

SUPREME COURT OF QUEENSLAND

CITATION: *R v FAJ* [2016] QCA 245

PARTIES: **R**
v
FAJ
(appellant)

FILE NO/S: CA No 303 of 2015
DC No 245 of 2015

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich – Date of Conviction: 3 December 2015

DELIVERED ON: 30 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 27 May 2016

JUDGES: Gotterson and Morrison and Philippides JJA
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 by a jury, after trial, of one count of rape and four counts of aggravated indecent treatment of a child under 16, under 12, under care – where the appellant appeals against his conviction on the sole ground that it is unreasonable and cannot be supported having regard to the whole of the evidence – where the appellant contends that on count 1 there were irreconcilable inconsistencies in the complainant’s evidence – where the appellant contends that on count 2 the complainant’s mixing up of locations made her an unreliable witness – where the appellant also contends that on count 2 the verdict was unsafe, not because of evidence that pertained to it alone, but because of the effect if the verdicts on counts 1 and 4 were set aside as unsafe – where the appellant contends that on count three the verdict would be unsafe if the verdicts in counts 1 and 4 were set aside as being unsafe, and that the complainant’s demeanour after the event was observed as being contrary to what one might expect had the events occurred as alleged – where the appellant contends that on count 4 the verdict was unsafe because of (i) the differing accounts by witnesses and the

complainant as to what the complainant was wearing; (ii) the implausibility of the appellant being able to pull the complainant's jeans down whilst driving, if she were wearing jeans; (iii) the complainant's quiet and calm demeanour after the events was alleged to have occurred; (iv) the absence of medical evidence and (v) the preliminary complaints were inconsistent with the offence alleged – where the appellant contends that on count 5 the verdict would be unsafe if the verdicts in counts 1 and 4 were set aside as being unsafe – whether the verdicts of guilty were unreasonable or insupportable having regard to the evidence

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied
The Queen v Baden-Clay [2016] HCA 35, cited

COUNSEL: M J Copley QC for the appellant
 C N Marco for the respondent

SOLICITORS: Paramount Legal for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.
- [2] **MORRISON JA:** On 3 December 2015, Mr FAJ was convicted by a jury, after trial, of one count of rape and four counts of aggravated indecent treatment of a child under 16, under 12, under care. The indictment alleged that the offences took place on an unknown date between 2 February 2014 and 21 May 2014.
- [3] The Crown case alleged that the five counts occurred in this way:
- (a) Count 1 – Mr FAJ told the complainant that he loved her; he kissed her on the lips;
 - (b) Count 2 – Mr FAJ touched the complainant's breasts under her shirt; he put his hand into the top of her jeans, inside her underwear and felt her "private part";
 - (c) Count 3 – Mr FAJ took the complainant to an empty house; he laid her on the floor, pulled her jeans and underwear down and used his tongue to lick her "rude";
 - (d) Count 4 – Mr FAJ was driving the complainant; he pulled her jeans and underwear to around her ankles; he then put his finger into her "private";
 - (e) Count 5 – Mr FAJ was driving the complainant; he gave her his mobile phone and told her to watch three pornographic videos of girls older in age than the complainant.
- [4] The sole ground in respect of the appeal against conviction is that the verdict is unreasonable and cannot be supported having regard to the whole of the evidence.

The applicable legal test

[5] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*¹ requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[6] In *M v The Queen* the High Court said:²

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.”

[7] *M v The Queen* also held that:³

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

[8] Recently the High Court has restated the pre-eminence of the jury. In *The Queen v Baden-Clay*⁴ the Court said:

“[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is “the constitutional tribunal for deciding issues of fact.” Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that

¹ (2011) 243 CLR 400, at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487, 493, 494.

² *M v The Queen* at 493. Internal citations omitted.

³ *M v The Queen* at 494.

⁴ [2016] HCA 35, at [65]-[66]. Internal citations omitted.

respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.

- [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.""

The complainant's evidence

- [9] The complainant and her mother (**MUM**) lived in a house near Mr FAJ's house. The house owner (**VEG**) was a greyhound owner. Mr FAJ had a female partner (**BAJ**). They were greyhound breeders and racers. They had kennels and the complainant often went there to help with the dogs.
- [10] The complainant was interviewed by police when she was about 11 years old. In the course of the interview various names were given to each of the occasions on which the five counts occurred: count 1 was the kissing time; count 2, the touching time; count 3, the Brisbane day; count 4, the sick horse; and count 5, the videos. Her evidence is conveniently dealt with under those headings, though, of course, her evidence as a whole has to be scrutinised.
- [11] The complainant was about 12 years old when her pre-recorded evidence was given. She affirmed that what she said in her police interview was true. She affirmed that what she had told police on the occasion when she went with them to a house near a lake, was also true.
- [12] The defence case, as put to the complainant in cross-examination, was that there was never anything done sexually, never any inappropriate touching, never anything inappropriate shown on his phone, and the complainant was simply wrong on all counts.⁵ The complainant disagreed.
- [13] In response to her evidence that she had told nobody until she told MUM, the complainant said that those at her school did not need to know it, and that she was scared that the others might scream or yell, or hit her.⁶
- [14] She also explained that the day before her trial evidence she had been given the video to watch, but had not watched all of it as "it was just too emotional" to do so.⁷

⁵ AB 39 lines 4-14.

