree with the order proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J**: The appellant was convicted at trial on 18 counts involving the sexual abuse of two sisters. Counts 1 – 12 related to the child complainant S. Counts 13 – 18 related to the child complainant D, S's younger sister.

[4] The complainants' mother, J, and the appellant had two children before their relationship ended. The appellant started a relationship with T. Most of the counts on the indictment concern a period between October 2007 and July 2008 when the appellant acted as a driver and minder for T, J and another woman who worked as prostitutes. On some occasions one of the complainants would accompany the appellant when he dropped the women at a client's place. The appellant would park his van in a nearby secluded place and wait for the woman to phone. Sexual offences were alleged to have occurred in the van during these waiting periods. This course of conduct against each complainant was at the heart of the counts of maintaining a sexual relationship with a child (Counts 1 and 13).

The appeal

[5] The only ground of appeal is that the verdicts "were unreasonable and cannot be supported having regard to the evidence". The appeal is about the credibility and reliability of each complainant's evidence.

[6] The principal challenge to the evidence of S concerns the sequence of her disclosures which commenced in 2008, her explanations for failing to previously disclose offending and the apparent improvement in her memory. The appellant submits that when these and other problems with the evidence of S are added to the exculpatory evidence of T, there was an "irredeemable problem" with a jury accepting her evidence beyond reasonable doubt.

[7] Somewhat different submissions are made about the quality of D's evidence. One is that she initially denied to police in 2008 that the appellant sexually abused her. Another is that there are inconsistencies between her evidence and some of the evidence of preliminary complaint witnesses.

[8] On 23 October 2011 S and D went to the police station and each made disclosures of offences by the appellant. The appellant does not submit that the jury was bound to find that there was collusion. However, he submits that there were real signs of at least contamination of evidence as between S and D. Evidence suggesting possible collusion is said to add weight to the unreasonableness of the verdicts.

[9] The prosecutor and the learned trial judge recognised certain problems with each complainant's evidence. The trial judge gave comprehensive directions and appropriate warnings about the need to scrutinise each complainant's evidence with great care. No criticism is made by the appellant, and no fair criticism could be made, of the trial judge's directions to the jury. The appellant contends that these directions and warnings were not enough to stop him being convicted in a case where it was not open to the jury to be satisfied beyond reasonable doubt of his guilt.

[10] The respondent submits that a close reading of the evidence does not support a finding of collusion or support the view that the evidence of each complainant was as problematic as the appellant contends. The evidence of each complainant is said to be strengthened by:

(a) other evidence showing the appellant's sexual interest in the child;

(b) the evidence of J that the appellant drove her to jobs as a prostitute and that at times either S or D would accompany them and be left in the van with the appellant while prostitution services were provided;

(c) the evidence of the other complainant.

T, who gave evidence for the appellant, was submitted by the respondent to be a clearly partisan witness whose evidence the jury was entitled to reject, particularly as J gave evidence which contradicted some of T's evidence.

[11] The respondent submits that the jury was entitled to accept each complainant's evidence after the matters raised by the appellant were canvassed at the trial and were the subject of appropriate directions by the trial judge.

Legal Principles

[12] When it is alleged that a verdict of guilty is unreasonable and not supported having regard to the evidence, an appellate court must determine whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.[1]

[13] 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. In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where evidence lacks credibility for reasons which are not explicable by the manner in which it was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.[2]

[14] In answering the question of 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 not disregard or discount either the consideration that the jury is a 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. Still, an appellate court must make its own independent assessment of the evidence. If the evidence is such as to leave the court to conclude that, even allowing for the advantage enjoyed by the jury, there was a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence.[3]

The evidence at trial

[15] The prosecution relied upon a number of recorded interviews admitted pursuant to s 93A of the *Evidence Act* 1977 (Qld) and the pre-recorded evidence of the complainants. The evidence that was recorded in accordance with s 21AK of the Act was given on different dates in 2011, 2013 and 2014.

[16] The balance of the evidence at trial in March 2014 consisted of the evidence of J, evidence from preliminary complaint witnesses and some non-contentious evidence about dealings with child safety authorities and a homeless women's shelter at which J was accommodated in April 2004. Some evidence was given by police and there were a large number of formal admissions.

[17] The appellant did not give evidence, but called T as a witness.

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1 *M v The Queen* (1994) 181 CLR 487; *Michaelides v The Queen* (2013) 87 ALJR 456.
2 *R v PAH* [2008] QCA 265 at [29].
3 *R v PAH* [2008] QCA 265 at [30].

The complainants' family circumstances and their disclosures

[18] Before turning to the evidence of the complainants about each of the counts, it is necessary to describe their family circumstances and the sequence of their disclosures.

[19] S was born in early 1996, and is J's eldest child. D was born in late 1997. J had two sons with the complainants' father. They were born in 1999 and 2001.

[20] J met the appellant in 2003 and started a relationship. She fell pregnant in late 2003. Problems with accommodation forced her and her three youngest children to go to a women's shelter for about 10 days in April 2004. S stayed with the appellant. J and the appellant had a son in June 2004 and a daughter in May 2005.

[21] J's six children were neglected. Many notifications were received by the Department of Child Safety between 2005 and 2007, and investigations were undertaken by the Department. One investigation in April 2006 led to the complainants being placed in foster care from 10 April 2006 to 27 September 2006. The Department of Housing found J rental accommodation, where she lived between May 2006 and July 2010.

[22] J's relationship with the appellant was practically at an end by around 2006. He had started a sexual relationship with T in about 2004-2005. T moved into the appellant's home, which was occupied by other people including another woman who, like T, worked as a prostitute.

[23] In around October 2007 J encountered the appellant and T whilst shopping, and resumed contact with him. J's evidence was that her relationship with the appellant was not good, but they had sex together from time to time.

[24] By this time J's children had been returned to her, and she and her children would often sleep over at the appellant's place. The evidence about their sleeping arrangements is somewhat confusing. The appellant and T usually slept in one bedroom. J said that sometimes S slept in the appellant's room with him and T. Sometimes D would be in the room as well on a mattress on the floor. Sometimes J would sleep with the appellant in his bed, and, on occasions S or D would also share that bed.

[25] According to J, T asked her if she wanted to work as a prostitute because they needed to help the appellant with some money and pay bills. J agreed and began work as a prostitute, but did not get much work. T was the most popular of the three prostitutes. Clients were sought through newspaper advertisements. Clients would ring, and the woman would usually be driven by the appellant to the client's place. After dropping the woman off at the client's place, the appellant would usually wait in the vicinity until he received a text message or call telling him that the job was finished and the prostitute needed to be picked up.

[26] J's evidence was that when the appellant drove her to these jobs, sometimes S or D would come for the drive, and sometimes both of them went for a drive. S went more often than D.

