SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAF* [2015] QCA 130
PARTIES:	**R** **v** **LAF** (appellant)
FILE NO/S:	CA No 308 of 2014 DC No 475 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Unreported, 30 October 2014
DELIVERED ON:	17 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2015
JUDGES:	Margaret McMurdo P and Holmes JA and Applegarth J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Applegarth J concurring as to the order made, Holmes JA dissenting
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of one count of maintaining a sexual relationship with a child and found not guilty of other specific offences in respect of the same complainant – where the evidence included admissions made in a pretext phone call with the complainant – whether the guilty verdict on the count of maintaining was inconsistent with the other verdicts *Criminal Code* (Qld), s 229B *Evidence (Protection of Children) Amendment Act* 2003 (Qld), s 11 *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60, cited *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, cited *R v CX* [2006] QCA 409, cited *R v DAL* [2005] QCA 281, cited *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

COUNSEL:	C W Heaton QC for the appellant J A Wooldridge for the respondent
SOLICITORS:	Wettenhall Silva Solicitors for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Applegarth J's reasons for dismissing this appeal against conviction.

[2] This is an unusual case in that the jury acquitted the appellant of many charged counts of specified sexual offending relied on by the prosecution as particulars of the charged offence of maintaining a sexual relationship with a child, yet found him guilty of the maintaining offence without convicting on any other charged offence.

[3] The trial judge appropriately directed the jury in terms of s 229B *Criminal Code* which provides:

> "**Maintaining a sexual relationship with a child**
>
> (1) Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime.
>
> …
>
> (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
>
> (3) For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
>
> (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship –
>
> (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
>
> (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
>
> (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.
>
> …"

[4] It is clear from the terms of s 229B that an accused person can be convicted of this offence if the jury is satisfied there was an unlawful sexual relationship with the child involving unlawful sexual acts. The unlawful sexual acts need not be separate, charged offences (s 229B(4)(a)).

[5] The complainant gave evidence that the appellant committed the particularised counts as well as many other uncharged unlawful sexual acts. The jury could rely on the evidence of the uncharged unlawful sexual acts to prove the offence of maintaining. The experienced trial judge gave the jury comprehensive, careful directions, which have not been challenged in this appeal, as to how to approach their difficult task.

[6] It is true that the appellant, in a detailed police interview, denied the commission of the offences and gave similar evidence at trial.

[7] But a particularly persuasive part of the prosecution case were three pretext phone calls between the complainant and the appellant. The first included:

> "COMPLAINANT: And just you know was wondering why like you just basically like kept having sex with me basically you know like, why? Like I've just been thinking about it. I – you know how my mind works?
>
> APPELLANT: Um oh well I'm not sure. I haven't thought about that at all really. Um…
>
> COMPLAINANT: Because yeah, just because I was just wondering like – yeah, I was just – yeah, wondering things that went through your – in your head when you're like laying down trying to go to sleep type things.
>
> APPELLANT: Yeah, um um yeah, I'm not too – you sort of caught me off – yeah. We'll have a talk about it one day definitely.
>
> COMPLAINANT: Yeah, like – I don't know – yeah, I just thought that I would like try and bring it up now and then like sort it out, because – I don't know, like I just thought you know get it off my conscience as such.
>
> APPELLANT: Yep.
>
> COMPLAINANT: And you know figure out why. Sorry.
>
> APPELLANT: Yeah, I don't know. Um what else you've been doing anyway?"

[8] The second included:

> "COMPLAINANT: Yeah. I was – remember – remember what we talked about the other day?
>
> APPELLANT: Yeah, yeah. I have been thinking about it. Yeah, yeah.
>
> COMPLAINANT: Do you – are you able to answer my questions?
>
> APPELLANT: Um I – I can, but it's going to be a – it's a bit of a long – long answer and I'm in the middle of work right now so.
>
> COMPLAINANT: Oh okay.
>
> APPELLANT: Where – where are you going to be this – tonight?"

[9] The final phone call included:

APPELLANT:	What do you want to know girl and why do you want to know it? What – what – what are you after?
COMPLAINANT:	I'm just after like um just to know why.
APPELLANT:	And why does it make a difference? Like what…
COMPLAINANT:	I don't know. I just want to know like…
APPELLANT:	In terms of?
COMPLAINANT:	The – why. Like what – I don't know, but I just – I don't know why I want to know but I just want to know.
APPELLANT:	What's the outcome do you want?
COMPLAINANT:	Pardon.
APPELLANT:	Do you want to know it meant something, because it did.
COMPLAINANT:	Did it mean something?
APPELLANT:	And it still does. Of course it does.
COMPLAINANT:	Oh okay.
APPELLANT:	And it still does you know. Oh just because I – I haven't always disappeared from your life doesn't mean I'm not looking over your shoulder trying – you know…
COMPLAINANT:	Yeah.
APPELLANT:	I ask mum all the time how you are, what you're doing, how's your school work. I spoke to you the other day. I knew you were failing school a little bit because mum said so because I asked her.
...	
APPELLANT:	You know. But you know I'm not going to lie to you, if you – if you – you know, I'm – I'm lying in a donga right now in bed, so I'm a thousand miles from you. If you walked in that door today and slipped into my bed it would be on. If you wanted it. That's the way it is.
COMPLAINANT:	Yeah.
APPELLANT:	That's – that's it. So I hope I – don't dwell it on girl just get on with your life.
COMPLAINANT:	Okay.
APPELLANT:	Yeah. You have a partner. You have everything you know.

COMPLAINANT: Mmm.

APPELLANT: [Inaudible] you must be taught. If you need to ring me at some stage then get on the phone or text me and you call me? Just give us a text and you call me.

COMPLAINANT: Yeah.

…

APPELLANT: But if you really want to know, do I love you, yes I do. I love you more than I should but no. If anything we ever did meant something to me, yeah it did. Yeah it did.

COMPLAINANT: Sorry.

APPELLANT: And I – and I think you – I think you quietly enjoyed most of it as well.

COMPLAINANT: Pardon? Sorry?

APPELLANT: And I think you quietly enjoyed most of it as well. Yeah.

COMPLAINANT: Well I don't know.

APPELLANT: You don't know. Okay. Well [inaudible]

…

You might be a bit confused but yeah.

COMPLAINANT: Mmm. It was kind of a weird situation sometimes.

APPELLANT: In terms of?

COMPLAINANT: Well that you were basically my father figure.

APPELLANT: Yeah.

COMPLAINANT: And then this was happening. So it was kind of a confusing weird situation.

APPELLANT: Yep. Well I'm here if you need me.

…"

[10] The appellant's evidence about these phone calls was that the complainant rang him and mumbled something, accusing him of having sex with her. He said:

> "I was a bit perplexed. I couldn't really think. It was just – I hadn't even known – I wasn't sure if I'd heard her right. She made some other comments and I couldn't believe what she was saying. She'd never made – you know, she'd never mentioned it or made an allegation like that before at all. It was the first time I'd ever heard of it."[1]

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1 T4-65.

[11] Later that day he rang her mother who said the complainant was having some trouble at school and having issues about the breakdown of her mother's marriage; she felt some responsibility for this and for the family's resulting economic problems. He wanted to know what was going on. He was puzzled as to where her allegations were coming from. He had seen something on Facebook about her running away from home.

[12] At the time of the third call on 15 November 2011 he said he was keen to find out what was going on. It was:

> "[A] very dangerous subject matter that had no foundations that [he] could see. And [he] needed answers."[2]

He was concerned for the complainant's wellbeing as well as his own. He wanted to reassure her that he was still there for her.

[13] In cross-examination he agreed he had the transcribed phone conversations with the complainant,[3] to which I have referred.

[14] In re-examination he said he asked her for sex hoping to solicit some sort of response and anger from her. He:

> "[Was] probing for – for some emotion from her as well and it never came, or she just went yeah. So it was – there was just continuous probes during that conversation of trying to find out where she was, what she was doing and – and, at the same time, provide some sort of, you know, reassurance that she was, you know, if you're in trouble, tell me. Tell me what you're in trouble about, like, this was – yeah. And – just trying to reassure her and – yeah. And – and in the process of doing – I said some really stupid things."[4]

[15] The pretext phone calls were compelling support for the complainant's evidence that the appellant had an unlawful sexual relationship with her when she was a child, during which he committed a number of unlawful sexual acts. The appellant's evidence as to these phone conversations was implausible and illogical.

