SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAM* [2016] QCA 35
PARTIES:	**R** **v** **KAM** (appellant)
FILE NO/S:	CA No 24 of 2014 DC No 28 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 6 December 2013
DELIVERED ON:	26 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2015
JUDGES:	Fraser JA and Applegarth and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of three counts of rape, and one count of indecent dealing of a child under 16, under care – where the complainant was the daughter of the appellant – where the complainant's evidence was uncorroborated – where the appellant highlighted that the complainant's disclosure to police coincided with an era of domestic disharmony between he and his daughter – where the appellant appealed against conviction on the basis the verdict was unreasonable or insupportable having regard to the evidence – whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUND FOR APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was self-represented – where the prosecution complained the appellant had misstated the effect of certain evidence in his address – where the judge accepted the request for redirection and clarified to the jury three matters of fact – where the judge exercised his discretion to remind the jury of the three facts rather than remain silent – whether the judge erred in giving the redirection

Criminal Code (Qld), s 210(a), s 348, s 349, s 619, s 620(1), s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
G P Cash for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **APPLEGARTH J:** I have had the advantage of reading the comprehensive reasons for judgment of Henry J, with which I agree. I also agree with the order proposed by his Honour.

[3] **HENRY J:** The appellant was convicted following a five day trial in the District Court of three counts of rape and one count of indecent treatment of a child under 16 under care. The complainant was his 12 year old daughter.

[4] The sole ground of appeal is:

> "The verdict is unreasonable or cannot be supported having regards to the evidence in the circumstances."[1]

[5] That ground requires this court to independently assess the sufficiency and quality of the evidence to decide whether on the whole of the evidence it was open to the jury to be satisfied beyond a reasonable doubt the appellant was guilty.[2]

Review of the Evidence

Overview

[6] The appellant, a Congolese refugee, arrived in Australia in 2008 with his two daughters, the complainant IO, born on 8 July 1998, and her younger sister JO, born on 17 October 2001. At the time of the alleged offences the appellant and his daughters were living in Woodridge.

[7] PL notified the police of the defendant's misconduct.[3] PL, an African Refugee Support Worker, originates from Benin in West Africa. She first met the appellant and his daughters in 2009.[4] She thereafter had contact with the children regularly after school and at church. The children also visited PL at her home, arranging such visits by contacting PL by mobile phone with the consent of the appellant.[5] On one occasion in 2011, after PL noticed the complainant had outgrown her bras, the appellant consented to PL taking the children shopping for underwear. The complainant was to later tell police PL was like a mother to her and a sister to her father.[6]

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1 This ground adopts generalised bases for setting aside an appeal in the *Criminal Code* s 668E(1).
2 *M v The Queen* (1994) 181 CLR 487; *SKA v The Queen* (2011) 243 CLR 400.
3 AR p 162.
4 AR p 96.
5 AR p 97.
6 AR p 258 L8.

[8] PL gave evidence that on 6 February 2011 she telephoned the appellant to apologise for not picking up the complainant and her sister as she had planned to do their hair.[7] The phone was then passed to the complainant. Once in a different room from the appellant the complainant asked PL to come and "rescue her"[8] and went on to disclose her father had sex with her.

[9] After her conversation with the complainant PL went to the police station and she spoke to Detective Baxter.[9] Detective Baxter testified that upon receiving information from PL, he attended the appellant's house with fellow officers.[10]

[10] Upon arrival at the appellant's house, Detective Baxter first spoke to the appellant and explained he had received information concerning an allegation of sexual assault against his child IO.[11] Detective Baxter invited the appellant to attend at the police station to discuss the matter and enquired as to the whereabouts of the children. The appellant told the officers the children were downstairs in the garage and exited the back door arriving downstairs ahead of the officers. The appellant went quickly up to the complainant and whispered something to her which the police did not hear.[12]

[11] The appellant and his daughters were taken to the police station. The complainant participated in two police interviews at the station. The first commenced at 10.10 pm[13] and the second at 11.50 pm,[14] around 30 minutes after the first interview had concluded.

[12] In the first interview[15] the complainant was obviously reticent to talk about what had happened. She acknowledged something was concerning her but said she did not feel like talking about it. She was asked about the content of a letter she had written the previous day to her father. She explained the letter said she had decided to move away. She said there was a reason why she wanted to move but would not disclose the reason. She mentioned she wanted her father to treat her as a child but did not want to tell the police the way in which he did not treat her as a child. She would not discuss whether someone had told her not to talk to the police.