[27] On 17 July 2008 the complainants were taken into foster care with O, one of the witnesses who gave preliminary complaint evidence. On 22 September 2008 S was interviewed by the police and disclosed offending by the appellant that had occurred after the appellant and J resumed their relationship in October 2007. A further, short interview with police was undertaken by S on 30 October 2008. In a separate interview that day, D denied that the appellant had sexually abused her.

[28] In August 2010 the complainants went into foster care with KF, another preliminary complaint witness, and disclosures were made at various times by S and D to KF or her daughter AS. On 1 November 2010 "at the behest" of the Department of Child Safety, S wrote a letter headed "My Sh*t Life!". It gave an account of how J met the appellant when S was eight and how later, when J and her children had to move out of a house, the women's shelter could only take three of the four children. S did not want her brothers or sister living with the appellant so she stayed with him. The letter reports that while staying with him, the appellant "started to feel me & stuff". S explained that she did not tell her mother what had happened over the time as the appellant "would hurt me if I did".

[29] The letter went on to describe how sometimes:

> "... we would sleep over [the appellant's] house because we had no beds for a while. Even then, when mum wasn't around he would try feeling me up. I told him I didn't like it but he kept saying it was going to be okay, it was going to get better soon. I was only 9 at the time than (sic) so I didn't understand what he meant. He was doing this for a period of time."

These episodes are identified as having occurred before S and her siblings went into foster care in April 2006.

[30] The letter went on to describe how some time after S, her siblings and her mother moved to another suburb, J bumped into the appellant and contact resumed. S described how the appellant and T arranged for J to act as a prostitute, with T negotiating the arrangement. The letter continued:

> "[T] would get ready & [the appellant] would ask me if I was coming & I had to say yes otherwise he's crack a tanty. So I said yes and we'd leave. When we dropped [T] off to the callers place, [the appellant] would wait somewhere in the car, & he would feel me & try [to] kiss me & stuff. I kept telling him to stop but he kept saying it was going to be okay. But I didn't believe him. I was so scared but I couldn't tell anyone about it. I always wanted to commit suicide & I still do sometimes because I think its my fault, that I didn't tell anyone sooner.
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> Than (sic) one day he was suppose (sic) to take me to the doctors because I was sick but instead he took me to a park & I asked where were we going & he said to me that we were going to a park and I said why but he didn't answer me back. I honestly thought I was going to be killed right there & then. But when we got to the park he started feeling me, I told him to stop but he didn't, I than (sic) told him I didn't like & he just smiled & stopped. He told me to jump to the back of his van so I did. He than (sic) locked the car doors from the inside & jumped to the back where I was. He started feeling me again & I started to cry. He pulled my clothes off. I tried to force myself away from him but he didn't budge. He inserted his penis & yeah you know what happened. I cried the whole time why (sic) he just laughed & smiled. We went to his house after that. And told mum that the doctor said I was fine. So from than (sic) on he took me with him on every job [T] had. Until we went into foster care the second time. After that I never saw him again. But even now I'm scared to go anywhere by myself because I think he's there waiting for me.

> And a lot of the times he would ground us & lock us in the rooms & make us starve. He always use (sic) to smack us with hoses, tree branches and other stuff like that. He even made [G] go without food for a long time."

[31] There was an extraordinary, and unexplained, delay in S's evidence being pre-recorded. This first occurred on 27 April 2011.

[32] S and D were each interviewed by police on 23 October 2011. On 13 December 2013 there was a further pre-recording of S's evidence. D's evidence was pre-recorded on 17 and 30 January 2014.

[33] It will be necessary to refer in greater detail to the contents of the various police interviews and the evidence which S and D each gave to the Court in these various recordings. The totality of their evidence painted a picture of physical and emotional neglect. S agreed under cross-examination on 13 December 2013 that J is intellectually impaired. S also agreed that she was basically "the mother of the house" in the sense that she did all the housework and looked after all the other kids.

[34] On 22 September 2008, S had explained to the police that she had not told anyone about the appellant's conduct because she was concerned that she would have to go back into foster care. Under cross-examination this explanation was challenged and S agreed that foster care was much better than her mother's care. She rejected a suggestion that she was lying when she said that she did not want to go back into foster care. Trial counsel for the appellant (who did not appear on the appeal) questioned S as to why she would choose her mother's care over someone who could look after her. S responded:

> "At that stage it occurred to me that I needed to help my mother more than I needed to be helped".

However, once experiencing the foster care of O, S did not wish to leave. She and her sister remained in foster care. By 2010 J was living with a new boyfriend, with whom she had a child in 2010 and another child in 2011. When S gave her pre-recorded evidence in December 2013, she was still in foster care. By then she was aged almost 18, and giving evidence about the dysfunctional family circumstances which prevailed in her and D's life at the time of the alleged offences, many years earlier.

Counts 1 – 12 in relation to S

[35] Count 1 charged that between 1 September 2003 and 17 July 2008 the appellant maintained an unlawful sexual relationship with S. S was aged between seven and 12 during the relevant period. As well as relying on the specific sexual acts identified in Counts 2 and 4 – 11, the prosecution relied on sexual acts that were not specific as to times or their circumstances. The particularised sexual acts included touching the genital area, touching the breasts, kissing S, inserting the appellant's penis into the complainant's anus, her vagina, and her mouth, inserting his fingers into her vagina, and having S touch his penis. The principal sources of evidence relied upon by the prosecution were S's letter of November 2010, her police interview on 23 October 2011 and the s 21AK hearing on 13 December 2013.

[36] Counts 2 and 3 related to when J was staying at a women's shelter. Count 2 alleged that the appellant touched S on or around her genital area. Count 3 charged the appellant with having taken an indecent photograph or photographs of S. Evidence

supporting these charges was found in S's police interview on 23 October 2011. S's evidence was that one night when she was staying at the appellant's home and in bed the appellant rolled over and started feeling her vagina over the top of her clothes. She told police that the appellant got up, got his camera and made her lift up her nightie and took pictures of her vagina and breasts. She was able to describe the circumstances surrounding these alleged offences including a trip to the toilet, the appellant being on his computer, and the colour of her nightie.

[37] Counts 4 – 12 each particularised offending between 1 October 2007 and 17 July 2008.

[38] Count 4 related to an occasion when the appellant was driving his van. This count of indecent treatment of a child under 16, under care, arose from statements made by S to police on 22 September 2008. Towards the start of that interview S responded to a question about why she was speaking to the police by saying that "This man had sex with me". She went on to identify the appellant. When she was asked about the appellant having had sex with her and how many times this happened she responded: "Not that many". She said she did not remember how many, but indicated that it was more than once.

[39] She was then asked about the very first time this happened and initially described being on a journey with the appellant when he kept touching her despite her complaints, and that she was offered money. The appellant was said to have left S alone for the rest of the journey.