[16] As Applegarth J has explained in his reasons, the jury, taking a particularly conscientious approach to their onerous duties and giving full weight to the appellant's evidence, may not have been satisfied beyond reasonable doubt of the complainant's evidence on the carefully particularised counts on which they acquitted. In light, however, of the evidence of the pretext phone calls and the jury request for redirections as to whether they could convict of maintaining if not convicting on the other charged counts,[5] it is hardly surprising that the jury members were all satisfied beyond reasonable doubt of the complainant's evidence that the appellant had an unlawful sexual relationship with her in that he committed more than one unlawful sexual act with her between 30 April 2003 and 31 January 2011, when she was a child.

[17] For these reasons, together with those of Applegarth J, the guilty verdict on count 1 was not unreasonable and was not inconsistent with the verdicts of acquittal.

[18] **HOLMES JA:** In this appeal, I have had the considerable advantage of reading the judgments of the President and Applegarth J. I gratefully adopt their setting out of

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2 T4-67.
3 T5-14 – T5-17.
4 T5-19 – T5-20.
5 Wednesday 29 October 2014, T 4 - 5; AB 440 – 441.

the evidence, but have reached a different view as to the significance of the acquittals on the nine counts of rape and the count of indecent treatment.

[19] The pretext telephone calls certainly provided support for a conclusion that there had been sexual intercourse between the complainant and the appellant, but that was not enough to convict of the offence of maintaining a sexual relationship under s 229B of the *Criminal Code*. For that to occur, the jurors had to be satisfied of the commission of at least two of the unlawful sexual acts relied on by the prosecution either as counts of the indictment or as uncharged acts;[6] that was the way the case was left to them.

[20] In theory, different jurors in numbers short of a majority might have been satisfied on some or all of the alternative charges on counts 2, 6 and 8-12, on which they were unable to agree on verdicts, so that all of them were ultimately satisfied of at least two of them (but not the same two); or, alternatively, they might have convicted on the basis of uncharged acts. The question is whether there is an inconsistency between the conviction on the maintaining count and the acquittal on all but one of the remaining counts which indicates that the guilty verdict could not properly have been arrived at.

[21] The acquittals on the rapes in counts 6 and 8-12 would be problematic taken alone, because they indicated that the jury was not prepared to accept beyond reasonable doubt the complainant's clear evidence that non-consensual sex had occurred in each instance, and her more general evidence that she had not wanted to do any of the things involved and had been forced to do them. One might be able to reconcile the inability to be satisfied of the lack of consent with a willingness to find alternative charges or uncharged acts proved, on the basis that the tenor of the pretext telephone calls caused doubt as to consent short of requiring disbelief of the complainant, while allowing the jury to be satisfied that there had been sexual intercourse. But that could not explain the acquittals on counts 3, 4 and 5, in which consent was not an issue.

[22] The argument was put that the acquittal in relation to count 3 was explicable on the basis of the complainant's uncertainty whether the underlying event happened at Easter or Christmas 2006. The dates of the alleged offences did not form part of the Crown's particulars given to the jury, which identified the various offences by reference to where the complainant's family were living; nor were they included in the written summary of the elements of the offences, also given to the jury. Nonetheless, the error as to timing might account for the jury questioning the reliability of the complainant's evidence on count 3. It does not account for the acquittals on counts 4 and 5, which involved events which, the complainant was clear, occurred at Easter 2006. The respondent's suggestion that a doubt about the complainant's reliability in relation to count 3 might carry over to assessment of her reliability on counts 4 and 5 makes, with respect, no sense. The complainant acknowledged she might have got the timing wrong on count 3; she made no similar acknowledgement in relation to counts 4 and 5.

[23] I do not think that there is any explanation for the acquittal on counts 4 and 5 other than the jury did not find the complainant's evidence credible in relation to those counts. She gave considerable detail of the alleged offences, describing the pornographic videos she was shown (count 4) and the appellant's having intercourse with her on a mattress (count 5) while the videos played, before ejaculating into his hand and wiping it with a rag. There was no discernible difference in the quality of her evidence on those counts and that on any other count or uncharged act, other than that

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6 Those acts had also, of course, to fall within the definition of "offence of a sexual nature" in s 229B(10).

it was, of course, much more detailed than her general allegations of intercourse and touching on multiple occasions. And if the appellant's admission in the pretext phone calls were capable of reinforcing confidence in the complainant's account of other charged or uncharged acts involving intercourse, it should equally have had that effect in relation to count 5.

[24] One can only conclude that the jury were not satisfied beyond reasonable doubt that the complainant's evidence was true in relation to the allegations underlying counts 4 and 5, and there was no basis for them to suppose that her evidence was any more reliable in relation to the other counts, or the uncharged acts. The conviction on count 1, in light of the acquittals on other counts, was an "affront to logic and commonsense"[7]. It seems to me entirely possible that because of the appellant's general acquiescence in the pretext calls to having had some form of sexual intercourse with the complainant, the jury dispensed with the need to be satisfied beyond reasonable doubt of the complainant's evidence as to two of the charged or uncharged acts.

[25] The verdict was, in my view, unreasonable. As a result, the appeal should be allowed and the conviction set aside.

[26] **APPLEGARTH J:** The appellant was convicted of maintaining an unlawful sexual relationship with a child between 30 April 2003 and 31 January 2011. The child was the daughter of his de facto partner, and was aged between seven and fifteen during that period. The complainant gave evidence of particular incidents that occurred on five different occasions and these were the subject of separate counts (Counts 2 – 12). She gave evidence of other specific sexual acts and also general evidence of numerous times the appellant had sexually abused her by touching her breasts or vagina or by penetrating her vagina with his fingers or penis. She could only guess at the number of times she had been sexually abused and she could not provide details. She said most of the occasions were very similar, and also that she did not want to remember them.

[27] The appellant was recorded by police in pretext telephone conversations made by the complainant in November 2011. Those conversations could be said to contain admissions by the appellant of having had sex with the complainant. He was interviewed by police and gave evidence at his trial, and in doing so denied that he had sexually abused the complainant.

[28] The jury returned not guilty verdicts on the rape counts charged as Counts 2, 3, 5, 6, 8, 9, 10, 11 and 12 and was unable to agree on alternative offences that were left to it on some of those counts. It returned a verdict of not guilty on Count 4, being a charge of indecent treatment of a child under 12, under care. It was unable to agree on Count 7, being a charge of indecent treatment of a child under 16, under care.

The appeal

[29] The appellant submits that the verdict of guilty on Count 1 (maintaining) is unreasonable in that it is inconsistent with the verdicts of not guilty, leading to "an affront to logic and common sense and suggesting a compromise in the function of the jury". Alternatively, he submits that the guilty verdict on Count 1 cannot be supported having regard to the evidence.

[30] The jury's verdicts of not guilty are said to demonstrate that it could not accept the complainant as a witness of truth. The appellant submits that there was no room for a conclusion that the complainant was honest but mistaken about some of her allegations.

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7 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

[31] Whilst the appellant acknowledges that the pretext calls supported the complainant's allegations, any admissions in them are said to be only to generalised conduct, not specific offences. The doubt the jury was left with on the specific allegations, being the allegations that were able to be closely tested, is said to reveal an adverse conclusion about the complainant's credibility in relation to the specific offences that were particularised. According to the appellant, the jury cannot logically and reasonably have had a doubt about the complainant's evidence on each of the specific counts and yet been satisfied to the requisite standard that he maintained a sexual relationship with her during the period alleged.

[32] The respondent submits that close attention to the evidence with respect to the specific offences explains why the jury may not have been satisfied beyond reasonable doubt that the prosecution had proven:

- that penetration occurred on certain occasions; or
- an absence of consent with respect to some of the alleged acts of sexual intercourse; or
- that certain offences occurred during the period particularised with respect to those offences.

For one or other reason, the specific offences may not have been proved beyond reasonable doubt without the jury taking a generally adverse view of the complainant's credibility or reliability. The jury's verdict is said to be consistent with an acceptance of the complainant's evidence about uncharged sexual acts that supported the offence of maintaining.

The issue: First ground of appeal

[33] An appellant who claims that a verdict is unreasonable because of inconsistent verdicts must persuade an appellate court that the verdicts are inconsistent in the relevant sense. If there is a proper way by which the verdicts may be reconciled, allowing the Court to conclude that the jury performed its function, and if there is some evidence to support the verdict said to be inconsistent, the Court will not substitute its opinion of the facts for one which was open to the jury.[8] To demonstrate inconsistency in the relevant sense, the different verdicts must be shown to be "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty."[9]

[34] Accordingly, the essential issue is whether there was a logical and reasonable basis for the jury to have found the appellant guilty on Count 1, and not guilty on other counts. Are the different verdicts an affront to logic and common sense? Can the difference between the verdicts be explained?