⁶ AB 39.

⁷ AB 39-40.

Count 1 - the kissing time

- [15] The complainant said this occurred when one of Mr FAJ's greyhounds, called May, had puppies.⁸
- [16] In her interview she said:
- (a) Mr FAJ collected the complainant from her home at about 5 pm and took her to his house, because May was going to have her puppies that evening; she fed the greyhounds and put them in their night pens;⁹
 - (b) BAJ went to sleep in the house after May started having her puppies;¹⁰ when BAJ went to sleep in the house, Mr FAJ kissed the complainant on the lips;¹¹
 - (c) May had her puppies at about 12 pm;¹² at about 1 am, while the second puppy was being born, the complainant had a sleep on a mattress in the kennel; when she woke all the puppies had been born;¹³
 - (d) the conduct the subject of the charge occurred between 2 am to 3 am on the morning when May had her three puppies;¹⁴
 - (e) a female friend of BAJ was there;¹⁵ she went for a sleep after the puppies were born;¹⁶
 - (f) Mr FAJ told her that he loved her; that occurred at the kennels,¹⁷ in the puppy pens;¹⁸
 - (g) he kissed her;¹⁹ the complainant tried to push him away but he grabbed her by the arms; she said "go away",²⁰ he kept on kissing her;²¹ and
 - (h) the complainant got away and went in with some of the dogs; after that she went to sleep in the spare bedroom in the house;²² when she woke she let the dogs out, then went home.²³
- [17] In her pre-recorded evidence the complainant identified various photographs of Mr FAJ's house and the kennels. She said that she had got the location for the kissing time and the touching time round the wrong way, in that the conduct in the kissing time took place "on the other side of the kitchen" shown in photograph 6, in the air-conditioned rooms.²⁴

⁸ Transcript of interview, page 4.

⁹ Transcript of interview, page 10.

¹⁰ Transcript of interview, page 10.

¹¹ Transcript of interview, pages 7-8.

¹² Transcript of interview, page 11.

¹³ Transcript of interview, page 9.

¹⁴ Transcript of interview, pages 9-10.

¹⁵ Transcript of interview, pages 10-11. As evidence came out, this was MAZ, a friend who lived about 1 km away.

¹⁶ Transcript of interview, page 12.

¹⁷ Transcript of interview, pages 6, 12.

¹⁸ Transcript of interview, page 8.

¹⁹ Transcript of interview, pages 4, 7-8, 12.

²⁰ Transcript of interview, pages 8, 12.

²¹ Transcript of interview, page 8.

²² Transcript of interview, page 13; she said the dogs were Mindy and Salty.

²³ Transcript of interview, page 14.

²⁴ AB 18 lines 18-29; AB 26 line 23.

[18] The complainant's pre-recorded evidence largely matched the account above, but differed in some respects. The essential aspects are:

- (a) she accepted that people were there to help the dog earlier than midnight;²⁵
- (b) she remembered that Mr FAJ and BAJ were there the whole time that the dog was giving birth;²⁶
- (c) she accepted that she could not remember most of the kissing incident, and it was a bit hard to remember;²⁷
- (d) she accepted that she may have had a few minutes sleep before the first puppy was born; but she denied the proposition that she went to sleep at 9 pm, 10 pm or 11 pm, or that she slept through the whole night;²⁸
- (e) she denied that all those persons were there when she woke up, saying that BAJ and her friend were not there;²⁹
- (f) she denied that BAJ stayed up with the puppies, saying that it was BAJ who came from the house in the morning to take her up to sleep;³⁰ and
- (g) she did not say anything to BAJ about what had happened as she was scared and thought BAJ would "get up me"; for the same reason she did not tell the woman who owned the house where she and her family were staying; she did not tell MUM because she was scared she would be punished.³¹

Count 2 – the touching time

[19] In her interview the complainant said:

- (a) Mr FAJ touched her "where I didn't want to be touched";³²
- (b) at first she could not recall when that happened, but then said it was about 4 pm on a weekend when the complainant had gone over to help with the dogs; she was in term 1 of grade 5;³³
- (c) BAJ had gone out to trial the dogs;³⁴ BAJ's son and another person were there, helping with the dogs; the two others then went for a drive;³⁵
- (d) the complainant put some bowls in the sink; Mr FAJ called her over and started touching her with his hands, on her "boobs and private";³⁶ the touching was under her clothes, by putting his hands down the top of her clothes; one hand was down her top and the other was touching "my private";³⁷
- (e) the touching occurred in the front room of the air-conditioned dog kennels;³⁸ she told him to go away, but he said "no";³⁹

²⁵ AB 26.

²⁶ AB 27.

²⁷ AB 27, 28.

²⁸ AB 28, 29.

²⁹ AB 28, 29.

³⁰ AB 29.

³¹ AB 30.

³² Transcript of interview, page 4.

³³ Transcript of interview, pages 14-16.