[40] She then gave an account of going out again in the appellant's van. This evidence was the subject of Count 5 which charged the appellant with having raped the complainant in the back of his van while they were in a park. S's recollection was that it was around midday. She could not say when precisely the rape occurred other than it was a couple of weeks after the time he touched her when they were in the van. S described how she got into the van thinking that they were going shopping, but had been taken to near a park. She could not describe the location of the park. She described an episode of rape in the back of the van. After the appellant said, "We're finished" S and he returned to the front of the van and went to the shops. As with the previous occasion, S gave evidence about feeling scared and not telling anyone because she thought that the appellant would hurt her. S was able to give some details of what she was wearing and what was said to her during this episode.

[41] Count 6, a charge of indecent treatment, related to an occasion when the appellant dropped T at a hotel near McDonalds. Her evidence described the location at which T was dropped off and having parked with the appellant nearby. She gave evidence of the appellant having touched her on and around her vagina.

[42] Count 7, a charge of rape, concerned an occasion when the appellant was alleged to have inserted his penis into the complainant's mouth. S gave a detailed account of this episode as having occurred after the appellant dropped T off. It was at night and S was told by the appellant to get into the back seat of the van. He unzipped his pants and forced her to suck his penis. The car was parked near a river bank. S recalled a police car doing a "drive by" and how the police shone a torch into the van. S was lying down at the time and the police drove off.

[43] Count 8 alleged digital rape on an occasion that S could particularly remember. She recalled that on this particular time he dug his fingers "in deeper and harder" in response to her saying she did not enjoy what he was doing. She could not recall where the van was parked when this happened.

[44] Counts 9 – 11 related to an occasion when the appellant was alleged to have dropped T off at an address and waited with S in the van. These counts were based on S's evidence that, after having dropped off T, the appellant and she drove to a bush area, at which point she was told to get into the back of the van. The appellant told her to get on her hands and knees and inserted his penis into her vagina (Count 9). She told him to stop and he later stopped. He then required her to lie on her back, spread her legs and he inserted his penis into her vagina (Count 10). After this, the appellant made S play with his penis (Count 11).

[45] Count 12 particularised an occasion when S recalled the appellant using a red car. The car belonged to a friend of T. S initially sat in the back seat and the appellant dropped T off. It was expected to be a half hour session. The appellant was said to have told S to get in the front passenger seat and to have made her play with his penis. S recalled that T called within 15 minutes, saying that the session had been cancelled and that she wanted to be picked up.

[46] Counts 6 – 12 (inclusive) were disclosed during S's interview with police on 23 October 2011.

Counts 13 – 18 in relation to D

[47] The charge of maintaining a sexual relationship with D related to a period between 18 November 2005 and 17 July 2008. It was based on D's interview with police on 23 October 2011 and the evidence she gave at the s 21AK hearing on 30 January 2014. D was aged eight to 10 during this period. When the police interviewed D on 30 October 2008, when she was 10 years old, she did not make any disclosures, and denied being touched by the appellant. However, the evidence revealed that D had made a complaint of rape to a friend, AS, in August 2010, more than a year before S and D went to the police on 23 October 2011.

[48] The sexual acts that were particularised in respect of the count of maintaining a sexual relationship with D included acts of touching her on and around her genital area, kissing her, inserting his penis into her vagina, inserting his penis into her mouth, inserting his fingers into her vagina and forcing her to touch his penis.

[49] In addition to the specific episodes which became the subject of other counts, the maintaining count relied on more general evidence of D. She told the police on 23 October 2011 that the appellant "would finger me and um I'd have to suck him off but he only started having sex with me when I was 10". D suspected that her mother knew what was going on. She recalled occasions when her mother and the appellant were in bed having sex, and she would also be in the bed. The appellant was alleged to have reached over and fingered her at the same time.

[50] Count 14 charged the appellant with taking an indecent photo of D. D's account of this episode was of having been in the appellant's room on the mattress, wearing a nightie, and being woken up and told to spread her legs, whereupon the appellant took a photograph of her vagina.

[51] Counts 15 – 17 concerned an occasion when the appellant dropped J off and waited with D in his van. D's evidence was that the job her mother was taken to was expected to last two hours and the appellant drove D to a park. The appellant pulled his pants down and forced D to suck his penis (Count 15). The appellant and D then went into the back seat of the van. After people who had been walking past left, he put his fingers in D's vagina (Count 16), and then put his penis in her vagina (Count 17).

[52] Count 18 charged the appellant with indecent dealing for having kissed D when they were on the way to pick up T on another occasion.

Contentions in relation to Complainant S

[53] The appellant submits that there were fundamental problems with the evidence of S which are not redeemable through the legitimate use of similar fact evidence given by D. D's evidence was acknowledged by the appellant to have fewer problems than S's evidence, but D's evidence was said to have problems of its own.

[54] The core problems with S's evidence were submitted to be the inconsistent nature of the disclosures and that the explanations for her incremental disclosures were unconvincing. Senior Counsel for the appellant fairly accepted that incremental disclosures in cases of this kind are not unheard of and that some inconsistencies about past events are common features in such cases. However, what were said to be inconsistencies between S's accounts and her "highly problematic explanation for those inconsistencies" were submitted to be so fundamental as to require verdicts of acquittal.

The disclosures in the September 2008 interview

[55] The incremental nature of S's disclosures and her later explanations for that begin with a consideration of the police interview on 22 September 2008. As already noted, S understood she was to be asked questions because the appellant "had sex" with her. When asked about the very first time this happened and to tell everything she could remember, S (who was then aged 12) did not immediately speak of the first incident of sexual intercourse. She referred to an episode of indecent dealing which had occurred some weeks before the first act of sexual intercourse.

[56] The appellant submits that it is clear from her answers that S was describing the full extent of the appellant's offending against her. I do not consider that this is clear. The questioning relevantly started with an enquiry about the appellant having "had sex" with her. It did not enquire about the first time the appellant had touched her in an unwanted or sexual way.

[57] In responding to a question about having sex with the appellant, S indicated that she had sex with the appellant on more than one occasion. Later in the interview, she was asked "Did he have intercourse with you more than once?", to which S responded "Um, um not that I can remember." It is not entirely clear whether the question was understood as enquiring about whether intercourse happened more than once on the first day that sexual intercourse took place or if intercourse occurred on different dates. The question was probably intended, and may have been understood, as enquiring about the latter. S's demeanour at this point of the interview suggested a disinclination to talk about any later occasion. Her apparent inability to remember other occasions of sexual intercourse is not necessarily indicative of an unreliable witness. The jury may have understood her responses as being that of a 12 year old girl who, in the circumstances, could not remember other occasions or did not want to remember them at that stage of the interview. The jury may have reasonably concluded that S was reluctant to tell all in her first interview with police. Even as a 15 year old in October 2011 she was reluctant to detail, and appeared embarrassed to disclose, other acts of sexual abuse that occurred after the act of vaginal rape that was charged as Count 5.