Relevant principles

[35] The principles governing the assessment of claims that verdicts are inconsistent were summarised by Jerrard JA (with whom Atkinson and Douglas JJ agreed) in *R v CX*[10] as follows:

> "1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the onus is on the party alleging

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8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 365 – 368.
9 At 368.
10 [2006] QCA 409 at [33].

that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.

2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?

3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted. It is not the role of an appellate court to substitute its opinion of the facts for one which was open to the jury, if there is some evidence to support the verdict alleged to be inconsistent.

4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.

5. Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant.

6. Accordingly, as Callinan J wrote is *Osland v The Queen*, there is an important distinction between an acquittal and a disagreement by jury; a disagreement on one count is not necessarily inconsistent with a conviction on another, where an acquittal might be, for the reasons explained by McHugh J in *Osland*. As Keane JA wrote in *R v DAL* at [23], a failure to agree on a number of charges does not necessarily imply that the jury as a whole

> entertained a reasonable doubt about the reliability of evidence germane to the count or counts on which it convicted a defendant, in the same way that verdicts of acquittal might, and which would therefore throw the integrity of the guilty verdicts into question.
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> 7. It is therefore incorrect to describe as inconsistent with other verdicts the (non) result in counts on which a jury has failed to reach a verdict; that failure is indicative only of the inability of the jury unanimously to reach a verdict on those particular counts one way or another.
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> 8. Further, the failure of a jury to agree on some verdicts on a number of charges may be explicable by reason of the eccentric view of one juror not being satisfied beyond reasonable doubt of all of the elements of the offence in question. That explanation does not necessarily throw the integrity of guilty verdicts on other charges into question.
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> 9. Likewise, where there are a large number of counts on an indictment, there is scope for merciful disagreement by way of a refusal by some jurors to convict on some of the plethora of charges brought against a particular defendant, even though the jury are not prepared unanimously to acquit."

[36] These principles require attention to the elements and particulars of each count, the evidence in relation to each count and a consideration of the issues that were raised for the jury's consideration.

Background

[37] The complainant was born in mid-1995. Her parents separated when she was about two. She and her younger sister lived with their mother, who started a relationship with the appellant in late 2002. In May 2003 the appellant began to live with the complainant's mother and her two daughters. In late 2003 the appellant and the complainant's mother had a son.

Count 2: Rape on a date unknown between 30 April and 13 December 2003

[38] The first occasion of sexual misconduct which the complainant recalled was said to have happened when she was aged about eight, when the complainant was sitting on her bed, waiting to have a shower. She alleged that the appellant came into her room, sat next to her, put one of her legs over his leg and then pushed her underwear aside, putting his fingers into her vagina. After a few minutes the appellant asked her how it was, to which she did not reply. He then stood up, kissed the complainant on the forehead and said to her to tell him later if she liked it. He then walked out of the room.

[39] Presumably by reason of an oversight in respect of the date upon which legislation changed in relation to the issue of consent for children under the age of 12,[11] the prosecutor at trial did not elicit evidence about consent from the complainant about this occasion. For understandable forensic reasons it was not suggested to the complainant in cross-examination that she had consented to any penetration that had occurred on

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[11] The amendment that a child under 12 years is incapable of giving consent did not take effect until 5 January 2004: *Evidence (Protection of Children) Amendment Act* 2003 (Qld), s 11.

the occasion in question. The appellant's submission that consent was not a "live issue" cannot be accepted. The prosecution case was that the absence of consent might be inferred from the circumstances, including the complainant's age. Consent was an issue and the jury was specifically directed about it, including the absence of evidence from the complainant about whether she consented or not to the act occurring.

[40] The jury's verdict of not guilty on the count of rape indicates that it was left with reasonable doubt as to:

(a) whether penetration occurred; and/or

(b) whether penetration occurred without the complainant's consent.

The not guilty verdict does not necessarily suggest that it formed the view that the complainant was dishonest or gave evidence which was inherently unreliable.

[41] The jury's failure to agree on the alternative count of indecent treatment of a child under 12 under care suggests that at least some, and possibly many, members of the jury found the complainant's evidence about being indecently treated on the occasion she recalled plausible. If the jury had a reasonable doubt about the occurrence of the episode in question because it concluded that the complainant's evidence was dishonest or implausible then it would have returned a verdict of not guilty to the alternative count.

The wardrobe incident

[42] The next incident about which the complainant gave evidence, but which was not the subject of a specific count, was said to have occurred at the same residence, and the complainant was "pretty sure" she was nine years old at the time. She recalled being taken by the appellant into the main bedroom, after which he closed the door. Just after this, the complainant's sister knocked on the door and asked where the complainant was. At this point, the appellant put the complainant in a cupboard or wardrobe and told her younger sister that she was at the park with a friend. The younger sister then left the house to find her. The complainant's mother was not at home at the time, possibly because she was at work.

[43] According to the complainant, after her sister left the appellant opened the cupboard, took her out of it, after which he grabbed her arm and told her that she could not leave. She was put on the bed face first, after which the appellant laid on top of her and put his hand through the top of her pants and underwear and "then proceeded to just have a feel around down there."

[44] Under cross-examination the complainant was able to give details about the cupboard, and confirmed the contents of her statement to police that the incident occurred on a Friday afternoon, when her mother was not home and when her father did not pick her up, as usual, to spend the weekend with him. The complainant's mother gave evidence of having been in employment at this time. The complainant could not say whether her mother was not at home because she was at work or out shopping. But this does not detract from her clear recollection of the incident, including what she was wearing at the time. The account which the complainant gave was not implausible and being hidden in a cupboard is something she would be likely to remember.

[45] If the jury was otherwise satisfied about her credibility and reliability, and found that the incident of indecent treatment occurred as the complainant testified, then it was entitled to use the occasion in determining whether the prosecution had proved Count 1 beyond a reasonable doubt.

[46] The same observation applies to other specific incidents of uncharged sexual acts. The jury was directed that, if satisfied beyond a reasonable doubt that such an incident occurred, it might use this evidence of other sexual acts that were not the subject of specific charges. Such evidence might be used if the jury was satisfied that the defendant had a sexual interest in the complainant and gave effect to it by doing those acts.

Digital penetration in the bunk beds

[47] The complainant gave evidence that she and her family moved to another town after the appellant obtained employment there. The evidence indicated that they moved in September 2005. The appellant's employment was at a boarding college and included catering duties. A fully contained house which was located in the college grounds came with the job. Initially the complainant and her sister slept in bunk beds. About two months later a partition was knocked down so that the complainant and her sister each had a room of their own. Before this happened the complainant slept on the top bunk.

[48] The complainant gave evidence that during this period when the appellant was on his way to the toilet at night he would reach through the bars on the bunk bed and put his hands inside the complainant's underwear and then into her vagina. She would roll away and then he would go to the toilet. Her evidence was that these acts initially occurred each night when they first got the bunk beds, and then dropped to every second or third night and then to once a week, after which it stopped. These acts took place over a period of about three weeks prior to the renovations. The complainant's recollection was that these incidents stopped after a month or so.

Count 3: Rape on a date unknown between 1 March and 10 December 2005

[49] This count related to an occasion which the complainant recalled being the first time that the appellant had penile intercourse with her. Her account of where this act occurred and what was said and done on that occasion was reasonably clear, because, as she accepted, it was a very significant event in her life. However, serious questions arose during the course of the trial about the date the incident was alleged to have occurred and, in particular, whether it was at Easter 2005 or around some other holiday period.

[50] The complainant had a bedroom of her own by this time. She recalled that she had rescued a small bird and was in her bedroom tending to it. The appellant walked in, pulled down the curtain that operated as a bedroom door and made a joke about the bird. The next thing the complainant could recall was the appellant being on top of her, having pulled her pants down, and that he penetrated her vagina with his penis. After having sexual intercourse the appellant got off the complainant, said, "Dinner's at six" and walked out. Afterwards, the complainant noticed that she was bleeding.

[51] Under cross-examination the complainant confirmed that she was hurt by the appellant thrusting himself in and out of her. She found it "excruciating". She estimated that the episode was over and done with in a few minutes and did not last any more than five minutes.

[52] The appellant was responsible for cooking meals for many students at the boarding school and after serving them an evening meal would go to the nearby house to check on the complainant and her siblings. The school kitchen and the house that was supplied to the appellant were separated only by a few metres. The appellant would have something like a five minute break and during this time the complainant's mother would be lending a hand in the school kitchen.