³⁴ Transcript of interview, pages 14-15.

³⁵ Transcript of interview, pages 16-17.

³⁶ Transcript of interview, pages 17-18.

³⁷ Transcript of interview, page 19.

³⁸ Transcript of interview, page 18.

³⁹ Transcript of interview, page 20.

- (f) the complainant identified her “private” as being the part of the body used to wee when she went to the toilet;⁴⁰
 - (g) she was feeling scared at the time; she ran up to Mr FAJ’s house to play with Mr FAJ’s cat; afterwards Mr FAJ asked her to put the dogs back in, and she helped do that;⁴¹ and
 - (h) she then went home and did not tell anyone about it.⁴²
- [20] In her trial evidence the complainant identified a drawing done by her as showing where she was touched.⁴³ Her evidence largely matched that in the interview, relevant aspects being:
- (a) she said that she could remember most of the events;⁴⁴ and
 - (b) she denied that she told police that after it happened she ran to Mr FAJ’s house, but said that she finished with the greyhounds and then went home.⁴⁵

Count 3 – the Brisbane day

- [21] The complainant said in her interview that this occurred when she and her brother were taken to Brisbane by Mr FAJ.⁴⁶ Her account was:
- (a) it happened at night;⁴⁷ the car used by Mr FAJ’s father had broken down in Brisbane and the RACQ was called; Mr FAJ was going to assist his father;⁴⁸ Mr FAJ said BAJ was ill and asked MUM if the complainant and her brother could accompany him to Brisbane;⁴⁹ they drove to Brisbane in Mr FAJ’s black Monaro;⁵⁰
 - (b) the complainant and her brother played while the car was fixed; they were in some parking spaces near an old shop, with trees and bushes nearby;⁵¹ on the way home “we kind of fell asleep”; they stopped at a service station to get fuel, at which point the complainant was awake;⁵²
 - (c) (at the start of the interview) on the way home “he took us to this old house somewhere. It’s like on a dirt road and he said I have to go to the toilet, come with me, and I said ‘no, no’ and he said ‘It will just be five minutes, come on and then we’ll go home’ So I said ‘ok’ and then he ... lied me down and then his stucked his tongue in my private”;⁵³
 - (d) (then later in the interview) “we went to this old house and he said ‘I’ve got to go to the toilet, come with me’ and I said ‘no, no, no’ and he said ‘come on it will only be five minute’ so, ‘and then we’ll go home’ and I said ‘ok’ so

⁴⁰ Transcript of interview, page 20.

⁴¹ Transcript of interview, pages 21-22.

⁴² Transcript of interview, page 22.

⁴³ AB 21, Exhibit 4.

⁴⁴ AB 31.

⁴⁵ AB 31.

⁴⁶ Transcript of interview, page 5.

⁴⁷ Transcript of interview, pages 23-24.

⁴⁸ Transcript of interview, pages 23, 25.

⁴⁹ Transcript of interview, page 24.

⁵⁰ Transcript of interview, pages 25, 26.

⁵¹ Transcript of interview, pages 23, 26, 27.

⁵² Transcript of interview, pages 28, 29.

⁵³ Transcript of interview, page 5.

then I went with him and then he lied me down on this wooden floor and ... he then starting licking my private”;⁵⁴

- (e) they went to “the old house”, which was on a dirt road and had a ramp like a wheelchair ramp, and a wooden floor;⁵⁵ the house was made of wood, brown, and a little off the ground;⁵⁶ the ramp was at the back of the house, and there was no door;⁵⁷
 - (f) the car was stopped behind the house;⁵⁸
 - (g) the complainant walked up the ramp, and Mr FAJ “lied me down on the floor and the he started licking my rude”, “licking my private”;⁵⁹ he pulled her jeans and underpants down around her ankles to do that;⁶⁰ she was lying on her back, and Mr FAJ was “holding himself up with his hands”;⁶¹
 - (h) she was clear that he did not stick his tongue into her private, but only licked it;⁶² she identified her “rude” as the “one I wee with”;⁶³ she said “stop it” but he said “no”;⁶⁴ he stopped when she said “stop it, go away”;⁶⁵
 - (i) she ran back to the car where her brother was still asleep; she fell asleep and woke up when they arrived home;⁶⁶ and
 - (j) she said she had not been to the old house before, and had not seen it since; she did not know where it was, but thought she would recognise it.⁶⁷
- [22] In her trial evidence the complainant identified photographs of a house as being the old house.⁶⁸ Police made a video of a walk-through inspection by the complainant. The building was substantially as she described in her interview.
- [23] In cross-examination the complainant adhered to her version of the events. Relevant aspects of that evidence are:
- (a) she denied that Mr FAJ asked if MUM’s partner (**WEL**) would come on the drive as well;⁶⁹
 - (b) she accepted that because she fell asleep at one point that she may not have remembered the events properly, but denied it was a dream;⁷⁰
 - (c) she did not tell anyone about what happened;⁷¹

⁵⁴ Transcript of interview, page 23.

⁵⁵ Transcript of interview, page 29.

⁵⁶ Transcript of interview, page 30.