[58] In later police interviews, and when being cross-examined by defence counsel, S did not depart from her evidence given on 22 September 2008 that the first occasion she had sex with the appellant was in the van, as she described in that interview. The occasion seemed to have been some time before May 2008.

Cross-examination in April 2011

[59] S disclosed indecent dealing by the appellant some years prior to 2008 in her letter of November 2010 and under cross-examination in April 2011. She gave details of an episode of indecent dealing in 2004 while her mother was staying at a women's shelter when the appellant touched her vagina on the top of her clothes. When cross-examined about why she had not disclosed this episode to police on 22 September 2008, S responded:

> "Because I thought that time was a major time because, the times before that, he only felt my body, not actually sexually abused me."

[60] S accepted that in not telling the police on 22 September 2008 about the prior incidents of touching, she told a lie to the police. But the cross-examiner's description of her non-disclosure as a lie was unfair, or at least inaccurate. That description was based on an assumption that police questioning on 22 September 2008 had asked S about the first time the appellant had touched her sexually. In fact, the questioning was directed to the first time they had sex. The jury was entitled to conclude that S had not lied in failing to disclose the touching in 2004 and earlier years. S's explanation for not disclosing on 22 September 2008 such indecent dealing, as quoted above, was satisfactory.

[61] The cross-examiner went on, however, to point out that what appeared to be a problem with the explanation, namely that on 22 September 2008 she disclosed an incident of touching that occurred a few weeks before the alleged rape in the van. When asked under cross-examination why she told police about the occasion when the appellant touched her in the van, but not earlier occasions of being touched, S responded "because I was scared". This was not a satisfactory explanation, notwithstanding S's evidence that she was scared of the appellant. She explained on oath that the appellant had always said to her that if she ever told anyone he would do "bad things to me like send me to a girls' home or hurt me more and stuff like that". Being scared of the appellant explained why S had not disclosed the appellant's sexual abuse of her to Children's Services officers and others before she went into foster care. Being scared of the appellant could not explain why she would disclose only some things about the appellant in September 2008. It was an unsatisfactory explanation. The jury was entitled, however, to conclude that her first explanation was the correct one.

[62] The jury was entitled to conclude that:

1. S's account of being touched sexually in the van in 2008 a few weeks before the appellant's first act of sexual intercourse with her in the van was given by way of background, in response to questions about the first time she had sex with the appellant. The incident in the van (Count 4) set the scene for what happened in the van a few weeks later (Count 5);
2. S did not disclose in her 22 September 2008 interview incidents of sexual touching that had happened some years earlier because she was not directly asked about it;
3. S's interview on 22 September 2008 did not purport to be a complete account of the appellant's sexual abuse of her;
4. S did not in fact lie to police on 22 September 2008.

As to 4, when cross-examined on 13 December 2013, S asserted that she had not lied to the police on 22 September 2008, and had been unable to recall previous matters during that interview.

The police interview on 23 October 2011

[63] In October 2011, S, then aged 15, gave details of offences by the appellant which post-dated the first act of sexual intercourse which she had described to police on 22 September 2008. These other offences were charged as Counts 6 - 12.

[64] S was cross-examined in a further pre-recording of evidence on 13 December 2013 (by which time she was aged 17) and was asked about her two explanations for not disclosing all of the offending in her interview on 22 September 2008. The first explanation was that she did not remember at the time all that had happened and that her memory had improved. The second explanation was that she thought on 22 September 2008 that she was being asked about "a major time" and not simply occasions when the appellant only felt her body. When asked which of the two explanations was the true explanation, S replied "both, Sir".

[65] The appellant seeks to characterise these explanations as inconsistent. However, S's evidence in December 2013 and on other occasions does not compel that conclusion. S explained that over the course of time she had memories of earlier incidents and that when she spoke to police in 2011 her memory had improved somewhat. Thinking had created "a wider memory of other occasions that had occurred". Watching TV shows like *Law & Order: SVU* also prompted her to think of events in her life. She denied adopting what she saw on TV so as to make up a story about the appellant. She also spoke to her sister, D, about the appellant's abuse when they came into the care of KF after August 2010.

[66] The jury was required to be cautious in relying upon evidence to the effect that S's memory had improved over time, particularly when the memory was triggered by watching TV. But there was no necessary inconsistency between S's explanation of:

- her memory improving over the time she was in foster care; and
- not recalling in 2008 earlier episodes of indecent dealing because she understood she was being asked about "a major act".

[67] S was not pressed (or even specifically asked by the police) in September 2008 about whether S had indecently touched her on the outside of her clothes before 2008. The explanation under cross-examination in April 2011 that she understood that she was being asked about "a major act" that had occurred in 2008 and not less serious touching some years earlier was satisfactory. The proposition that there was a deliberate non-disclosure in September 2008 assumes that in the course of an interview about being raped in the van in 2008 S positively recalled an episode of touching in 2004 and other occasions of touching some years earlier, and chose not to disclose them. Her explanation of an improved memory after she had been in the safety of foster carers and being prompted to think about her earlier life and previous occasions of sexual abuse was not incredible. She was not required to choose between the two explanations. Both explained the incremental nature of her disclosures. They were not inconsistent and they were not incredible.

[68] Discussions between S and D raised the risk of contamination. However, the jury was entitled to conclude that the more complete disclosures made to police in October 2011 arose as a result of S's own appreciation, following her cross-examination in April 2011, that she had not told all that she knew in September 2008. She explained in her evidence to the Court on 13 December 2013 that the reason for the additional disclosures to police in October 2011 was that she "felt as if for something to be actually done more evidence should be provided and that it obviously had to be told to somebody".

[69] This was a satisfactory explanation from a witness who, as a traumatised 12 year old, had been unable or unwilling to recall all of the occasions of sexual abuse she had experienced.

[70] One aspect of S's evidence relates to an uncharged act that was the subject of cross-examination on 13 December 2013. She was asked by the appellant's trial counsel whether she had been anally raped by the appellant, and her response was that she had been. When asked to recall the occasion, S stated it was in the back of the van, the appellant told her to turn over and his penis penetrated her anus. She cried and the appellant told her not to worry and that "everything was going to be okay". When asked to explain why she had not given a statement about this act, she replied "nobody asked so I didn't believe it was relevant to say". She went on to explain that she did not remember it when she spoke to police in October 2011. She was asked by defence counsel when she first recalled that she was anally raped to which she responded:

> "To be honest, just now when you've asked me the question."

However, S immediately conceded that she may have disclosed this to KF. KF's evidence was that S had made a disclosure of anal rape to her. S said that the occasion of anal rape did not come to mind when she spoke to police in October 2011 because she was only then questioned about being vaginally raped.

[71] It is remarkable that when speaking to police in October 2011, and seeking to give police more evidence than she had done in September 2008, S did not disclose the incident of anal rape, even if she was not asked a direct question about that matter. It is also difficult to accept that she would have forgotten about it or not regarded it as relevant to the police investigation.