[53] In her evidence in chief the complainant said that she was 10 when the described incident of sexual intercourse happened and that it was in 2005. She was pretty sure that the incident happened on a Thursday. When asked whether it was a particular time of year in 2005, she responded that it was "approaching Easter, I'm pretty sure". However, her evidence that it was approaching Easter in 2005 was incorrect. She and her family did not move to that house until around September 2005. Under cross-examination the complainant confirmed that the incident happened when she was 10, but she only turned 10 in July 2005. She accepted that she was wrong in her evidence in chief about Easter 2005. She responded:

> "There was another incident in Easter though. Or, on Easter, that three day holiday that they have".

She explained:

> "I think it was approaching Christmas. I said the wrong – it was after my birthday. I said Easter, obviously confusing it with the next incident that I recall which was Easter when I was still 10".

She stated that the "next incident was on Easter in the exact same house", which was a reference to the occasion charged in Counts 4 and 5.

[54] Whilst accepting that the incident could not have been at around Easter 2005, the complainant's recollection was that the incident in question happened in 2005 when she was 10 and that there was "an occasion coming up". Her recollection is that it was a Thursday during the school term and the week was coming to an end.

[55] Count 3 originally alleged that the incident occurred between 1 September 2005 and 10 December 2005. It was amended to read between 1 March 2005 and 10 December 2005, so as to accommodate the complainant's evidence about Easter 2005. However, the evidence made it clear that the incident could not have occurred before September 2005. In addition, the incident could not have occurred until after the bedroom renovations occurred. These occurred a few months after the family moved there in September 2005 and it could not be shown that they had occurred prior to 10 December 2005. As a result, the alleged offence could not be proven to have occurred during the period alleged by the prosecution.

[56] The trial judge's summing up appropriately highlighted the variations in the complainant's evidence about the date of the alleged incident.

[57] The complainant being aged 10 at the time of the alleged rape, consent was not an issue. As the trial judge explained, the law was amended with effect from 5 January 2004 to provide that a child under the age of 12 is incapable of giving consent. That provision did not apply to Count 2, which was alleged to have occurred in 2003. But it applied to Count 3 and so the issue for the jury was whether the prosecution had proved the incident of sexual intercourse which the prosecution alleged occurred in 2005. No alternative offence was left for the jury's consideration on Count 3.

[58] The appellant submits that the verdict of not guilty on that count demonstrates a failure by the jury to accept the complainant's evidence that the incident occurred at all and, therefore, a failure to accept the complainant as an honest witness. The respondent submits that the jury may well have formed the view that the complainant was an honest witness, but been left with a reasonable doubt in relation to Count 3 because of the evidence outlined above in relation to the date of the incident.

[59] The evidence did not establish that the incident occurred between 1 March and 10 December 2005. The complainant's unreliable recollection about the date was sufficient to raise a reasonable doubt about whether the incident occurred during the period stated in the amended indictment.

Counts 4 and 5: Exposure to pornographic movies and rape in April 2006

[60] The offences charged as Counts 4 and 5 were alleged to have occurred in a room that was used as an office in the house that I have earlier described, in which the family lived. These offences were alleged to have occurred between 7 and 19 April 2006, being the Easter period that year. Count 4 alleged that the appellant showed the complainant pornographic movies. Count 5 alleged that on the same occasion he had sexual intercourse with her and therefore raped her.

[61] There was evidence about a computer in the room that was used by the appellant as his office or study. The appellant used it as his work computer. The complainant also used it to play computer games. She recalled an occasion when she was playing a game on the computer when the appellant came into the room and asked to use the computer. She went to get a drink and when she returned the appellant asked whether he could show her something. Her evidence was that he opened "some folders, which were all porn folders". She described in her evidence the contents of these videos. Her evidence was that she was shown these things at Easter 2006.

[62] The complainant recounted how the appellant stood behind her rubbing her shoulders whilst they watched the movies, and that he then obtained a mattress from a spare room and laid it out on the floor of the study. She was then "coaxed onto the mattress" and the appellant said that they should have sex in the same position as the woman depicted on the movie. The complainant described how the appellant penetrated her vagina until he ejaculated.

[63] The appellant gave evidence denying the incident, but accepted that there was a mattress kept in an adjacent room. He gave evidence that the computer in the office did not have access to the internet so that he could not have accessed the internet to obtain the pornography which the complainant alleged he showed to her. The complainant gave evidence that the computer could be connected to the internet through a dial-up service. Whether or not the computer could access the internet by some means or other in April 2006 may be something of a distraction. The complainant's evidence about the pornography was not specifically that it was downloaded and her reference to the appellant opening "porn folders" suggests that any videos were stored on the computer. In any case, there is no dispute that the complainant used the computer at this time to play a building game titled "Habbo Hotel", and if this was an online game then it must have been played through an internet connection.

[64] Issues were raised during the complainant's cross-examination about her evidence that the incident occurred at Easter 2006. The complainant's recollection was that the religious college was getting ready for a celebration. This was a celebration before the Easter holidays. The complainant rejected the suggestion that there was no Easter celebration, and said that she and her family had not left to go away on Easter holidays.

[65] The appellant's evidence was that at Easter 2006 the family was not at the college. He said that before going on holidays he would have been busy at work and been at the kitchen at the time. He denied having had sexual intercourse with the complainant on any occasion.

[66] No issue of consent arose in connection with the incident of alleged sexual intercourse which was charged as Count 5. No alternative count was left to the jury. The jury returned a verdict of not guilty in relation to Counts 4 and 5. The respondent accepts that the verdict on Count 5 cannot be rationalised on the basis that the jury was not satisfied that the complainant did not consent.

[67] The appellant submits that the verdicts necessarily demonstrate that the jury did not consider the complainant to be honest in her allegations about this episode. The respondent contests this submission and contends that the jury may have found that the complainant was an honest witness, but nonetheless have been left with a reasonable doubt on Counts 4 and 5, not being sufficiently satisfied of the reliability of her recollection in relation to this occasion. One explanation is said to be the carry-over of her confusion about the timing of the events in relation to Count 3. According to the respondent, such an approach would have been open to the jury and consistent with the *Markuleski*[12] direction that was given by the trial judge. The jury was told that if it had a reasonable doubt about the truthfulness or reliability of the complainant's evidence in relation to one or more of the counts, it must be taken into account generally in assessing the truthfulness or reliability of her evidence. On this basis, doubts about the reliability of her recollection in relation to Count 3 and the date it occurred might carry over concerning the reliability of her evidence about the date Counts 4 and 5 occurred.

The incident during the carpet cleaning

[68] This act of alleged sexual intercourse was said to have occurred when the family was about to move into a two-storey house on the school grounds. The carpets in the new house had to be cleaned. The appellant's two children were visiting. According to the complainant, they and her sister wanted to go to the new house, but the appellant insisted that she come with him to clean the carpet.

[69] The complainant gave a detailed account of the incident: of how they had cleaned most of the house, but when it came to the main bedroom, the appellant had sexual intercourse with her on the floor. He was on top of her for about five or ten minutes, having penetrated her vagina with his penis. He then withdrew and ejaculated on the floor next to her. She recalled that he jokingly said, "I really need to clean the carpets now".

[70] As with other incidents involving an alleged unlawful sexual act that was not the subject of a specific count, this incident was relied upon for the purposes of the charge of maintaining. The respondent relies upon the fact that the jury, or one or more of its members, if satisfied beyond a reasonable doubt that an unlawful sexual act occurred, was entitled to use the evidence in determining whether Count 1 was proved.

Counts 6, 7 and 8: Two rapes and indecent treatment in December 2007 – January 2008

[71] The offences charged as Counts 6, 7 and 8 were alleged to have occurred on the same occasion on a date unknown between 14 December 2007 and 29 January 2008 in the family home, when the complainant's mother and sister were away. The complainant's recollection is that her mother and sister had gone away for the night, and that this occurred during the Christmas holidays. By then, the complainant was aged 12. The complainant alleged that the appellant had sexual intercourse with her involving penile penetration over a period that "felt like two to three hours", to which she did not consent (Count 6), then performed oral sex on the complainant (Count 7: a charge of indecent dealing) and later had sexual intercourse with her (Count 8).

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12 *R v Markuleski* (2001) 52 NSWLR 82.