[13] During the first interview the complainant would not reveal what her father had whispered to her when the police had visited their home earlier that night. However, in the second interview, conducted by a different officer, the complainant did disclose what her father had whispered to her, namely:

> "[P]lease don't tell anyone, I'm begging you, I could go to gaol forever."[16]

[14] In the course of the second interview the complainant was more forthcoming. She disclosed an episode when the appellant touched her breasts and three subsequent episodes when he had carnal knowledge of her. She alleged that he used condoms in the latter two episodes. The four episodes give rise to the four charges and are canvassed individually below.

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7 AR p 98.
8 AR p 98 L28.
9 AR p 99 L7.
10 AR p 162 L30.
11 AR p 162 L45.
12 AR p 140 L36, AR p 163 L10.
13 AR p 221.
14 AR p 255.
15 AR pp 221-254.
16 AR p 278 L57.

[15] The appellant accompanied police back to his house where a search ensued.[17] During the search, the detectives discovered the letter written by the complainant, dated 5 February 2011, as well as a packet of condoms with nine condoms remaining from a pack of 12 in his bedside table drawer.[18]

[16] Meanwhile the police and the Department of Child Safety arranged for the appellant's two children to stay at PL's house.[19]

[17] The children stayed at PL's house for five to six days before being collected by Child Safety officers. Following an approval process of around three months, the children returned to live with PL for about one year, after which they were placed with a new carer.[20]

[18] The complainant participated in one additional police interview prior to trial, on 14 March 2012.[21] In that interview the complainant provided some clarifying particularity about the episodes, including as to consent and penetration.[22]

[19] The video recordings of all three interviews were exhibited at trial.

[20] The complainant's evidence was pre-recorded on 30 January 2013.[23] She explained she did not disclose the truth in her first interview with police because she was shy and silent and was scared because she had never talked to police before.[24] The complainant confirmed that in the second and third interviews with police she had told the truth.[25] She identified the locations where the episodes occurred by reference to various photographs.[26]

[21] At trial, the prosecution called evidence from the complainant, as well as the appellant's younger daughter JO, the complainant's best friend Ms YN, PL, paediatrician Dr Ryan Mills and some police officers involved in the investigation.

[22] The appellant's native language is French. He was assisted by an interpreter at trial and on this appeal. He represented himself at trial and on this appeal. He had been represented by a solicitor earlier, including at the time of the pre-recording of evidence on 30 January 2013, when counsel appeared for him. He became dissatisfied with his legal representation[27] and his solicitor and counsel were given leave to withdraw on 18 February 2013, the day the trial had initially been listed to commence.[28] By the eventual time of trial in December 2013 the appellant had been repeatedly advised it would be in his best interests to be legally represented but he maintained his decision to act for himself. Of that decision he told the trial judge on day three of the trial:

> "I still believe the decision I've made is the best."[29]

[23] The appellant's right to give and call evidence was explained to him thoroughly and repeatedly by the trial judge throughout the trial.[30] The parties' rights of address were

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17 AR p 135 L33.
18 AR p 135 LL32-40.
19 AR p 99.
20 AR p 99 L39.
21 AR p 133 L24.
22 AR p 303.
23 AR pp 13-36.
24 AR p 14 L18.
25 AR p 14 LL33-46.
26 AR pp 15-18.
27 Address transcript 1-2 L8.
28 AR p 3.
29 AR p 151 L22.
30 AR p 61 L35, AR p 159 L40, AR p 166, L34.

also explained, including that the Crown Prosecutor could not address the jury if the appellant did not give or call evidence.[31] The appellant elected not to give or call evidence.

The Offending

Count 1 - Indecent treatment (the breast touching episode)

[24] In the second police interview of 6 February 2011, the complainant recalled the first time the appellant had ever touched her inappropriately[32] was on a Friday in the summer school holidays after Christmas before school started.[33] The appellant walked up behind her in the hallway at their house, grabbed her breasts with both hands and said words to the effect of, "this is not how girls aged like you should look"[34] or "you shouldn't have big boobs like that".[35] In cross-examination, the complainant said she remembered the incident because she was really shocked.