⁵⁷ Transcript of interview, page 31.

⁵⁸ Transcript of interview, page 30.

⁵⁹ Transcript of interview, pages 31, 32, 33.

⁶⁰ Transcript of interview, pages 32, 33, 34.

⁶¹ Transcript of interview, page 34.

⁶² Transcript of interview, page 60.

⁶³ Transcript of interview, page 33.

⁶⁴ Transcript of interview, page 33.

⁶⁵ Transcript of interview, page 34.

⁶⁶ Transcript of interview, page 35.

⁶⁷ Transcript of interview, page 36.

⁶⁸ AB 20, Exhibit 3.

⁶⁹ AB 32.

⁷⁰ AB 32.

⁷¹ AB 32.

- (d) she agreed that MUM had showed her photographs of two buildings, one of which was the one she identified as the old house where the events took place; it was after that that the complainant went there with the police;⁷² and
- (e) she accepted that she had stopped at that house on other occasions, some or all of which were times when Mr FAJ was not there; and that she knew the house apart from the events the subject of the Brisbane day.⁷³

Count 4 – the sick horse

[24] In her interview the complainant said this occurred when a horse cut her leg and “had to get cut up for dog meat”.⁷⁴ She said:

- (a) they had just moved out of VEG’s house to a new house, but her mother had been called over to help VEG;⁷⁵
- (b) the complainant was at Mr FAJ’s house; Mr FAJ and BAJ had a big fight in their shed while the complainant was present; the fight was over the fact that Mr FAJ had not told BAJ that the complainant was coming over, when BAJ’s son was coming over as well;⁷⁶
- (c) BAJ then said she was going to trial the dogs, and left; after she left the complainant then had a shower, and she and Mr FAJ had shepherd’s pie for dinner; MUM came over later;⁷⁷
- (d) they all went over to where the horse was being cared for; MUM talked to the horse owner while the complainant stayed in the car;⁷⁸
- (e) MUM asked Mr FAJ to take her somewhere while the horse was dealt with; he “took me down the back way to his house”; they did not actually go to the house; instead, they went down a dirt road, which was all she could remember of the way they went, as it was night time;⁷⁹
- (f) the complainant was in the front seat of the Monaro;⁸⁰
- (g) they were just about to turn around and Mr FAJ “sticked his finger in my private”;⁸¹
- (h) Mr FAJ “said ‘pull your pants down’ and I said ‘no’ and he said ‘ok then I’ll do for you’ and then started pulling my pants down and I was kicking and I said ‘stop it’ and he said ‘no’ and then he kept doing it to me”; he pulled down her jeans and underpants, to her ankles;⁸² the car was still moving when this occurred;⁸³

⁷² AB 33.

⁷³ AB 33.

⁷⁴ Transcript of interview, page 5.

⁷⁵ Transcript of interview, pages 38, 39.

⁷⁶ Transcript of interview, pages 38, 39, 40.

⁷⁷ Transcript of interview, pages 41, 42.

⁷⁸ Transcript of interview, pages 42, 43.

⁷⁹ Transcript of interview, pages 37, 38, 43.

⁸⁰ Transcript of interview, page 44.

⁸¹ Transcript of interview, pages 5, 40, 43, 44.

⁸² Transcript of interview, page 44, 45.

⁸³ Transcript of interview, pages 45, 47.

- (i) Mr FAJ stuck his finger in her private, and it hurt a lot; he started “putting ... it in and out”;⁸⁴ she said “stop it”, “don’t, stop it” and “don’t”;⁸⁵ she finally managed to get him to stop by kicking him on his foot;⁸⁶ and
- (j) they returned to the house where MUM took her home; she did not tell MUM what had happened because she was “afraid she was going to be shocked”; she told no-one else.⁸⁷

[25] In her trial evidence the complainant said that she hit Mr FAJ in the arm, then he stopped the car, then she kicked him.⁸⁸ In cross-examination she agreed that she had not told the police about hitting him on the arm, or that he stopped the car as a result of that.⁸⁹

[26] In cross-examination the complainant gave this evidence:

- (a) on the day of the events in question there had been some discussion about going out to dinner, but that did not eventuate because of the horse;⁹⁰
- (b) she could not recall if she was wearing a black dress, or that Mr FAJ had told her mother that he did not want her to stay over or that he said he did not want her staying while BAJ was away;⁹¹
- (c) she was unsure about various aspects, such as whether they went to their former house to discuss the horse, whether she stayed in the car during that process, and whether it was MUM who asked Mr FAJ to take the complainant for a drive;⁹²
- (d) at first she denied that she told police that the car was moving the whole time, then said she was unsure about that, then she said that she did tell the police that he pulled her jeans down while driving;⁹³ shortly thereafter she said that the car was still being driven throughout the events;⁹⁴
- (e) she said she pulled up her jeans then kicked him;⁹⁵ after being reminded of the fact that the car had a centre console with gearstick and brakes, she accepted that if she told the police that she kicked him in the foot, that was wrong; she then said she kicked him on the top of his leg;⁹⁶ and
- (f) she did not tell anyone what occurred.⁹⁷

Count 5 – the videos

[27] The complainant said that Mr FAJ offered her a phone on which to watch pornographic videos. Her account in the police interview was:

⁸⁴ Transcript of interview, page 46.