[72] The complainant's evidence was that her younger brother had gone to bed and then she went into her room. The appellant later came in and asked her to go with him. She said no and he then grabbed her hand and took her to the main bedroom at around 7.30 or 8 pm. He undressed her and himself and had sexual intercourse with her in numerous positions. The complainant explained that she felt uncomfortable and scared and did not know what to think. She denied that she consented, and said that she did not say anything to the appellant while it was happening. After performing oral sex on the complainant, the appellant was said to have adopted the missionary position, had sexual intercourse with her and ejaculated all over her stomach. After all of this occurred and the appellant was lying next to the complainant, he is alleged to have said:

> "[W]hen you're 18 you're going to think, you know, I'm a dirty prick and a paedophile and all those nasty words but just remember I love you and I'm doing this for you".

He is said to have said other things which the complainant "found creepy".

[73] The appellant gave evidence of an occasion when the complainant's sister broke her arm and her grandmother took her to the Tablelands. His evidence was that the complainant's mother followed on the Friday and took her children with her, leaving the appellant to work at home. He said that there was no other occasion when the complainant's mother was away overnight. He denied having had sexual intercourse with the complainant or having performed oral sex and he denied saying the things which she alleged.

[74] In her evidence in chief the complainant recalled another incident during the same holidays in which a very similar episode had occurred. This was an occasion when the appellant had access to his biological children and they and the complainant and her siblings spent time with them and the appellant. The complainant and the other children had an enjoyable time playing games until a night when the appellant came into her bedroom, grabbed her hand and took her into another bedroom. The complainant said that it was the same as had happened before except there was no oral sex and he did not ejaculate on her stomach. Under cross-examination on a point of detail about whether the appellant had ejaculated into an old shirt, the complainant sought to clarify any confusion about the two incidents which she described as "almost exactly the same".

[75] So far as the acts of alleged sexual intercourse which were charged as Counts 6 and 8 are concerned, the respondent accepts that there is no logical basis for concluding that the jury was left with a reasonable doubt as to whether penetration occurred, given the complainant's evidence about a protracted episode of sexual intercourse. Consent was, however, an issue in relation to the alleged events, the complainant being aged over 12 by the Christmas holidays in December 2007. The jury returned verdicts of not guilty on Counts 6 and 8. Consent was not an issue on Count 7 and the jury was unable to reach a verdict. The jury was also unable to reach a verdict on the alternative charges of incest on Counts 6 and 8.

[76] The appellant submits that the verdicts of not guilty on Counts 6 and 8 demonstrate that some members of the jury were not satisfied that the events occurred at all, while others on the jury must have accepted the complainant's evidence as to the fact of the event, but were not satisfied that she was truthful in relation to some other element, most likely consent. It is said to follow that no member of the jury was satisfied that the complainant was truthful in her claims of a lack of consent.

[77] The respondent submits that the verdicts simply indicate that the jury was not satisfied beyond a reasonable doubt about the absence of consent. The respondent contests the contention that the jury must have found the complainant untruthful in her evidence about a lack of consent. The respondent submits that, having regard to the evidence, a reasonable doubt about the absence of consent cannot be equated with the conclusion that the jury found that the complainant was not an honest witness. I return later to the evidence in relation to consent, including statements in a pretext call and evidence by the complainant about the course of the relationship and what occurred on this and other occasions, and the argument that it was capable of raising a reasonable doubt about the absence of consent.

[78] The respondent also relies on the fact that if, as the appellant alleges, the jury had found the complainant was not an honest witness, it would have returned verdicts of not guilty on the alternative counts of incest and on Count 7. Instead, at least some members of the jury must have been satisfied about the complainant's evidence of what occurred on the occasion that led to Counts 6, 7 and 8 being alleged.

[79] The complainant's evidence about the occasion that gave rise to Counts 6, 7 and 8 and another occasion which she described as "almost exactly the same" raised a question about possible confusion on the part of the complainant about the dates of those occasions, and uncertainty about whether the alleged episode that gave rise to Counts 6, 7 and 8 occurred during the December 2007 – January 2008 school holidays. The complainant's mother gave evidence of being away from home with the complainant's sister who needed treatment in the latter half of 2007, when that child injured the growth plate in her elbow. The complainant was unable to say whether this was the same occasion which she described as the time when her mother and sister went away, and which she thought occurred during the Christmas holidays in 2007.

Incident when the appellant's biological children were staying in the same house

[80] I have earlier described the complainant's evidence in relation to this alleged unlawful sexual act.[13] It was relied upon for the purposes of Count 1 and the respondent submits that if the jury, or one or more members of it, was satisfied beyond a reasonable doubt that the alleged unlawful sexual act occurred, then it might be used in determining whether the prosecution had proved Count 1 beyond reasonable doubt.

[81] The complainant's evidence in relation to this alleged incident contained a reasonable amount of detail and if the jury accepted it then the unlawful sexual acts occurred about two weeks before Christmas 2007. However, possible confusion between that incident and the incident which occurred when, according to the complainant, her mother was away overnight seeking treatment for her sister's arm, may have been sufficient to cast doubt about whether the incident that led to Counts 6, 7 and 8 occurred during the same holiday period. An explanation for the jury's verdicts of not guilty on Counts 6 and 8 and its inability to agree on a verdict on Count 7 and the alternative counts is that it had a reasonable doubt in relation to the reliability of the complainant's evidence that the specifically charged incident occurred during the Christmas holidays.

Counts 9, 10, 11 and 12: Rape counts on a date unknown between 30 April 2010 and 31 January 2011

[82] These four counts of rape were alleged to have occurred on an occasion when the complainant travelled alone with the appellant to a college in order to clean the dormitory

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13 At [74].

and to ready it for the arrival of new furniture. The complainant alleged that this episode occurred in May 2010, but accepted in cross-examination that the trip was in January 2011. The complainant's mother and the appellant gave evidence of the complainant having accompanied him on such a trip. The complainant's acceptance under cross-examination that the trip occurred in January 2011, rather than May 2010, led to an amendment to broaden the dates in Counts 9, 10, 11 and 12, such that in its amended form, each count alleged an offence of rape on a date unknown between 30 April 2010 and 31 January 2011.

[83] The complainant gave evidence that her mother was helping her mother's parents run a small business in a country town at the time and that the appellant was living in another town where he was the dormitory parent of a boarding house. He requested the complainant to return with him to that town in order to clean the dormitory. She did not wish to do so, but her mother encouraged her to help the appellant. She and the appellant went to the dormitory for the weekend. After cleaning the dormitory during the day she went to fold out a futon mattress, at which point she says the appellant invited her to sleep in his bed and then "you know, coaxed me into the bedroom". She says she tried to go to sleep but that he undressed her and had sex with her. She said there were many incidents that weekend, and that on the first night sexual intercourse occurred for about an hour. The appellant withdrew and ejaculated into a towel. When asked in evidence in chief whether she consented to the sexual intercourse the complainant replied, "No". This episode of sexual intercourse was the subject of Count 9.

[84] Count 10 related to an incident which was alleged to have occurred the next day. According to the respondent, things went normally until noon, at which time she was playing a computer game. The appellant took her into a bedroom by taking her hand and leading her in. He showed her a condom wrapper which he opened. He used the condom and had sexual intercourse with her for about five minutes. He then took her into another room where he continued to have sex with her. He withdrew, tied a knot in the condom and put it on the floor. Again, the complainant said that she did not consent to sexual intercourse.

[85] Count 11 related to an incident that allegedly occurred a few hours later, when the appellant took the complainant back into the main bedroom. Her evidence was that he again grabbed her hand and led her in, sat her on a bed and took her pants off. He is then said to have produced a vibrator with two balls, one of which did not work. The complainant said that he placed the working ball inside her vagina, which gave her a horrible feeling. He took it out and then inserted his penis into her vagina. He later ejaculated into a towel which was next to him.

[86] According to the complainant, not long afterwards the appellant stood in front of her, grabbed her head with his hands and inserted his penis in her mouth. This act of oral sex was the basis for Count 12. The complainant said she felt disgusted, and recalled the appellant looking down on her with a half-smile and that he made a remark to the effect, "You're going to make a man very proud one day". The complainant denied that she consented to oral sex.

[87] The complainant said that when she and the appellant were preparing to leave to return to the town in which she and her mother lived, the appellant walked into the room and was "frantically throwing stuff everywhere". She asked him what he was doing and he said that he had lost the condom.

[88] The complainant's evidence derived some support from the evidence of her mother who said that when she was cleaning up to vacate the premises in March/April 2011 she moved a bed out to vacuum and found a used condom which had fallen against the wall. As she and the appellant did not use condoms she inquired of him about it. He responded that it must have been left by the previous house parents.