[72] S described the matter to KF but not to the police. Her explanation for not disclosing the alleged anal rape to police was problematic. It cast doubt over the credibility and reliability of her evidence about the alleged act of anal rape. It also had the potential to diminish the credibility and reliability of her evidence about the charged acts.

[73] Proof beyond reasonable doubt that the alleged anal rape occurred was not essential to proof of the count of maintaining. The jury may not have been satisfied beyond reasonable doubt that the act of anal rape occurred and still convicted the appellant on Counts 1 - 12.

[74] The omission to disclose the allegation of anal rape to police after disclosing it to KF may have imperilled a conviction for the alleged anal rape if it had been charged as an offence. Her omission to disclose it to police adversely affected the quality of S's evidence about that act. It also was a matter for the jury to consider in its overall assessment of S's evidence. However, the limited disclosure of that uncharged act did not irreparably harm the credibility and reliability of S's evidence about the charged acts.

[75] The sequence of disclosures of the offences that were charged and S's explanations for them required careful and cautious scrutiny by the jury. I do not consider that the explanations were so problematic that the evidence of S could not be relied upon as proving Counts 1 - 12 beyond reasonable doubt.

Other aspects of S's evidence

[76] The appellant points to other evidence which was submitted to have tended to reduce rather than enhance S's credibility. One is that her first disclosure of offending followed a denial to child safety officers, before she went into foster care, that the appellant had ever sexually offended against her. However, she explained this was because she was scared of him and wished to care for her mother. In 2008 S and D were placed in the care of O, and S spoke to her granddaughter, TH. The appellant points to evidence from TH that S told her that she had been raped by "someone" but at the time of the disclosure gave very little detail. Under cross-examination TH agreed that S had initially told her that "she didn't know who it was". However, TH's interview with police on 24 October 2008 more fully explained that S initially did not say who had raped her, but in a later conversation told how she had been raped and that it had been by the appellant.

[77] The appellant also points to S's evidence on 27 April 2011 that she had not told anyone other than KF about a particular incident. S later acknowledged that this was untrue and that she had also spoken to her sister, D, about this. She explained why she had lied in this regard:

> " ... I didn't want to have [D] be put through what I had to go – what I have to – go through. Like, for this pre-recording I didn't want to have to have her sit here and go through what I'm feeling right now".

The admission to having lied was apt to diminish S's credibility. However, it was open to the jury to accept her explanation that she lied to protect her sister from having to go through a similar forensic examination.

[78] S gave evidence of offences occurring on occasions when she went with the appellant to drop off T to work as a prostitute. The appellant notes that T gave evidence that neither S nor D ever accompanied them on such trips. However, the jury was entitled to reject T's evidence, due to her association with the appellant and the consequences to her of admitting that children were involved in her being transported to and from work as a prostitute. T's evidence did not compel acceptance and did not diminish S or D's credibility. There was evidence from S's mother that the children accompanied the appellant when she was dropped off for the purposes of prostitution. S acknowledged that she engaged in some exaggeration in her November 2010 letter when she wrote that from a certain time on the appellant took her with him on every job with T. However, the evidence supported the conclusion that the appellant had taken S with him on many such occasions, and that he also took D in the van on other occasions when he was acting as driver and minder for T and J.

[79] In addition to the matters raised by the appellant in his written submissions, I have had regard to other aspects of S's evidence which may affect its reliability. In her police interview in September 2008, S recalled going to the shops after sexual intercourse occurred in the van, buying some food and taking it home. Her November 2010 letter referred to a plan to go to the doctors because she was sick. In her cross-examination in December 2013, she confirmed that she was supposed to go to the doctor. Her recollection about a plan to go to the doctors does not discredit her earlier evidence about the first occasion she was raped, namely in the van near a park area (later described as the Loam Island incident) after which she and the appellant went to the shops before going home. These matters do not present significant issues in relation to S's credibility and reliability.

[80] The last few sentences of S's November 2010 letter about the appellant's discipline and neglect of her and her siblings should be compared with S's denial on 13 December 2013 of personally being physically disciplined by the appellant. In giving evidence in 2013 she was sure that her brother G had been physically disciplined by him, but not sure about his physical discipline of D. It is not clear that the letter was intended to suggest that S was also physically disciplined. To the extent it suggested that S was physically disciplined it exaggerated or misstated the non-sexual abuse and neglect that she and her siblings suffered.

[81] These other aspects of S's evidence did not diminish S's credibility to any real extent. The manner in which S gave her evidence over a period of years and the detail she gave permitted the jury to conclude that she had a reasonable recollection of detail.

The principal challenge to S's evidence

[82] The appellant submits that the sequence of disclosures, the changing explanations for the failure to previously disclose offending, the apparent improvement in memory of the detail of previously disclosed offences and the capacity to remember previously forgotten offending "strains credulity past breaking point". He submits that when these problems are added to S's initial denial of any offending by the appellant, her admitted lies and the exculpatory evidence of T, there is "an irredeemable problem with the jury accepting the evidence of S beyond reasonable doubt".

[83] I do not agree. S's initial denial of any offending by the appellant was well-explained. The sequence of incremental disclosures was unremarkable. S gave satisfactory explanations for not disclosing all of the offences in her initial September 2008 interview with police.

[84] The jury was entitled to place little weight upon a child witness's ready acceptance of a cross-examiner's assertion that she has lied by not disclosing earlier, less serious episodes of touching when she spoke to the police in September 2008. S later denied that she had lied in this regard and the jury was entitled to accept her explanation of her failure to disclose in 2008 acts of unwanted touching that occurred some years earlier.

[85] After going into foster care and being removed from the dysfunctional circumstances that had characterised much of her earlier life, S was able to disclose matters which she was unable or unwilling to remember during her first encounter with police in September 2008. It is not incredible that her memory of previously undisclosed matters might improve during a period of stability and reflection.

[86] That the memory of a child in S's predicament might improve after a period in the care of foster parents is understandable and S's ability and willingness to disclose in 2010 and 2011 matters which she did not disclose in her first interview with police in 2008 did not present an irredeemable problem with her evidence. It is not entirely surprising that S, as a 12 year old in 2008, just emerging from a lengthy period of abuse and neglect at the hands of the appellant and her mother, should focus her disclosure on the first act of sexual intercourse with the appellant which had occurred some weeks earlier in the van. This was, after all, what she understood the police were interested in talking to her about. However, earlier in the interview she said that she had sex with the appellant more than once.

[87] A jury would not necessarily take an adverse view of S's credibility and reliability because of the sequence of disclosures and the apparent improvement in her memory after September 2008. The jury might reasonably understand that in response to questioning about the first time that she had sex with the appellant, S would preface her account with a narrative of an episode of unwanted touching in the van a few weeks earlier which was the immediate precursor to the first act of sexual intercourse.