⁸⁵ Transcript of interview, pages 40, 46.

⁸⁶ Transcript of interview, pages 46, 47.

⁸⁷ Transcript of interview, page 48.

⁸⁸ AB 22 line 29 to AB 23 line 2.

⁸⁹ AB 23.

⁹⁰ AB 34.

⁹¹ AB 34.

⁹² AB 34, 35.

⁹³ AB 35.

⁹⁴ AB 36.

⁹⁵ AB 36.

⁹⁶ AB 36.

⁹⁷ AB 36.

- (a) after the occasion involving the sick horse the complainant and Mr FAJ were driving to Brisbane, taking dogs to the vet, when he gave her a phone to watch a video on; she thought it was a Nokia phone;⁹⁸
- (b) he said “here watch these”;⁹⁹ there were three different videos, and he showed her how to switch to the next video;¹⁰⁰ the videos were “all gross”; they showed naked girls “sticking things in their privates ... Pens and that ... Texas...”;¹⁰¹ and
- (c) she identified the “privates” as the “one they wee with”.¹⁰²

[28] In cross-examination it was established that she had not told anyone of these events until she told MUM.¹⁰³ Further the cross-examination established the way in which her complaints were revealed. It was said that MUM first asked her if Mr FAJ had done anything wrong to her, to which she responded “no”. Then MUM questioned her further, and the complainant told her that Mr FAJ had kissed her. Then she was given a piece of paper and was asked to write down everything she could remember, and it was in that process that she revealed the events.¹⁰⁴

[29] That piece of paper was what the complainant read out at the police interview. It identified these acts on the part of Mr FAJ, each of which are able to be related to a charged act: (i) kissed her – count 1; (ii) touched her breasts – count 2; (iii) put his hand in her underpants – count 2; (iv) kissed her “private” – count 3; (v) put his finger in her “private” – count 4; and (vi) showed her “yucky videos” – count 5.

Preliminary complaint

[30] The events came to light when MUM took her out of school, told her she was not in trouble, and then told her that BAJ hated MUM because BAJ thought there was something between Mr FAJ and the complainant. The sequence was then as set above in paragraphs [28] and [29].

[31] As a consequence of MUM giving her a piece of paper to write down the events, the complainant “started writing everything down”. She wrote:¹⁰⁵

“He kissed me and touched my boobs, put his hand in my nickers ... [a]nd showed me yucky videos. He kissed me, kissed my private and put his finger in my private”.

[32] In the police interview she read another written account (which she called a “book”) into the record. She acknowledged that it was not in strict order:¹⁰⁶

“It shows where he touched me. [Mr FAJ] kissed me, sticked his tongue in my private and his finger in my private. He always kissed me when we were alone, he also told me he loved me and he would always grab me and touch me where I did not want to, where I did

⁹⁸ Transcript of interview, pages 51, 52, 55.

⁹⁹ Transcript of interview, page 55.

¹⁰⁰ Transcript of interview, page 56.

¹⁰¹ Transcript of interview, pages 50, 51.

¹⁰² Transcript of interview, page 55.

¹⁰³ AB 37.

¹⁰⁴ AB 38.

¹⁰⁵ Transcript of interview, page 50.

¹⁰⁶ Transcript of interview, page 59.

not like to be touched. He, he showed me these gross videos one time when we, he took me and my brother up to Brisbane on the way home he, [my brother] was asleep in his car and he ... He took us to this old house on this dirt road and said 'I have to go to the toilet, come with me' I said 'no, no, no' but he said to me that it would be 5 minutes and then we will go home. So I went with him, that is when he stuck his tongue in my private. It all started when, it all started to happen when his dog May had puppies, when his partner was asleep in their house. He ... saw my red undies and he also said if Jake wasn't here you can have, hop in the shower with me but I said 'no' and he said 'come ...'.

[33] During the police interview the complainant was asked about the red undies. She said that on the occasion when the horse was injured (see paragraph [32] above) she had a shower at Mr FAJ's house and he "stole my red leopard print undies" and that they were still at his house.¹⁰⁷

[34] MUM also asked her to draw on a diagram where she had been touched. The drawing became an exhibit,¹⁰⁸ and showed the breast and genital area.

Other evidence

[35] Evidence was called by both the Crown and the defence.

Medical evidence

[36] The complainant underwent an anogenital examination on 18 June 2014. The purpose was to look for any evidence of acute or recent or past trauma. The examination was perfectly normal. The doctor said there could be two reasons for that. First, that nothing had happened. Secondly, if something did happen, because of the nature of what happened, or the time between when the alleged event had occurred and when the examination took place, the injuries were completely healed. The doctor said he examined her several months after the last event, and minor injuries resolved within days.

Evidence of the complainant's mother, MUM

[37] MUM and her children moved into the house owned by VEG, in February 2014. They met another woman neighbour (MAZ) who lived about a kilometre away.

[38] MUM's evidence included the following.