[89] The appellant said that he did not recall such a conversation, and he did not think that they would have moved the bed out as the complainant's mother described.

[90] The complainant identified the vibrator which she said had been used by the appellant that weekend.

[91] The appellant denied the allegations during a police interview and at his trial. He said the trip occurred on 18 and 19 January 2011 and the point of the trip was to talk to the complainant about some behavioural issues. She was said to have been behaving nastily to others in the family. The appellant denied any sexual activity with the complainant. He denied producing a condom and said that he had not used condoms for years. He said the vibrating balls had deteriorated and that the one ball which worked required a six volt battery in order for it to operate.

[92] The jury returned verdicts of not guilty to each of the rape charges. It was unable to agree on alternative verdicts of incest on Counts 9, 10 and 11 and an alternative count of indecent treatment of a child under 16 under care on Count 12. The appellant submits that the not guilty verdicts necessarily demonstrate that the jury unanimously were unable to accept the complainant's evidence of non-consensual sexual activity on this occasion. The respondent rejects this contention and submits that the jury must have been unable to conclude, beyond a reasonable doubt, that whatever happened on this occasion occurred without the complainant's consent. The respondent submits that the verdicts were consistent with those returned on Counts 6, 7 and 8 and can be rationalised on the same basis, namely a reasonable doubt about the absence of consent.

[93] The jury's inability to unanimously agree on individual verdicts as to whether the sexual activity alleged by the complainant otherwise occurred means that one or some jurors were so satisfied to the requisite standard, and that one or some jurors were satisfied to the requisite standard about these alternative counts.

[94] The reluctance of at least one juror to be satisfied to the requisite standard that the appellant had committed incest or indecently treated the complainant that weekend as alleged is explained by the respondent on the basis that the complainant's evidence about the date of the incident may have caused one or more jurors to hesitate in finding her evidence sufficiently reliable in order to act upon her evidence in relation to the specific, charged incident.

[95] In summary, the verdicts may be explained on the basis that the jury had a reasonable doubt concerning the absence of consent, and were unable to unanimously agree on alternative verdicts. The verdicts do not necessarily support the conclusion that the jury took a generally adverse view about the complainant's honesty or, for that matter, her reliability.

[96] The respondent relies in connection with these counts, and more generally, upon the decision in *R v DAL*[14] to the effect that it is not correct to speak of inconsistent verdicts when a jury fails to reach agreement on charges. The failure to reach a verdict is not to be

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[14] [2005] QCA 281 at [8], [21].

equated with a verdict of acquittal. Keane JA cited with approval *Osland v The Queen*,[15] in which Callinan J observed that there is "an important distinction between an acquittal and a disagreement by a jury". As Keane JA went on to observe in *R v DAL*, the failure of a jury to agree on verdicts on a number of charges may well be explicable:

> "by reason of the eccentric view of one juror not being satisfied beyond reasonable doubt of all the elements of the offence in question. Such an explanation does not necessarily throw the integrity of the guilty verdicts into question because it does not imply that the jury as a whole entertained a reasonable doubt about the reliability of evidence germane to the counts on which it convicted in the same way that a verdict of acquittal might have done".[16]

The glitter incident

[97] During her cross-examination the complainant gave evidence about an incident she had reported to the police. She said that she did not give evidence in chief about that matter because she was "just concentrating on the bigger ones". She then gave evidence of being in the main bedroom on a mattress on the floor at the end of the bed that was used for her young brother. She and the appellant were lying together on the mattress and the complainant was playing a game with fake makeup that had glitter in it. She and the appellant were joking around and then the next thing she remembers was the appellant having his hands in her pants and fondling her. She recalled, "there was a bit of fingering but it was mainly just in there having a feel around". It did not last very long because her mother walked into the room and the appellant just started tickling her. Her mother asked what they were doing, to which the appellant and she replied that they were just tickling.

[98] The so-called glitter incident occurred at the end of the school year and before the partition wall came down which created separate bedrooms.

[99] The glitter incident was the subject of a statement made by the complainant to the police and the detail which she gave about it at the trial permitted the jury to rely upon it as a specific sexual act. This incident was relied upon by the prosecution as an unlawful sexual act for the purpose of Count 1. The respondent submits that the jury, or one or more members of the jury, if satisfied beyond a reasonable doubt that such a sexual act occurred, was entitled to use the occasion in determining whether Count 1 was proved beyond a reasonable doubt. The jury was so-directed in relation to that incident, and others.

Overview of allegations

[100] The allegations made by the complainant against the appellant may be categorised as follows:

(a) Five specific occasions which became the subject of specific counts:

(i) Count 2

(ii) Count 3

(iii) Counts 4 and 5

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15 (1998) 197 CLR 316 at 406 [232].

16 [2005] QCA 281 at [23].

(iv) Counts 6 to 8

(v) Counts 9 to 12

(b) Other specific occasions which were not the subject of specific counts, particularly:

(i) the wardrobe incident

(ii) the carpet cleaning incident

(iii) the occasion when the appellant's children joined them on school holidays

(iv) the glitter incident

(c) Other evidence of sexual acts that occurred over an identified period at an identified place, particularly the bunk bed incidents

(d) General evidence of sexual abuse

In relation to the last category, the complainant gave evidence that the appellant touched her indecently on "more than 50" occasions. She said that most of the occasions were quite similar and she could not provide details.

The pretext calls

[101] After the complainant reported allegations against the appellant to others, and then to the police, police arranged for her to participate in telephone conversations with the appellant on 6, 11 and 15 November 2011. In the first call the complainant asked:

> "And just you know was wondering why like you just basically like kept having sex with me basically you know like, why? Like I've just been thinking about it. I – you know how my mind works?"

The appellant responded:

> "Um oh well I'm not sure. I haven't thought about that at all really. Um …"

The appellant promised to have a talk about it one day.

[102] The appellant's submissions accept that this and the other pretext calls provided support for the complainant's allegations, but point out that any possible admissions were only to generalised conduct, and not to any specific offences. The complainant did not put any specific allegation to the appellant. In the second call she asked the appellant whether he was able to answer her questions, to which he responded that it would be a long answer and that he was in the middle of work at the time. In the third recorded conversation, the appellant asked the complainant what she wanted to know and why she wanted to know it, and asked the complainant whether she wanted to know whether it meant something "because it did". The complainant asked did it mean something, to which he replied, "And it still does. Of course it does".

[103] Another passage from that conversation which has a bearing upon the issue of consent is as follows:

> "Appellant: But if you really want to know, do I love you, yes I do. I love you more than I should but no: If anything we ever did meant something to me, yeah it did. Yeah, it did.

Complainant: Sorry.

Appellant: And I – and I think you – I think you quietly enjoyed most of it as well.

Complainant: Pardon? Sorry?

Appellant: And I think you quietly enjoyed most of it as well. Yeah.

Complainant: Well I don't know.

Appellant: You don't know. Okay. Well [inaudible].

Complainant: Pardon?

Appellant: You might be a bit confused but yeah.

Complainant: Mmm. It was kind of a weird situation sometimes.

Appellant: In terms of?

Complainant: Well that you were basically my father figure."

[104] The jury was directed about the use which it could make of the evidence of the pretext calls. It was directed to the effect that the evidence was relevant to the prosecution case that the appellant was guilty and that his answers revealed a consciousness of guilt, and that he knew what the complainant was talking about because he had a sexual interest in her and had given effect to that interest by sexually offending against her. The jury was also directed that the appellant was not asked in the calls about specific incidents alleged by the complainant and that, therefore, his remarks were limited to generalised sexual offending, rather than any specific count on the indictment.

[105] The appellant submits that if the jury concluded that he was admitting in the pretext calls to having had "sex" with the complainant, then a conviction on Counts 3 and 5 would seem to automatically follow. I do not accept this submission. The jury might well have concluded that the appellant admitted having had sex with the complainant on more than one occasion, but in accordance with the trial judge's directions, not regarded those admissions as sufficient to convict on specific counts such as Counts 3 and 5.