[88] In making the limited disclosures which she did in September 2008, S was not purporting to give a comprehensive account of every occasion of indecent dealing or sexual abuse which she suffered. Her subsequent disclosures to her foster carer KF, in her November 2010 letter, under cross-examination in April 2011 and in her interview with police in October 2011 involved incremental disclosure. Her explanations for her incremental disclosure in this regard were not necessarily inconsistent. The first explanation that she gave was satisfactory. Her explanation of an improved memory over time was also satisfactory.

[89] I conclude that S's evidence was not as problematic as the appellant submits. It was open to the jury to accept that the September 2008 disclosures were an incomplete account of the sexual abuse S had suffered and that S had not lied to police in September 2008 by not telling them more on that occasion. Although the recollection of being anally raped, prompted by cross-examination about that topic for the first time in December 2013, was remarkable, it did not fundamentally undermine the credibility and reliability of S about the offences with which the appellant was charged and convicted. S's evidence was problematic in some respects, but not so problematic that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on Counts 1 - 12. It was open to the jury to accept that S's evidence of the offences was sufficiently credible and reliable to be satisfied beyond reasonable doubt of the appellant's guilt.

[90] My review of S's evidence, including viewing the recordings of her interviews with police and pre-recorded evidence, does not lead me to conclude that her evidence about the charged acts is incredible, unreliable or so problematic that the jury could not reasonably convict the appellant on Counts 1 - 12.

[91] S's evidence derived support from the evidence about the appellant's sexual interest in her and her sister. S's evidence also was strengthened by the evidence of D, to which I turn.

Contentions in relation to Complainant D

[92] The appellant submits that there are two very problematic aspects of D's evidence. The first is the timing of her disclosure on 23 October 2011 and the risk of collusion with S. The second is certain inconsistencies with preliminary complaint evidence.

The timing of D's disclosure and possible collusion

[93] D was aged between eight and 10 during the period of alleged sexual abuse. On 30 October 2008, when aged 10, she was interviewed by police and denied being touched by the appellant.

[94] On 23 October 2011 she and S went to the police and made separate statements. The respondent acknowledges the relevance of the fact that D had previously denied that the appellant had offended against her. However, the respondent makes the

reasonable submission that an initial denial to police by a 10 year old in D's situation by the appellant would not necessarily discredit her. It was open to the jury to infer that she was reluctant to disclose offending by the appellant, when first asked by the police.

[95] The respondent also observes that it is unremarkable that the sisters had spoken to each other about the appellant's sexual abuse before they went to the police, and that it is hardly surprising that two sisters would go to the police station together.

[96] Four factors are advanced by the respondent which are said to detract from the suggestion that the sisters colluded around October 2011 and that D concocted false allegations against the appellant in order to support S.

[97] The first is that the evidence does not support the theory that the first disclosure by D of sexual abuse occurred on 23 October 2011 when D went to the police station with her sister. D disclosed sexual abuse by the appellant to AS as early as August 2010. AS is the stepdaughter of KF, who was D's and S's foster carer at the time.

[98] The second factor is that D's evidence, as recorded, is compelling and clearly unscripted. She does not purport to give evidence of the appellant doing things to her sister: the kind of evidence that might be expected if S and D colluded so as to support S's evidence. The content of D's evidence, the way in which it was "teased out of her" by the police who interviewed her and the manner in which it was given were submitted to not show any of the hallmarks of collusion. Instead, it was a compelling account of what happened to D. I agree with this description of D's evidence.

[99] The third and associated factor is that the respective accounts of D and S were not identical, as one might expect if they had colluded. D's best recollections were of occasions after her mother had been dropped off by the appellant "to do her job", whereas S's recollections tended to be of occasions when the appellant dropped off T. These and other differences in their respective recollections were said to be unlikely if there had been collusion between D and S.

[100] The fourth factor is that D did not disclose to police an episode involving her that occurred on a trip to Mount Isa. S gave evidence about this episode on 23 October 2011. She recalled coming into a room and seeing the appellant in D's bed with his hands under the doona, apparently doing something to her. He then took his arms out from below the doona. If D colluded with S in her evidence, then D might have been expected to give evidence about this incident when she went to the police station the same day. However, D did not recall this incident when speaking to the police. Her recollection of it was only prompted during cross-examination on 30 January 2014. She was asked whether the appellant had ever touched her sexually whilst they were in Mount Isa. She recalled the circumstances in which her mother was asleep and the appellant came over to her bed and "started fingering me". She confirmed that she did not tell police about it and was then asked when she recalled the incident. She responded that she only remembered when the cross-examiner brought up the holiday to Mount Isa. She had not read S's statement where S mentioned walking in and seeing the incident and she had not spoken to S about what S told the police. The respondent correctly submits that the evidence about the Mount Isa episode does not suggest collusion.

[101] The four matters pointed to by the respondent, taken together, detract from a suggestion of collusion.

[102] Collusion could not reasonably be inferred from the mere fact that the sisters chose to go to the police together. A comparison between the accounts of D and S does not provide any compelling evidence of collusion. The disclosure by each sister of sexual abuse had some common features. These similarities are explained by the fact the abuse of the sisters occurred in a similar way, particularly because of the opportunity which was presented to the appellant to sexually abuse each child in the van. The accounts of D and S did not have the appearance of being rehearsed or concocted. D's early complaint to AS in August 2010 is inconsistent with S inducing D to support her account only after S was cross-examined in April 2011. It is inconsistent with S deciding after that time and prior to October 2011 to induce D in 2011 to tell false stories about the appellant.

[103] The evidence gave rise to a risk of contamination of evidence as between D and S during the period they spoke to each other in around 2010-2011, and there also was a risk of collusion. D's initial denial of sexual abuse warranted careful scrutiny of the truthfulness of the account she gave to police in October 2011. However, neither the timing of her disclosure nor the risk of collusion was such as to make it unreasonable to conclude that she was a credible and reliable witness.

[104] D's ability to recall events in a way which did not appear contrived and which gave the impression of being an authentic account of actual events and conversations extended beyond her recollection of the offences themselves. For example, D recalled an occasion when she was 10 and sitting with the appellant in the car whilst her mother went to the shops. She recalled that the appellant asked her about "doing what we used to do", to which D responded, "Like what do you mean?". D explained that she was trying "to act stupid so it wouldn't happen again". D's recollection was that the appellant responded: "Don't act stupid, you know what I'm talking about", and said that he would pay her. Her mother returned to the car at this point. It is unlikely that this kind of detail was concocted.

D's preliminary complaint evidence

[105] The appellant relies on the inconsistency between, on the one hand, the recollections of KF and AS at the trial in 2014 that D claimed to have been anally raped and D's denial that anal rape had occurred.

[106] KF and her stepdaughter AS gave evidence that D had disclosed to each of them that she had been raped in the van by the appellant. According to KF, S also spoke to her a number of times about being raped in a white van when her mother was taken to prostitution jobs, of an incident in Mount Isa and of occasions when the appellant had taken photos.