[39] Mr FAJ drove a black Monaro. He came over one day and while he was there he asked if the complainant wanted to help him with their dogs. The complainant would go over to his house after school to help, and she was paid about \$5 per day. She would walk over or be picked up by Mr FAJ or BAJ.¹⁰⁹

[40] The complainant stayed over at Mr FAJ's house in about March 2014, on an occasion when one of the dogs was having puppies. Mr FAJ said she could go and watch, and that he and BAJ would be there. The complainant went over in the

¹⁰⁷ Transcript of interview pages 60, 61.

¹⁰⁸ AB 233.

¹⁰⁹ AB 77.

- afternoon, and returned when Mr FAJ dropped her off, about lunchtime the next day.¹¹⁰
- [41] Prior to the complainant returning, Mr FAJ had gone to see MUM, saying that the complainant was either asleep or had been asleep, and he would drop her back later.¹¹¹ That was the only time that the complainant had slept over.¹¹² On another occasion Mr FAJ and BAJ had taken the complainant to the greyhound races.
- [42] On one later occasion,¹¹³ Mr FAJ arrived and said that one of the dogs needed to see a vet in Brisbane. He said that the complainant could go with him. When the complainant said yes, he said to wear something nice so they could go out to lunch while they waited. They returned later that afternoon.¹¹⁴
- [43] She could recall an occasion when the complainant and her brother went with Mr FAJ. Mr FAJ arrived in his black Monaro,¹¹⁵ and said that a car his father used had broken down. He asked if WEL, the complainant and the brother could go with him to Brisbane. WEL did not wish to go,¹¹⁶ but the complainant and her brother did. They did not arrive back until about 1 am the next day.¹¹⁷
- [44] She recalled the time the horse was injured. VEG called and said that one of her horses was injured and needed to be put down. At the time the complainant was at Mr FAJ's house, some 15 km distant. VEG asked her to go to her house, which she did. Having arrived to find VEG not there, MUM drove over to Mr FAJ's house. The complainant was inside eating shepherd's pie and Mr FAJ was on his computer. Mr FAJ said that he had a fight with BAJ, who had left.¹¹⁸
- [45] Having told Mr FAJ about the horse, he said he would come over to look at it. He drove in his Monaro with the complainant, and MUM went separately. The decision was made to put the horse down. Mr FAJ suggested that he take the complainant for a drive so she did not have to see or hear the horse being shot. They came back about 10 minutes later.¹¹⁹
- [46] MUM recounted the time when the complainant told her what had happened. She took her out of school and questioned her as to whether Mr FAJ had ever tried to touch her. The complainant was upset and said that he kissed her. She was given a piece of paper to write on, which she did, and gave it to MUM. She also drew on a diagram, showing where she had been touched.¹²⁰
- [47] Cross-examination of MUM elicited these extra matters:
- (a) she lived at VEG's house for about a month and a-half; the complainant went over to help with Mr FAJ's greyhounds during that time;¹²¹

¹¹⁰ AB 78, 79.

¹¹¹ AB 79.

¹¹² AB 79.

¹¹³ This was after they had moved away to a different house at Mt Tarampa, some 15 km away from where Mr FAJ lived.

¹¹⁴ AB 80, 81.

¹¹⁵ At the Mt Tarampa house.

¹¹⁶ AB 90.

¹¹⁷ AB 81, 82.

¹¹⁸ AB 82, 83, 84.

¹¹⁹ AB 84, 85.

¹²⁰ AB 87, 88.

¹²¹ AB 89.

- (b) when she saw the complainant the morning after the puppies being born, the complainant was quiet, did not look upset, and did not say anything about the charged conduct;¹²²
- (c) when she saw the complainant after the trip to Brisbane to fix the car, the complainant was quiet and tired, but not looking upset;¹²³
- (d) on the occasion when the horse was put down, Mr FAJ said that BAJ had left and that the complainant should not stay with him if BAJ was not there; when she saw the complainant after they returned from the drive, she was quiet; she could not remember her looking upset;¹²⁴
- (e) on the occasion when the complainant returned from the trip to Brisbane (when she said she was shown videos) the complainant did not say anything about what happened, and she did not remember her looking upset; she described the complainant as being “just quiet and doesn’t say much”;¹²⁵
- (f) she agreed that the complainant knew that BAJ had a dislike for MUM, and would have known that before they went to the police;¹²⁶
- (g) she denied that a friend of WEL (COM) was at the house or in the room when she spoke to the complainant about being touched by Mr FAJ;¹²⁷ and
- (h) she agreed that the complainant’s first response was to deny that Mr FAJ had touched her; she said the complainant got quite upset when she was questioned, and said he tried to kiss her; she then wrote down more on the piece of paper; it was the first time she had heard those details from the complainant.¹²⁸

Evidence of VEG

- [48] VEG explained how she was acquainted with Mr FAJ and BAJ, and knew MAZ, and how Mr FAJ first met MUM. She could recall that the complainant helped with Mr FAJ’s dogs, but could not remember the details of how often or for how long that went on.¹²⁹
- [49] She gave evidence of her recall of the day when the horse was injured and put down:
- (a) she got the horse back to her place really late in the afternoon; she said she was “crying my eyes out” and “pretty much distraught”,¹³⁰ and “absolutely devastated about losing my mare”;¹³¹
 - (b) she saw the complainant and MUM briefly, then they disappeared; she could not recall if Mr FAJ was there then;¹³² she agreed it was possible that Mr FAJ took the complainant for a drive;¹³³

122 AB 90.
 123 AB 90.
 124 AB 90, 91.
 125 AB 91.
 126 AB 91.
 127 AB 92.
 128 AB 93.
 129 AB 118.
 130 AB 119.
 131 AB 122.
 132 AB 119.