[25] Subsequent to that event she recalled an occasion when she was walking in the living room and the appellant had hugged her from behind and kissed her cheeks and she walked off.[36]

Count 2 - Rape (the iPhone cartoon episode)

[26] Count 2, the first rape episode, occurred on the Friday before school commenced in January 2011.[37] It happened around eight, nine or 10 o'clock at night when the complainant's sister was asleep.[38] The complainant asked the appellant if she could watch a cartoon on his iPhone. He said she could do so in his bedroom.[39] She went to his bedroom. While she was sitting on the bed he touched her hair, put his arm around her and pulled her down.[40] He told her she was beautiful and he loved her.[41] He asked her to take her clothes off but she did not.[42] He kissed her and she moved her head away. He touched her breasts.[43] He pulled her shirt and bra away and removed her lower clothing.[44] He took off his underwear and she saw his penis.[45] When asked in the interview what shape his penis was she replied, "Kind of rectangle."[46]

[27] He lay over her on the bed and his penis made contact with her vagina. When asked during the second interview whether it only touched outside she responded, "No, the inside."[47] In her third interview with police she explained he put his penis in her vagina and started "humping" her.[48] He did not use a condom.[49]

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31 AR p 62 LL20-39, AR p 149 L23, AR p 150 L3, AR p 160 L1, AR p 166 L46, see s 619 *Criminal Code*.
32 AR p 285 L10.
33 AR p 284 L39.
34 AR p 15, pp 282-283.
35 AR p 33.
36 AR p 285 L45.
37 AR p 277 L12.
38 AR p 270 LL12-23.
39 AR p 259 L10.
40 AR p 259 L53.
41 AR p 288 LL3-18.
42 AR p 313 L48.
43 AR p 308 L10.
44 AR p 263 L13.
45 AR p 266 L36.
46 AR p 270 L58.
47 AR p 269 L4.
48 AR p 308 L42 – p 309 L9.
49 AR p 273 L48.

[28] In the second interview she said she did not know whether he ejaculated[50] but later in the same interview she recalled, after he had withdrawn his penis, "his sperm came out on his hand".[51] In the third interview she said that when he finished, sperm "starting coming down" and he later told her his sperm "didn't really go deep inside" her vagina.[52] He told her he had to go and clean himself and she went to her room and cried.[53]

Count 3 Rape - (the chicken and chips episode)

[29] By the time of the second rape episode, count 3, the complainant recalled the appellant had bought condoms[54] which she thought were in a cupboard in his bedroom near the bed.[55] When asked during her pre-recorded evidence to identify that location by reference to a photograph she identified the bedside table, referring to its lowest or middle drawer.[56]

[30] The episode occurred about 4 or 5 pm.[57] It was not a school day.[58] The complainant recalled her sister was sent by the appellant to the local shops to buy chicken and chips and a "Gotalk" prepaid mobile phone card.[59]

[31] While she was gone the appellant had sexual intercourse with the complainant on his bed.[60] She could not recall whether they were in a "sitting position or a sleeping position".[61] Afterwards the appellant took off the condom he had used and flushed it down the toilet.[62]

[32] The complainant had showered and dressed by the time her sister returned.[63] PL then arrived and they then went shopping for underwear.[64] The complainant recalled she had showered because the appellant told her to, saying PL "might smell you".[65]

[33] The complainant's younger sister JO was produced for cross-examination by pre-recording some two years later. In the course of her evidence this short exchange occurred:

> "Now, when you lived with your dad, you used to sometimes go with your sister to buy chicken from a chicken shop?-- No.
>
> No? So, you never went down to buy chicken from a chicken shop?-- No."[66]

The value of that evidence in contradicting the complainant is qualified, not only by the long delay in it being given by a child, but also by the ambiguity of whether "you" in the second quoted question was a collective reference to her "with" her sister, as referred to in the preceding question, or to her alone.

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50 AR p 270 L40.
51 AR p 300 L33.
52 AR p 309 L58 – p 310 L34.
53 AR p 310 L10.
54 AR p 273 L4.
55 AR p 274 L40, AR p 295 L19.
56 AR p 17 L23.
57 AR p 30 L40.
58 AR p 30 L47.
59 AR p 290 L18.
60 AR p 291 LL18-36.
61 AR p 292 L3.
62 AR p 301 L2.
63 AR p 31 L49, p 33 L33, p 293 L2.
64 AR p 291 L45.
65 AR p 318 L33.
66 AR p 38 L50.