[106] After canvassing the evidence about incidents that were not the subject of specific charges, the jury was directed as follows:

> "If, however, you do accept the complainant's evidence about these other sexual acts, then you can only use that evidence against the defendant in relation to the specific charges if you are satisfied that the evidence demonstrates that the defendant had a sexual interest in the complainant, and that he had been willing to give effect to that interest by doing those other acts. If persuaded of that, you may think that it is more likely that the defendant did what is alleged in the charges under consideration. If you are not so satisfied then the evidence cannot be used by you as proof of the charges before you.
>
> Of course, whether any of those other acts occurred and, if they did, whether those occurrences make it more likely that on different occasions the defendant did the acts with which he is charged in the indictment is a matter entirely for you. **You must remember, though, that even if you are satisfied that some or all of those other acts**

> **did occur, it does not inevitably follow that you would find the defendant guilty of the specific charges in the indictment**. You must always decide whether, having regard to the whole of the evidence, the offences charged in the indictment have been proved to your satisfaction beyond reasonable doubt based upon a consideration of the evidence relating to those specific charges." (emphasis added)

[107] The jury, acting in accordance with the trial judge's directions, may have been satisfied that the appellant admitted to having had sex with the complainant on a number of occasions, but because the pretext calls did not refer to any specific incidents, not felt able to rely on the pretext calls as an admission of certain specific offences. It does not follow that the appellant's admissions to having had sex with the complainant would automatically result in convictions on Counts 2 – 12. Although persuaded that the appellant had sex with the complainant a number of occasions, the jury may have entertained a reasonable doubt in connection with certain elements of those counts.

The issue of consent

[108] The respondent submits that the jury's verdicts of not guilty on a number of the rape charges may be explained by it having a reasonable doubt on the issue of consent. Parts of the pretext telephone conversations may have encouraged such a doubt, particularly the passage where the appellant said on 15 November 2011 to the complainant that he thought that she "quietly enjoyed most of it as well".

[109] Some of the evidence in the trial and the trial judge's directions raised consent as an issue. In addition, some of the questioning of the complainant sought to cast doubt on her evidence. For example, it was suggested to her that she had gone to some lengths to try and paint a picture of the appellant forcing her to do certain things. The complainant rejected this suggestion and reiterated that she was forced to do everything whether it was the appellant physically grabbing her or otherwise. Other questions in cross-examination raised why she did not walk away and why she was compliant. She was asked why she could not have simply said to him, "No I don't like it. I never have liked it. Stop doing it. I don't want this to happen …" The complainant explained that she did not complain about the appellant's conduct for fear that she would not be believed or that her allegations would bring an end to her mother's relationship with the appellant. She explained that "the last thing I wanted was to break up my Mum's marriage when she was finally happy."

[110] Questioning of the complainant about her lack of resistance or complaint, and the suggestion that she was exaggerating the extent to which the appellant had forced her to do things, had the legitimate forensic purpose of raising questions about her credibility and reliability. Defence counsel never contended that the complainant had consented to sex acts or that the appellant was honestly and reasonably mistaken about her consent. However, consent was a live issue for the jury on many of the charges of rape and it was instructed about it. That consent was a real issue for the jury is shown by the redirections sought by it on 29 October 2014 on that issue.

The appellant's essential contentions

[111] I have summarised the appellant's contentions about specific counts. Building on those contentions, the appellant relies on their accumulating effect. He submits that when a prosecution case has so many problems, which mount up and result in so many not guilty verdicts, the jury could not have been satisfied to the requisite standard on the maintaining count.

[112] The appellant concedes that it is possible to explain the individual not guilty verdicts in the way the respondent has done, and concedes that, in theory, a count of maintaining may stand where there have been verdicts of not guilty on counts charging specific rape offences. He submits, however, that in this case the jury's verdicts of not guilty on every count involving a specific allegation of sexual abuse (save for Count 7) demonstrate that the jury did not accept the complainant as a witness of truth. There is said to be no room for genuine doubt about her reliability, as opposed to her credibility or honesty.

[113] The appellant acknowledges that some of those members of the jury who joined in the not guilty verdicts on Counts 3, 4 and 5 (for which there were no alternative counts) must have accepted some, but not all, of the complainant's evidence in relation to other specific allegations so as to create a "deadlock" on Count 7 and the alternative counts that were put to the jury. But the fact that those jurors joined in verdicts of not guilty is said to demonstrate what should have been their inability to accept her evidence on the maintaining count to the requisite standard.

[114] In spite of what might be said to be a compelling admission to sexual misconduct against the complainant in the pretext calls, the not guilty verdicts are said to demonstrate that the jury was left with a reasonable doubt about the complainant's truthfulness in relation to the specific allegations which were charged and tested in cross-examination.

[115] The appellant frames the question for this Court as whether there is a logical and reasonable basis for the jury to have concluded guilt in respect of Count 1 in the light of the adverse conclusion as to the complainant's credibility in relation to every event that was particularised on the indictment (save for Count 7). But that proposed question is premised on the proposition that the jury must have reached an adverse view of the complainant's credibility in relation to each count upon which it returned a verdict of not guilty. The real issue may be framed as follows: do the not guilty verdicts demonstrate that the jury reached an adverse conclusion about her credibility?

[116] An associated submission, developed in oral submissions, is that if the jury was not prepared to accept the complainant as an inherently reliable and honest witness in respect of the counts that resulted in not guilty verdicts, then there is no logical basis to suppose that the jury found her to be any more credible when she gave evidence of specific uncharged acts of sexual offending.

[117] It is convenient to deal with the issue identified in [115] before turning to the following general question: is there any reasonable explanation for how the jury could reach verdicts of not guilty on Counts 2 – 6 and 8 – 12 and reach a verdict of guilty on Count 1?

Do the not guilty verdicts demonstrate that the jury reached an adverse conclusion about the complainant's credibility?

[118] The respondent submits, correctly in my view, that there may have been various reasons for the jury's verdicts, and that the applicant has not discharged the onus of showing that the guilty verdict is an affront to logic and common sense because the jury must have reached an adverse conclusion about the complainant's credibility. Reasonable explanations for the not guilty verdicts exist:

1. Count 2: reasonable doubt on the issue of consent in the absence of direct evidence and/or reasonable doubt about penetration, encouraged by the *Longman*[17] direction, in respect of alleged digital penetration which occurred several years earlier.

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17 *Longman v The Queen* (1989) 168 CLR 79.

2. Counts 3 – 5: reasonable doubt about dates, given the complainant's admission that Count 3 could not have happened at Easter 2005, and the possibility of confusion over whether the Count 3 offence happened at Easter 2006, thereby raising a doubt as to whether Counts 4 and 5 also were committed in Easter 2006.

3. Counts 6 – 8 and 9 – 12: reasonable doubt about the absence of consent.

[119] Save for Counts 3 – 5, consent was an issue on all counts on which the jury returned a verdict of not guilty. The jury was unable to agree on alternative counts which were put to it, and on Count 7, and this does not suggest that it found the complainant was not an honest witness. If it had, not guilty verdicts might have been expected on the alternative counts and on Count 7. A reasonable doubt about the absence of consent, arising from the pretext calls or other evidence, cannot be equated with a conclusion by the jury that the complainant was not an honest witness.

[120] That the jury might return the verdicts of not guilty which it did without reaching an adverse view of the complaint's honesty and credibility is reinforced by the directions it was properly given, in accordance with *Longman*, warning it to carefully scrutinise the complainant's evidence because of the delay between the date of the alleged offences and when they were reported to the police, the lack of opportunity for the allegations to be disproved by a timely medical examination and any inconsistencies and contradictions in the evidence. This warning was apt to direct attention to earlier comments made by the trial judge about the evidence about the timeframe for Count 3 and the complainant's confusion over Easter 2005 and Easter 2006.

[121] Jurors, complying with this and other directions in respect of alleged shortcomings in the complainant's evidence, may have had a reasonable doubt concerning the time certain offences occurred and a reasonable doubt about the absence of consent. The existence of such a doubt does not mean that the jury concluded that the complainant lacked credibility.

Is there any reasonable explanation for how the jury could reach verdicts of not guilty on Counts 2 – 6 and 8 – 12 and reach a verdict of guilty on Count 1?

[122] A short answer is that the jury was directed that it could. It was directed that if it had a doubt about the specific offences in Counts 2, 3 and 5 – 12, then it still could convict the defendant on Count 1 on the basis of the evidence of other alleged unlawful sexual acts, having carefully scrutinised the evidence of the complainant about those acts. The jury was directed that it had to be satisfied beyond reasonable doubt that an unlawful sexual relationship with the complainant involving unlawful sexual acts existed, but that it was not necessary for all of the jury to be satisfied about the same unlawful sexual acts.

[123] The jury was redirected following a question from it about whether it could find the appellant guilty of Count 1 "whilst not having an overall agreement on all other counts". The earlier direction was repeated, and the jury reminded that the unlawful sexual acts relied upon by the prosecution included the unlawful sexual acts not specifically charged, which the trial judge had summarised the previous day.