- (c) the complainant “was dressed unusual ... I thought she was in a nightie, but it wasn’t. It was some sort of ... going out thing or some – I don’t know”; she asked MUM why she had brought the complainant over, and the reply was that “she was going out for dinner or ... something ... that just sort of ... went out of me head”;¹³⁴
- (d) she was asked again about whether the complainant was wearing a nightie, and she responded by saying she was “absolutely devastated about losing my mare”, then said:¹³⁵
- “I don’t know whether she was wearing – it was – it’s not something that she – usually runs around in, like, jeans and T-shirt and that. It was, like, a – a nightie or, like, a dress or something.”
- (e) she agreed it was not just jeans, she had asked why she was dressed up like that, and she agreed it was “out of the ordinary”;¹³⁶ and
- (f) when the complainant was dropped back by Mr FAJ she was “white and shaken and she was really close to [Mr FAJ]”;¹³⁷ that was about when the man who was getting rid of the horse carcass came down, and he would have had blood on him; she saw the complainant move closer to Mr FAJ.¹³⁸

[50] She said that on the occasion when Mr FAJ was going to Brisbane to fix the car, he was asking for someone to go with him so he would not fall asleep. She did not remember the complainant being upset when she got back, nor did the complainant say anything to VEG about what happened.¹³⁹

Evidence of WEL

[51] The relevant parts of WEL’s evidence were as follows:

- (a) he moved into VEG’s house to rejoin the complainant’s family after a short separation from MUM; MUM told him that the complainant was going over every now and then to help with Mr FAJ’s greyhounds;¹⁴⁰
- (b) Mr FAJ asked him to go for a drive to Brisbane to fix a car used by Mr FAJ’s father; WEL could not, and neither could WEL’s father, who was also asked; he was “pretty sure” that MUM suggested that the complainant and her brother might go; they left about 3 pm or 4 pm, and got back about midnight; during the time they were away Mr FAJ called to apologise for the delay and explain what was happening;¹⁴¹
- (c) when they arrived back both children were asleep in the car;¹⁴² he did not remember anything unusual about the complainant at that time;¹⁴³

¹³³ AB 122.

¹³⁴ AB 120 lines 8-13.

¹³⁵ AB 122 lines 38-41.

¹³⁶ AB 122 line 45 to AB 123 line 4.

¹³⁷ AB 122 lines 10-12.

¹³⁸ AB 122.

¹³⁹ AB 121.

¹⁴⁰ AB 125.

¹⁴¹ AB 126.

¹⁴² AB 126.

¹⁴³ AB 128.

- (d) later when they were at Mt Tarampa he spoke to MAZ, and as a result to MUM; that was when MUM took the complainant out of school; he and his friend COM went to the house;¹⁴⁴ he denied that COM was at the house when the complainant arrived home with MUM, but accepted it could be the case;¹⁴⁵ and
- (e) he had not spoken to the complainant about the events.¹⁴⁶

Mr FAJ's evidence

[52] Mr FAJ elected to give evidence in his defence. He also called BAJ, COM, MAZ and JAV to testify in his case. The relevant parts of his evidence, including the cross-examination, are as follows:

[53] The complainant came over to help with the dogs three or four times a week, after school and on weekends.¹⁴⁷ He and BAJ played a role in looking after MUM's children; she seemed to be "palming them off ... on a regular basis ... every opportunity she got, she would palm them off to us".¹⁴⁸

Count 1 – the kissing time.

[54] When the dog was due to have puppies BAJ asked MAZ to help. MAZ was there for the entire time, only going home when it was finished. The complainant came over in the later afternoon, around 5 pm to 6 pm, to watch the birth. In cross-examination he said he could not give a specific time, "but somewhere in the region of 3, 4, 5 o'clock in the afternoon".¹⁴⁹ He picked her up.¹⁵⁰

[55] In cross-examination Mr FAJ explained that the complainant wished to see the whelping as she had missed out previously when another dog had a C-section at the vet. He said she asked him, and he then asked MUM, who agreed. He said "it was all good, because [MUM] was aware that both myself and [BAJ] would be present. ... I made that absolutely clear."¹⁵¹

[56] He could not recall when MAZ arrived but he could remember BAJ calling her "in the middle of the night". When she arrived she assisted with the first pup, which was stuck, and that was about 1 am, or between midnight and 1 am.¹⁵² The actual work of assisting in the whelping was done by BAJ and MAZ, because the dog was BAJ's favourite dog and "there was no way [BAJ] was getting to let me be the one doing the whelping". So he "basically just hovered around doing whatever was needed if they needed water or stitches ... to tie off the umbilical cord. I may have gone and got them for them".¹⁵³