Count 4 - Rape (the homework episode)

[34] The third and final time the complainant said the appellant had intercourse with her was after the school term had commenced, two to three days before the complainant's disclosure to PL.[67] The complainant recalled this occurred at night in the living room some time after dinner.[68] The complainant said her sister was in her room playing with her dolls[69] and she was doing her maths homework when her father called her over to where he was sitting on the couch.[70] The complainant said she told the appellant she wanted to finish her homework but he told her to stop doing it.[71]

[35] She explained intercourse occurred on the brown lounge chairs in the living room that were pushed together at the time.[72] The appellant used a condom but it came off.[73] The complainant said she was scared she would get pregnant but the appellant told her not to worry and to stand up and spread her legs so the sperm would come out.[74]

The pre-police disclosures

[36] In the course of the first and second interviews with police the complainant mentioned that she had talked to PL[75] and her best friend YN about what had been happening at home.[76]

[37] She told the police she had told YN walking to the train station after school. Of that conversation the complainant recalled:

> "I told her what happened like I used the word rape she, she couldn't understand so I had to explain it to her. And she wouldn't believe it, so I asked her if, do you think I should move the house I'm in? And she say that if you want, you can move but if you don't want, you can't…".[77]

[38] The only account placed before the jury from the complainant's best friend YN was when she gave pre-recorded evidence on 30 January 2013 over two years after the relevant events. She recalled a conversation after school when she and the complainant were walking to the train station and the complainant told her "that her dad tried to do bad things to her…and he forced her to sleep with him".[78] She later added the complainant "went on telling me that her dad tries to sleep with her every night".[79]

[39] When asked when the conversation occurred YN said it was in August 2011[80] which is inconsistent with it having occurred in January 2011. However, she also said the disclosure had occurred at a time when the complainant was still living with her father and she remembered the complainant had ceased living with her father about two weeks after that conversation.[81] That is generally consistent with the complainant's memory of the timing of the conversation.

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67 AR p 19.
68 AR p 30.
69 AR p 30.
70 AR p 19.
71 AR p 20, p 321 L32.
72 AR pp 298-299.
73 AR p 276 L29, p 296 L23.
74 AR p 296 L50 – p 297 L23.
75 AR p 244 L23, p 258 L13, p 279 L43.
76 AR p 233 L10, p 280 L30.
77 AR p 281 L33.
78 AR p 45 L50.
79 AR p 46 L16.
80 AR p 45 L40.
81 AR p 45 L47, p 46 L9.

[40] As mentioned above the complainant made a disclosure to PL on the evening of Sunday, 6 February 2011, which prompted PL to contact police and in turn prompted police to commence their investigation. As to the substance of that disclosure, during the telephone call with PL it will be recalled the complainant had asked PL to come and rescue her. When PL asked what had happened, the complainant referred to her father as "the one doing it". PL's testimony continued:

> "Okay. And what did you say when she said that?---So I said when did it happen last time, and she told me it was on Wednesday. Then I said can you tell me exactly what happened. And she told me yes. I was watching the TV around midnight and my dad come back from work, so I ask him to turn the TV on so I can watch kid cartoons in French and then he turned the TV on for her. While she was watching he start touching her inappropriately in the breasts and in the backside. And she said, Dad stop it. He keep doing it and she said she pushed him but he – she was overwhelmed by his power, so he pick her up and took her to his bedroom. Then I said what happened, then. And she told me you can't imagine what happened. Then I said, no I can't imagine, you need to tell me what really happened. And she told me he slept with me. Then I said what was your reaction. And she explained to me how she cried. Then I said how did he feel after that? She said, oh, he told me he loved me so much, that's why he took me to girls school, he's paying for private school. And I said okay. So are you going to give me a favour here? You are asking me to help you, but I can't do it on my own. Are you going to cooperate so if I go to seek help for you, will you be able to cooperate and tell the police what you just told me? And she said yes."[82]

Rising tension between the complainant and her father

[41] The complainant described her father as strict, both in the sense that he might occasionally hit her if she did something wrong and also because he would not allow her to socialise with her friends.[83] In the days leading up to police intervention the appellant had announced to his daughter that he was moving her from the school she had been attending for a number of years and at which she had recommenced at the outset of the 2011 school year.[84] This added to the already tense situation between them because she wanted to stay at her existing school, a school where she had been doing well academically.[85]

[42] It is against the background of these events that the complainant wrote the letter which was found during the police search. The complainant was to later tell the police of the letter that it was connected with her desire for her father to treat her as a child and her desire to move from her father[86] to a parent who could take care of her and love her as a daughter.[87] She explained she had written a letter in her bedroom and given it to her father after he had told her to write it.[88] She testified:

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82 AR p 98 L33 – p 99 L2.
83 AR p 314 L58 – p 315 L9, AR p 316 LL20-52.
84 AR p 26 L5.
85 AR p 34 L5.
86 AR p 231 L13.
87 AR p 289 L22.
88 AR p 253 L32, AR p 253 L42.