[107] KF did not give evidence-in-chief of any complaint to her by either S or D about being anally raped. Instead, she was cross-examined about this topic. After giving evidence at the trial on 7 March 2014 that S had told her she had been anally raped, the cross-examiner put to her that D had only said that she had been vaginally raped to which KF responded, seemingly unexpectedly, that D had said that she had been anally raped. KF could not recall when D told her that she had been anally raped. She accepted that a statement she gave to police on 6 December 2011 referred to D telling her that the appellant had raped her, and did not suggest that D had complained about being anally raped. Instead, KF had given a statement to police that S had told her that S had been vaginally raped and anally raped. It was put to KF in cross-examination

that she could be mistaken in now saying that D told her that she was anally raped, and it was only S who had complained about being anally raped. KF said that she was confident in her recollection that D had also said that she had been anally raped. KF's evidence at trial was that S first told her that she had been anally raped after they had watched a crime show on television. The show was about a boy being sodomised and, according to KF, S said to her "that happened to me". KF could not explain why her statement to police in December 2011 only referred to S complaining of being anally raped.

[108] AS (who was in grade 12 at the time she gave her evidence on 7 March 2014) recalled conversations in 2010 with D at high school. D was reluctant to discuss a matter despite AS's persistence in asking her about it. Eventually D told AS that she had been raped by the appellant, and that she did not want to talk about it.

[109] AS recalled an occasion when she and her stepmother were watching an episode of *Law & Order: SVU* on television. AS's recollection was that D was sitting with her at the time. She could not recall what D told her on that occasion. AS did not have any recollection of S speaking to KF later that night and S claiming to have been anally raped.

[110] Under cross-examination AS recalled the period after August 2010. She accepted the suggestion under cross-examination that she recalled D saying that she had been anally raped a couple of times. She did not give details of what was said by D, when it was said or the circumstances under which the disclosure came to be made.

[111] The appellant also relies on an alleged inconsistency between AS's recollection of being told by D that the appellant had kept a knife in his car and threatened to kill D, her mother and her family, and D's denial that the appellant had threatened her with any weapons. The alleged inconsistency in this regard may not be particularly pronounced. Some of the relevant questions which were accepted contained more than one proposition, making it difficult to determine which proposition or propositions the witness was truly accepting. D was not specifically and separately asked whether the appellant drove around with a knife hidden in his van. Her answers under cross-examination were to the effect that she was not ever threatened by the appellant with a gun or a knife, and that she did not recall the appellant driving around with a knife hidden in his van, threatening her if she did not do things. The evidence of AS involved her simple acceptance of the cross-examiner's suggestion that "at one stage [D] said that [the appellant] had kept a knife in his car and threatened to kill her and mum and her family". If the answer was accepted as a reliable recollection of an allegation by D that she was threatened by the appellant with a knife kept in the car then there was an inconsistency with D's denial of having been threatened with a knife.

[112] The respondent's general response to these alleged inconsistencies is that certain features of such preliminary complaint evidence sometimes make it an unreliable record of the actual conversation which took place between the complainant and another witness. These are said to be that:

(a) Such a conversation will rarely purport to give an account of the totality of events and often will simply be a general indication that sexual abuse occurred;

(b) Depending on the circumstances in which the conversation was initiated, who was present, the emotional state of the complainant and the degree of

detail given, the witness's recollection of the actual conversation may be unreliable and involve a significant aspect of reconstruction;

(c) The preliminary complaint witness is being asked to recall the detail of a conversation that took place, rather than to describe events that they saw or experienced themselves, and reconstructing the details of such a conversation may be more difficult than recalling an actual experience;

(d) A significant aspect of reconstruction, rather than true recall, will be involved where significant time has passed between the conversation and the evidence given by the preliminary complaint witness: such delay making it difficult to recall the words that were used or the content of the conversation with any precision.

The last point is particularly relied upon where, for example, AS was being asked to recall in 2014 a conversation which was alleged to have occurred in 2010.

[113] The specific features which are said to weaken the reliability of the recollections of KF and AS of certain conversations are:

(a) Neither witness gave an account in evidence-in-chief of D saying that she had been anally raped, the topic was raised only in cross-examination;

(b) KF had not previously purported to recall D, rather than S, reporting being anally raped. The earlier evidence of KF was that S, but not D, had complained about being anally raped;

(c) Neither KF nor AS could give evidence about when D made the alleged disclosure of anal rape;

(d) Both S and D were in the house the night upon which the *Law & Order: SVU* episode was broadcast, after which S disclosed to KF that she had been anally raped; and

(e) In giving evidence in 2014 about a disclosure in around 2010 the preliminary complaint witness may have reconstructed that D also made a disclosure of anal rape when that disclosure was in fact made only by S.

[114] These features are sufficient to conclude that the evidence of KF and AS about a disclosure of anal rape are of questionable reliability insofar as they attributed the allegation to D. D's evidence about the offences which she alleged were not rendered unreliable or incredible because of KF's and AS's quite possibly impaired recollected that D had complained of anal rape. It was clearly open to the jury to conclude that KF and AS were mistaken in attributing that disclosure to D, when in fact the disclosure was made only by S.

[115] As to the evidence about a knife in the car, something may have been said by D to AS about a knife in the car, and also about threats being made by the appellant. AS may have reasonably, but mistakenly, interpreted what was said by D as suggesting that the appellant had threatened D with a knife. AS's evidence involved the acceptance of the dual suggestion in one question that there was a knife in the car and that D had been threatened. A four year old recollection of such a conversation or conversations may have been unreliable. D did not deny that the appellant kept a knife in the car, only that she had been threatened with a knife. AS's recollection is consistent with a recollection of being told by either D or S that there was a knife

in the car and evidence that D felt threatened by the appellant. The nature of AS's acceptance under cross-examination that she had been told by D that the appellant kept a knife in the car and threatened to kill her and other members of the family is of questionable reliability because of its lack of detail and because it purported to recall a conversation or conversations which occurred possibly four years earlier. AS's recollection in this regard was not sufficient to cast any substantial doubt on the credibility and reliability of D.

[116] Whether an inconsistency between preliminary complaint evidence and the evidence of a complainant is such as to present an irreparable problem with the credibility and reliability of the complainant's evidence depends on a careful analysis of the evidence in a particular case. An inconsistency does not necessarily bespeak unreliability on the part of the complainant about the offence in question. The appellant cited *R v Thaiday*[4] as an example of a case in which there were serious discrepancies between the evidence of the complainant and the evidence of a preliminary complaint witness. Those discrepancies, along with the vagueness of the complainant's evidence, a lapse of many years since the occurrence of the events, and the absence of any real attempt on the part of the complainant to explain what was described as her "extraordinary delay or her belated decision ultimately to complain to the authorities" meant that there was a significant possibility that an innocent person had been convicted. The appellant acknowledges that *Thaiday* simply illustrates the principle that serious discrepancies between the evidence of a complainant and the evidence of a preliminary complaint witness may undermine the complainant's reliability, and that cases concerning alleged inconsistencies between the evidence of a complainant and preliminary complaint evidence are "intensely fact specific".