[124] The short answer that the jury did as it was directed and redirected it might do may not be a sufficient answer to the question posed above, when regard is had to other directions and the evidence. For example, if the jury took an adverse view of the complainant's honesty arising from its assessment of the complaint's evidence on a particular count, and applied the *Markuleski* direction it was given, then its general

assessment of the complainant as a witness would be relevant to the credibility of her evidence about other specified, uncharged acts. But as the discussion above in connection with the issue of credibility shows, the applicant cannot demonstrate that the jury must have reached an adverse view of the complainant's credibility.

[125] The inability of the jury to agree on Count 7 and on alternative offences that were left for its consideration shows that at least some jurors did not have a reasonable doubt that the specific sexual act that related to those offences occurred.

[126] In addition, the jury could have regard to other specific, but uncharged, incidents detailed in the complainant's evidence. The jury was not required to be satisfied about the same unlawful sexual acts in order to convict on the count of maintaining.[18]

[127] That the appellant had sex with the complainant on more than one occasion derived support from the contents of the pretext calls.

[128] The verdicts of not guilty on Counts 2 – 6 and 8 – 12 may be explained on the basis of the jury having a reasonable doubt about one of the elements of the offences or not being satisfied that the offence occurred in the period which the prosecution alleged in the indictment in respect of that count. The jury might have a reasonable doubt about specific charged offences without necessarily taking an adverse view of the complainant's credibility or her general reliability. Defence counsel was able to cross-examine the complainant about the specific uncharged acts which the prosecution relied upon in support of the maintaining count. Those incidents were not the subject of the same confusion over dates as arose in respect of Counts 3 – 5. A conscientious jury might return not guilty verdicts on Counts 3 – 5 in the light of the complainant's confusion or uncertainty over the dates the acts she described took place, but be satisfied that similar conduct, which was the subject of evidence about specific uncharged acts, did occur.

[129] In summary, the jury could reach verdicts of not guilty on Counts 2 – 6 and 8 – 12 and reach a verdict of guilty on Count 1. The law provides for such an outcome and the jury was directed to that effect. Doubts about the absence of consent in some instances, or the period during which certain charged offences were committed, did not require the jury to have a reasonable doubt that an unlawful sexual relationship involving unlawful sexual acts existed. All members of the jury were not required to be satisfied about the same unlawful sexual acts. The complainant's evidence about specific incidents which were not charged as separate offences, such as the wardrobe incident and the carpet cleaning incident, might have been accepted by the jury as honest and reliable. Jurors might have been satisfied beyond reasonable doubt that those unlawful sexual acts occurred.

Conclusion on Ground One

[130] I conclude that the appellant has not shown that the different verdicts are an affront to logic and common sense. The verdicts do not suggest a compromise by the jury of its function. The verdicts may be reconciled on the basis that the jury, acting conscientiously and in accordance with appropriate warnings and directions, entertained a reasonable doubt for various reasons on Counts 2 – 6 and 8 – 12. The not guilty verdicts on those counts do not mean that the jury reached an adverse conclusion about the complainant's credibility. Reasonable doubt on issues such as the absence of consent cannot be equated with a finding that a complainant was not an honest witness. The appellant has not established that the verdicts are inconsistent in the relevant sense, and that the guilty verdict on Count 1 is therefore unreasonable.

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18 *Criminal Code* (Qld), s 229B(4)(c).

Ground Two: Can the verdict be supported having regard to the evidence?

The appellant's submissions

[131] The second ground of the appeal relates to the sufficiency of the evidence. The appellant repeats the contention that the verdicts demonstrate that the jury was not satisfied of the complainant's credibility on the essential elements (or at least one of them) in relation to the specific counts. What is said to have remained of the evidence are uncharged and poorly particularised acts, and a very general statement of sexual abuse involving penile penetration on as many as 50 other occasions, and other unspecified sexual misconduct, also on as many as 50 occasions. The appellant correctly points out that these very general statements could not be tested and measured against other known facts.

[132] The fact that the jury entertained a doubt about the evidence of the complainant in relation to at least one of the elements on the specified counts is contended to assume importance in relation to the complainant's evidence of specific uncharged acts and her general allegations of sexual misconduct. The appellant submits that the jury could not have had a strong basis to conclude that an unlawful sexual relationship existed, which involved unlawful sexual acts. Any doubt which the jury entertained about elements of the specified counts should have applied to the uncharged occasions of particular unlawful sexual acts.

[133] Next, reliance is placed on the circumstances of the domestic environment, and the very limited opportunity for those unspecific occasions of sexual misconduct to have occurred.

[134] The respondent further submits that where the alleged sexual abuse occurred over many years, the circumstances in which the allegations were first made require some circumspection, including points of detail which varied between the complainant's statements to a school counsellor and to her friends.

[135] More generally, when regard is had to the unreliability of the complainant's evidence about the dates of some of the specific allegations, aspects of her allegations which are said to be implausible, and one instance of alleged lying, the evidence is submitted to be insufficient to sustain a conviction.

Consideration

[136] For the reasons given in respect of Ground 1, the verdicts did not demonstrate that the jury was not satisfied of the complainant's credibility in relation to specific counts.

[137] The remaining evidence was not limited to generalised evidence of unspecified sexual misconduct on 50 other occasions. It included evidence of some specificity in relation to unlawful sexual acts and the times and places at which they occurred. Even if the jury, or some members of it, entertained a reasonable doubt concerning the absence of consent on some of those occasions, a juror might be reasonably satisfied that an unlawful sexual act occurred on those occasions. For the reasons outlined in relation to Count 1, a juror, and perhaps many jurors, might have been satisfied that unlawful sexual acts occurred on the occasions that were the subject of specific charges, or that those acts occurred outside the time period charged in respect of that count. Those members of the jury who were satisfied on the evidence of the complainant that an unlawful sexual act had occurred on such an occasion were entitled to consider the occasion in deciding if the prosecution had proven the offence of maintaining. All members of the jury were not required to be satisfied about the same unlawful sexual acts.

[138] The limited opportunity, in terms of time and place, which the appellant had to sexually abuse the complainant was highlighted at the trial. However, the evidence revealed that there were occasions when the complainant's mother was not at home for various reasons. Also, some of the sexual offences alleged, which did not involve penile penetration, were alleged to have occurred when the complainant's mother was at home or nearby. It was open to the jury to reasonably conclude that 50 acts of unwanted touching occurred over so many years. It may have had reservations about the complainant's guess that sexual intercourse occurred on up to 50 occasions.

[139] As against that, if the jury assessed the complainant to be an honest witness, then it might accept that many acts of sexual intercourse occurred over a lengthy period of time, the details of which the complainant could not specifically recall. That the appellant had sex with the complainant on a number of occasions derives support from the pretext calls.

[140] The circumstances in which the allegations were first made, and the complainant's reasons for not raising those allegations earlier, were unremarkable. They were adequately explained by the complainant. Minor variations in the detail of her allegations, as recalled by the persons to whom she made those allegations does not make the verdict unsafe. The jury had an opportunity to assess the complainant's evidence in terms of its credibility and reliability. This included having regard to any inconsistencies in relation to the date upon which certain offences were alleged to have occurred.

[141] The allegations which the complainant made were not inherently implausible. Certain evidence given by her in relation to the balls associated with the sex toy does not demonstrate that the complainant was lying. She gave evidence that at the time of the incident that was charged as Count 11 the appellant produced a vibrator with two balls, one of which worked and one which did not. Her recollection was that the one which worked was placed inside her vagina. The appellant points to the evidence of the complainant's mother and the appellant that the vibrating balls required a six volt battery, and that the complainant did not mention a battery in her account of the use of the balls. The complainant's mother and the appellant gave evidence that one ball ceased to work. The appellant gave evidence that a six volt battery that was kept in a bedside drawer was used to get it to function. The fact the complainant did not mention the use of the battery is unremarkable. It does not prove that she lied about the appellant's insertion of one of the balls into her vagina.

[142] Differences in the complainant's evidence about dates and other matters were highlighted in the trial judge's summing up, which included a full account of defence counsel's submissions.

[143] I conclude that it was open to the jury, acting reasonably, to be satisfied on the basis of the complainant's evidence, supported by other evidence including the pretext call and the discovery of the condom, that there had been an unlawful sexual relationship with the complainant involving unlawful sexual acts.

Conclusion

[144] I would dismiss the appeal against conviction.