> "He told me to write it, he say he doesn't want him, he doesn't me to tell him, he want me to write it to him."[89]

[43] After she had given the letter to him he indicated he believed her friend had told her what to write in the letter.[90] The letter which was dated 5 February 2011, the day before the police attendance at her home, included the following passages.

> "Okay. I decided to move to anyone who can take care of me, someone who loves me as their daughter, someone who doesn't look through their daughter's privacy. … I want someone who can take care of me going to school to [the complainant's school] that school means a lot to me. … If someone wants to take care of me they should respect my privacy and every time I have a problem I know that I have talked to my parent or anyone I trust. I have someone who I trust in my life and they know all about me and I talked to them everything in my life and everything that happened at home with my sister and my dad and everything that happen at school. So if someone wants to take care of me they should respect my privacy, take care of me as their daughter and be a good parent to me."[91]

Medical examination

[44] Evidence was led from Dr Ryan Mills that he medically examined the complainant on 15 February 2011, some nine days after the intervention of police on 6 February 2011. The examination had initially been planned to occur on 8 February 2011 but because the complainant was menstruating and because of the minimal chance of any positive DNA evidence being detected even after that lapse of time, the decision was taken to postpone the examination until after the child's period had ceased.[92]

[45] The doctor described the complainant as being in advanced puberty with her genital development essentially "as per an adult".[93] He detected no abnormality on examination of the complainant's genitalia including the hymen.

[46] He explained that for her stage of development the hymen is no longer doughnut shaped as with younger children, but rather is crescent shaped and positioned at the bottom part of the opening of the vagina. He explained the intact presence of the hymen, albeit in its more adult form, did not exclude the possibility that sexual intercourse had occurred. He explained the hymen in sexually developed women will not necessarily be damaged by sexual intercourse, citing a study in which, of 36 pregnant adolescent girls who were examined, only two had physical signs of injury or healed injury to the hymen. He acknowledged intercourse may occasion minor injuries such as little bruises or abrasions which heal quite quickly so that their presence might only ever be detectable on examination shortly after intercourse.[94]

Analysis

[47] The complainant's evidence was not corroborated. As the appellant emphasised in his conduct of the trial there was no medical evidence showing his daughter's vagina

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89 AR p 289 L30.
90 AR p 252 L50.
91 Ex 4 (spelling errors corrected).
92 AR p 95 LL25-39.
93 AR p 91 L6.
94 AR p 93 L45 – p 94 L2.

had been penetrated and no scientific evidence, such as DNA from bed sheets, was forthcoming. Indeed the police did not even seize bed sheets from the appellant's house. The credibility of the complainant's account may have gained some support from the police locating condoms in the location mentioned by her when interviewed at the police station, but neither that evidence nor the evidence of the complainant's disclosures to YN and PL constituted corroboration. It follows the prosecution case turned upon the reliability of the complainant.

[48] The complainant's evidence described a strict father engaging in a pattern of sexual misconduct upon his young but sexually developed daughter during a short period between Christmas and the early stages of the 2011 school year. It was not an inherently implausible account. Nor was it an account contradicted by evidence led from the appellant. Were there any specific features of the evidence bearing upon the reliability of her account?

[49] The complainant was reticent in her first interview with police to tell them anything about what was obviously concerning her at home. However, that reticence was explicable because of the upsetting and sensitive nature of the information and also because on the same night her father had pleaded with her not to disclose his misconduct to police lest he go to jail. While the evidence that her father had pleaded with her only emanated from the complainant, the credibility of that evidence was bolstered by police evidence that they did see the appellant whispering something to the complainant after they arrived at his house. The appellant unwittingly improved the prosecution's evidence on this topic by establishing in cross-examination of one of the officers that the officer had said in his statement:

> "I could not hear what was said, but it was clear from [IO]'s body language that what was said to [IO] appeared to upset her."

[50] Considered in context, the complainant's obvious reticence to incriminate her father in the first interview was unsurprising and did not detract from her credibility.