[117] I do not consider that the actual or apparent inconsistencies between the evidence of D and the evidence of KF and AS are serious discrepancies which cast significant doubt upon the credibility and reliability of D. The inconsistencies are not of a nature that call for an adverse view to be taken of D's credibility or reliability. An assessment of the evidence tends to suggest that the evidence given by KF and AS in 2014 which attributed an allegation of anal rape to D which was in fact an allegation made by S.

[118] A jury, acting reasonably, was not required to reject D's evidence because it was inconsistent with the evidence of KF and AS in the two respects which I have discussed.

[119] Incidentally, KF's evidence lends some support to the credibility of S's evidence about being anally raped by the appellant, in that S had told KF about this in around 2010, but that S could not recall having told KF when she was cross-examined in December 2013. Defence counsel at the trial's cross-examination about anal rape triggered S's recollection of the incident.

Other aspects of D's evidence

[120] Certain written submissions about D's evidence were not developed in oral argument. Counsel for the appellant noted the respondent's arguments, if accepted, would render some of the evidence in this regard neutral, and that, standing alone, these matters were the kind of unremarkable features of "historical sexual offence trials". The appellant fairly acknowledged that his appeal stood or fell on the earlier submissions about what was said to be particularly problematic aspects of each complainant's evidence. This acknowledgement should be accepted, and the other evidence may be addressed relatively briefly.

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4 [2009] QCA 27.

[121] D's inability to recall in the police interview if the appellant's penis was soft, hard or medium was unremarkable for a child in her situation, given her age and the nature of the question.

[122] D's evidence of being digitally penetrated when she was in the appellant's bed and when either J or T also was in bed was not falsified by:

(a) J's denial of having sex with the appellant while either D or S was in the bed;[5] or

(b) T's denial that either D or S slept in their bed or that they had sex in front of either complainant.

D did not say that either woman saw the act of digital penetration, and if either of them in fact did so she would be reluctant to recall it, lest it suggest that she was complicit in the appellant's act of sexual abuse. J was warned about answering the question. T was a witness who a jury was entitled to conclude was partisan towards the appellant, and unlikely to admit witnessing such abuse. That T was treated by the prosecution as a partisan witness was evident from her cross-examination.

[123] Similarly, T's evidence that neither D nor S accompanied the appellant and her on occasions when the appellant drove T to a prostitution job did not have to be accepted by the jury. J gave evidence of being accompanied by one or other of the children in the car. It was open to the jury to conclude that T was naturally reluctant to admit having been even an unwitting participant in allowing a child to accompany her on a trip that was undertaken for the purposes of prostitution, lest it implicate her in the appellant's conduct or raise questions with the authorities which regulate prostitution.

Conclusion - D's evidence

[124] It was reasonably open for the jury to accept the evidence of D and to be satisfied beyond reasonable doubt that the appellant committed the offences charged in Counts 13 - 18 of the indictment. D's evidence also lends support to S's evidence about being sexually abused in the van by the appellant.

Were the verdicts unreasonable and not supported by the evidence?

[125] An independent assessment of the whole of the evidence is important in a case of this character to ensure that the jury did not overlook important deficiencies in the evidence of each complainant, possibly because of its sympathy for them or an adverse view about the appellant. The appellant's conduct in having a child accompany him when he dropped a prostitute to a job and then waited for the prostitute to call was apt to put him in a bad light. The dysfunctional circumstances in which S and D lived prior to July 2008 were apt to arouse sympathy for them. Appropriate directions told the jury to disregard feelings of prejudice or sympathy, and the jury should be taken to have done so. This is because, disregarding feelings of prejudice or sympathy, it was open to the jury, upon the whole of the evidence, to be satisfied beyond reasonable doubt of the appellant's guilt.

[126] I am not persuaded that the evidence of either complainant had the fundamental or profound problems for which the appellant contends. The evidence of S and D each had problems. S's evidence was more problematic than D's because of her incremental disclosures and because some of her explanations for having disclosed matters in

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5 AB 301 ll 34-35.

the sequence that she did were not satisfactory. However, a consideration of the circumstances in which she disclosed, first in 2008, and in later communications, the appellant's sexual abuse of her does not reveal a fundamental problem with accepting S's account of events. The limited nature of her disclosures in 2008 was understandable, given her circumstances, and the rape in the van allegation at which police questions were directed. In the following few years she was cared for and better able to recall matters which had occurred in the period between 2004 and 2008. Her claim to have been better able to recall matters a few years after she was originally interviewed by police was not untenable. In 2008, a 12 year old girl was being asked questions about a person she knew and of whom she was scared. She was asked about having had sex with him. She indicated in that interview that the appellant had sex with her on a number of occasions, but later said that she could not remember all of the occasions. Her reluctance to remember and disclose such details at that stage of the interview is understandable. Also, it is understandable that S would not, at that stage, cast her mind back to occasions some years earlier when the appellant had indecently touched her on the outside of her clothing.

[127] That S should be able to give greater detail and tell more when cross-examined and interviewed in 2011 is unsurprising. The incremental nature of her disclosures does not render them unreliable or S's evidence incredible. She explained how her memory improved after 2008. Her first explanation for having not disclosed earlier episodes of touching when interviewed in 2008 was satisfactory. I am not persuaded that the sequence of S's disclosures and her explanations give rise to the kind of profound problems contended for by the appellant. The whole of the evidence permitted the jury to be satisfied of S's credibility and the reliability of her evidence in respect of the specific counts charged as Counts 2 - 12 and also on the count of maintaining.

[128] D's evidence was not particularly problematic, once one accepts that there may be reasons why a 10 year old in her situation, when first interviewed by police, would deny being sexually abused by a person in the appellant's position. D gave evidence that she was scared of the appellant.

[129] The risk of contamination of evidence and the risk of collusion between D and S was a real one. But the evidence did not have the hallmarks of contamination or collusion. The appellant appropriately acknowledged in oral submissions that the jury was not bound to conclude that there had been collusion.

[130] The advantage enjoyed by the jury of seeing and hearing the evidence of all witnesses must be acknowledged. But that advantage should not be overstated in the case of the evidence of D and S, which was recorded and played to the jury and is able to be viewed on appeal in assessing their credibility and reliability as part of an assessment of the whole of the evidence.

[131] I am not satisfied that the evidence of either S or D had irreparable problems. The problems which the evidence had were not of a kind which meant that it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, based upon the whole of the evidence. It was reasonably open to a jury, taking account of the problems that were highlighted at the trial and the directions it received, to be satisfied that each complainant was truthful and gave reliable evidence which supported each of the offences with which the appellant was charged and convicted.

[132] I would dismiss the appeal.