[51] Comparison of the complainant's descriptions of the three rape episodes demonstrates that she gave a greater degree of detail about the first rape in comparison to the ensuing two. Her inability to recall whether she was seated or lying down when raped the second time is somewhat surprising, though less so when it is recalled there were three episodes, including one on a lounge chair, so that there may have been some blurring in her memory of positional detail. Further, it is apparent the distressing nature of these events made it difficult for her to recount the detail of them.

[52] There was little evidence of the complainant communicating her lack of consent. However, any acquiescence by her was hardly surprising and obviously obtained by exercise of her father's authority over her. It did not constitute consent.[95] Further, if the events occurred there is no prospect the appellant believed his daughter was giving free and voluntary consent.

[53] The complainant did not immediately flee or go to the police but that is unremarkable given her age and the appellant's position of authority over her. Nonetheless when it became apparent by the time school recommenced that a pattern was emerging, the complainant made a disclosure to her best friend and eventually a disclosure to PL, who the complainant obviously regarded as an adult she could trust.

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95 See s 348 *Criminal Code*.

[54] As to the disclosures to YN and PL, YN's memory that the disclosure occurred in August 2011 was inconsistent with the known sequence of events. It was obviously an innocuous error, as demonstrated by her memory the disclosure occurred shortly before the complainant ceased living with her father. It is true the disclosure to her best friend was not detailed but that is unsurprising given the sensitivities involved.

[55] In a similar vein it is true the disclosure to PL, whilst somewhat more detailed, is not entirely consistent with the disclosures made to the police. That is because of an inconsistency in the complainant being understood by PL to have described the iPhone cartoon episode as the most recent episode when in the complainant's account to the police it eventually became apparent that was the first episode of rape. Even in the complainant's account to police there was initially some confusion as to whether that was the first or last episode of rape.[96] Then, as in the conversation with PL, it was the questioner rather than the complainant who incorporated the reference to the "last" time. Given the clarification on this issue which unfolded in the second police interview and the prospect of jumbled recollections or misunderstanding in connection with a telephone call which would have been hurried and upsetting, the apparent inconsistency is not particularly concerning.

[56] Considered overall, the evidence about the disclosures to YN and PL tended to enhance rather than undermine the credibility of the complainant.

[57] The appellant was critical both at trial and on appeal of the role PL played. He characterised her as the accuser and complained that his children were put into the care of his accuser. The implication of that submission, insofar as it appears to be relevant to the reliability of the complainant, has to be that PL had an opportunity to influence the content of the complainant's evidence against her father. The sequence of events demonstrates that concern is without substance.

[58] The interview with police in which the complainant made the material allegations about her father was the second interview on the night when the police first intervened. The complainant was not living in PL's care at that stage. There is no evidence showing, as the appellant argues, that PL kidnapped IO earlier that day. The appellant further argues by reference to an obvious error of expression in a police application for a disease test order that PL had taken IO to the police station that night but that is not what the testimony showed. PL only attended the police station in company with her husband. IO was not present with her and was actually still at home with the appellant. As much was confirmed when the police then went to the appellant's home and saw both the appellant and IO there.

[59] Unlike the first two interviews, the third interview was conducted at a time after the complainant had been living in PL's care for a substantial period. However, the third interview only involved clarifying information and not any fresh allegations of additional misconduct. In addition, by the time the complainant's evidence was pre-recorded, and she maintained the truth of her complaints, she was no longer in PL's care. The evidence demonstrates that PL's only real role as the appellant's so-called "accuser" was contacting the police to inform them of what the complainant had told her on the very same evening the complainant subsequently told the police of what her father had done. There is no evidence to suggest that PL encouraged the complainant to concoct allegations against her father, let alone any evidence to suggest that she, as a friend not only of the complainant but also of the appellant, had any motive to do so.

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96 AR p 258 L50.

[60] The appellant highlighted that the complainant's disclosure to PL and the police coincided with an era of domestic disharmony between he and his daughter. In that context he highlighted the contents of her letter about moving away and emphasised it made no mention of any sexual misconduct by him. Even from the complainant's evidence it was clear she understood her father was going to make her go to a new school the following week, despite her desire to continue at the same school she had been going to for a number of years and at which she had recommenced at the outset of the 2011 school year. The evidence therefore showed the complainant wanted to move from her father and provided some arguable explanation why the complainant would have been motivated to be free of her father. However, that hardly compels the conclusion she concocted allegations of sexual misconduct. Moreover, given she wrote the letter to him at his request, it is unsurprising she did not write in it of his sexual misconduct towards her.

[61] In IO's pre-recorded evidence her cross-examination established she had sometimes been jealous of her younger sister's apparently better relationship with the appellant[97] and that the appellant used to shout at the complainant and call her names.[98] She explained she and her father used to have fights about her wanting to go out and spend time with friends and him making her stay home.[99] The complainant rejected a suggestion she had made up the allegations against her father because she hated living with her sister, because she wanted to move out and live with PL so someone who was a mother to her would look after her and because she wanted to stay at the same school. She explained what happened was bad and "shouldn't happen to anyone"[100] and that she "wanted to get out and be somewhere safe".[101] She was emphatic when challenged in cross-examination that each of the offending episodes did happen and that she was not making them up.

[62] The appellant sought to make something of his work records at trial, arguing he could not have been at home at the time of the alleged offending. The police, in apparent anticipation of alibi evidence that was never led, had procured a statement from the appellant's employer, summarising and annexing records of the times he had worked. The appellant wanted that evidence to be led and the prosecution consequently tendered the statement and annexure, admitting the content was true and accurate. However, the timeframes alleged by the complainant were not precise and, on their terms, were broad enough to include times outside those times when the appellant was apparently at work.

[63] The appellant argued that the finding of only nine condoms from a pack of 12 also undermined IO's credibility. His argument seemed to be that because the complainant only described the use of two condoms, not three, there should have been ten condoms found and the fact only nine were found is therefore at odds with the complainant's account. Such an argument overlooks the obvious possibility the appellant used, or at least opened and discarded, a condom in circumstances the complainant had no knowledge of.

[64] The above discussion demonstrates that, even considered collectively, the issues in the case were not so concerning that a jury acting reasonably ought to have entertained a reasonable doubt as to the appellant's guilt.

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97 AR p 24 L25.
98 AR p 23 L16.
99 AR p 24 L50.
100 AR p 29 L14.
101 AR p 29 L53.

[65] I am satisfied having reviewed the whole of the evidence that it was open for the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each charge. The sole ground of appeal must therefore fail.

Further issues

[66] The appellant's outline of submissions before this court advanced an array of other arguments. Most are so lacking in foundation and rational connection with the sole ground of appeal as to require no discussion. It is prudent however to address two arguments that in effect allege errors of law below.

[67] First, the appellant complained the learned trial judge was wrong to have clarified some factual matters with the jury in redirections. The prosecutor, when asked to submit as to re-directions, complained the appellant had misstated the effect of certain evidence in his address. He submitted those matters ought to be corrected. It would have been preferable for the prosecutor to have sought the directions prior to the commencement of the summing up. That is because the balanced correction of misstatements of evidence is easier to achieve within the body of a summing up than in redirections, when isolated reference to such evidence risks unduly elevating the jury's perception of its importance in the trial.

[68] The learned trial judge agreed to re-direct. The ensuing re-directions clarified three matters of fact.[102] One was that while YN had said the disclosure was in August of 2011 – a fact emphasised by the appellant – she had also said it was two weeks before the complainant ceased living with the father. The second involved a reminder of the unspecific nature of IO's evidence about the timing of the alleged offending, made relevant by the appellant having argued his work records gave him an alibi. The third matter was there was no evidence to the effect that PL made a hairdressing arrangement on 4 or 5 February as asserted by the appellant. It is not suggested the trial judge's re-directions on these matters contained any error.

[69] A trial judge is empowered to instruct the jury with such observations upon the evidence as the judge thinks fit to make.[103] The decision whether to re-direct about factual matters is quintessentially a matter for the trial judge's discretion, exercised with due regard to the above-mentioned risk of unduly elevating the importance of particular evidence and the trial judge's "fundamental task" of ensuring a fair trial.[104] It has not been shown his Honour erred in exercising his discretion to remind the jury of the above three factual matters rather than remain silent. While his Honour did explain to the jury that his re-direction arose from a need to correct matters arising from the appellant's address, the ensuing re-direction was fair and focussed on the actual state of the evidence. His Honour did not err in giving the re-direction.

[70] Second, the appellant argued he was wrongly deprived at trial of the right to cross-examine PL on the topic of some alleged misconduct in Africa.

[71] In cross-examination of PL at trial, the appellant asked PL:

> "Have you ever talked to the police back in Africa? I have been arrested for a rape case."[105]

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102 AR pp 190-191.
103 Section 620(1) *Criminal Code* (Qld).
104 *RPS v The Queen* (2000) 199 CLR 620, 637.
105 AR p 101 L15.

[72] Objection was taken before any answer was given and submissions ensued in the absence of the jury. It appeared from those submissions that PL must have told police the appellant had raped another of his daughters when living in Africa.[106] The appellant obviously disagreed with that information but apparently overlooked it had not even been led against him as evidence in chief from PL. The learned trial judge advised the appellant that pursuit of such evidence would make his position worse and ruled, correctly in the circumstances, that such evidence was not relevant in the appellant's trial.[107]

[73] Cross-examination continued through to the lunch break. After lunch the court resumed in the absence of the jury to deal with a logistical matter. The appellant then indicated he wanted to discuss an issue with the presiding Judge about a passage in PL's statement that he wished to ask her about. He said:

> "There is a paragraph I would like to read for her and confirm if she agrees or not. … 'I went and picked two girls up. I told the youngest girl to go and play with my kids. I then started talking to IO and she told me that when she was in Africa and living with aunty, that someone would come every afternoon and take her away and sleep with her. I asked her who the person was. She told me she didn't know who it was. I asked her if she had told her dad. She said that her dad was living in a different town. She told me that she was too scared to tell her aunty or her mother.'"[108]

[74] The reference to "sleep" was apparently assumed to be a reference to sexual intercourse. It appears the complainant must have also disclosed something to similar effect in one of her interviews with police, for the prosecutor informed his Honour:

> "When the defendant was represented, his representatives made a decision they wouldn't ask about that issue. That issue was in the – is in the unedited 93A tapes of the complainant child, but a decision was made by his then representatives not to go into that and hence it was edited out of her 93A tapes."[109]

[75] The appellant apparently perceives that if the complainant had been the subject of sexual intercourse when in Africa her medical examination in this case would have detected evidence of past childhood trauma to the hymen and, because it did not, that provides further evidence of her unreliability about sexual misconduct towards her. Such reasoning overlooks the general and essentially neutral effect of the medical evidence given at trial. More significantly it overlooks the complete absence of any direct evidence relevant to the point from the complainant.

[76] It is not suggested the decision of the defence not to explore this issue with the complainant was contrary to instruction. It was an unsurprising forensic decision. Such questioning was most unlikely to improve the defendant's prospects of acquittal and highly likely to engender jury sympathy for the complainant.

[77] Moreover, as the learned trial judge observed, such questioning would have led evidence that could not have been led without the judge's leave pursuant to s 4

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106 AR p 102.
107 AR pp 103-104.
108 AR p 117 L 20.
109 AR p 117 LL31-34.

Criminal Law (Sexual Offences) Act 1978 (Qld). His Honour went on to observe the same provision precluded such evidence being led without leave from PL. He indicated he would not give leave because, the decision having been taken not to pursue the leading of the evidence from the complainant, the evidence was irrelevant.[110]

[78] No error has been identified in the learned trial judge's handling of this aspect of the case.

[79] I note for completeness the recordings of the police interviews tendered at trial contained no reference to the complainant having been the subject of sexual misconduct in Africa, presumably because the recordings had been edited as agreed. However, they still contained some passing references to something having happened back in Africa and to the complainant having told PL about "what happened back in Africa".[111]

[80] The retention of such passages was regrettable because of the risk of speculation they might be a reference to some previous sexual misconduct against the complainant. They were so bereft of detail however that they were not logically capable of compelling such an interpretation and the jury were warned not to indulge in guessing.[112] Moreover, even if the passages were vulnerable to such an interpretation, they were not vulnerable to an interpretation that it was misconduct by the appellant. That is because it was obvious from the complainant's interviews with police and her pre-recorded testimony that there had been no sexual misconduct by the appellant against the complainant other than that described by her as having occurred in the short number of weeks prior to police intervention. For instance, when asked in the second interview if her father had ever touched her "rude parts" prior to the breast touching episode, she replied "Never".[113] It follows such vague references to something having occurred in Africa as did remain in the tendered interviews could not have prejudiced the fair trial of the appellant.

Order

[81] I would dismiss the appeal.

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110 AR p120 L28.
111 AR p234 L38, p258 L43, p279 L52, p299 L38.
112 AR p173 L22.
113 AR p285 L11.