[57] The work was only after each pup was born. There was a period of two hours when no pup was born, during which time the dog was simply monitored.¹⁵⁴

144 AB 127.

145 AB 129.

146 AB 128.

147 AB 132.

148 AB 133.

149 AB 147 line 15.

150 AB 134, 146.

151 AB 145 lines 29-32, 146 line 41.

152 AB 135, 148.

153 AB 136.

154 AB 136.

[58] The complainant fell asleep on a mattress at around 11 pm and stayed asleep through the whole birthing process, waking up about 7 am.¹⁵⁵ She was asleep before MAZ got there.¹⁵⁶ She was sleeping a couple of kennels down from where the dog was whelping.¹⁵⁷

[59] In cross-examination he said MAZ was there the whole time.¹⁵⁸

[60] Mr FAJ said he was not on his own with the complainant “for even one second ... during that entire whelping”.¹⁵⁹ The complainant was woken up by BAJ, while MAZ was still there.¹⁶⁰ BAJ took the complainant to the house while he attended to other duties.¹⁶¹

[61] He denied the allegation of kissing as “Absolutely false. Absolutely did not happen”.¹⁶²

Count 2 – the touching time

[62] Mr FAJ denied this in the same terms: “Absolutely false. Did not ever happen”.¹⁶³

[63] In cross-examination Mr FAJ said there were times when the complainant was with BAJ when he was absent, and some afternoons BAJ would take the dogs to dog trials at Ipswich.¹⁶⁴ Ipswich trialled on three days a week, and BAJ would usually take the dogs on Wednesdays.¹⁶⁵

Count 3 – the Brisbane day

[64] Mr FAJ said he was aware of the building identified by the complainant. He said it was the only public toilet between his house and the highway, and that he had been there “on numerous occasions”. Asked if he had been there with anyone else he said:¹⁶⁶

“I’ve been there with [the complainant] when I’ve had to go to the toilet or she’s had to go to the toilet but I specifically was not at that location on that night as alleged.”

[65] In cross-examination Mr FAJ said that he had taken the complainant to the public toilet before “on several occasions” and that there would have been occasions when it was just himself and the complainant.¹⁶⁷

[66] He described the allegations as to what he did to the complainant as “absolutely false”.

[67] In cross-examination Mr FAJ said it was MUM’s idea, and not his, that the complainant and her brother go with him.¹⁶⁸

¹⁵⁵ AB 135, 136, 148.

¹⁵⁶ AB 148.

¹⁵⁷ AB 148.

¹⁵⁸ AB 149.

¹⁵⁹ AB 135, 136.

¹⁶⁰ AB 136.

¹⁶¹ AB 136, 149.

¹⁶² AB 137.

¹⁶³ AB 137.

¹⁶⁴ AB 152 line 27.

¹⁶⁵ AB 152 lines 32-43.

¹⁶⁶ AB 137.

¹⁶⁷ AB 158.

¹⁶⁸ AB 154 lines 34-42.

“... At that point, [MUM] interjected into the conversation and said take the kids.

So you never asked for [WEL], [the complainant] or - - -?---I did not ask for [the complainant] or [her brother] to go with me. I asked for [WEL’s father] and [WEL], and [MUM] suggested the kids. I resisted and said no, I’ll be back far too late, but she kept pushing and pushing and pushing, until eventually I relented and said, well, all right, you know they’re going to be back late, though, and I took the kids with me, and I didn’t take one child, I took both.

No one suggested you just took one?---I’m just putting it out there, so that you know.”

- [68] He was asked why, given that he knew it would be a late night, he did not refuse to take the children. He said that WEL “was aware of how late we were going to be back”,¹⁶⁹ and he had made that absolutely clear before he left. Then:¹⁷⁰

“And you’d made - - -?---completely untrue.

- - - that pretty clear before you left?---Absolutely. I’d – I – I resisted taking the kids, because I knew it was going to be a late night. It ended up a lot later than I thought, because of the 90 minute wait, but it was still going to be too late. For kids that have a bedtime of 7.30, having them out after midnight’s not suitable.

All right. But you didn’t think you could just refuse to take them with?---I – I could have tried harder to say no. But what do you do when she’s saying take them, take them, take them.

You can’t get in the car and leave and say no?---I find it very difficult saying no to people.”

- [69] In cross-examination he said that while they waited for the RACQ to arrive the children were playing in a car park near a McDonalds.¹⁷¹ On the way back he stopped to get fuel.¹⁷² As to the way taken to get home he said that he would not have gone down the road leading to the public toilet because the only way back from there was a road he called Ted’s dirt track, and it was washed out and the Monaro would be damaged:¹⁷³

“And do you know which way you drove back?---Certainly not down Main Green Swamp Road. No.

All right. So if I said to you that you took [the complainant] up into the - - -?---Absolutely false.

The rest stop there?---On that night, absolutely false. The only way to go home from there is to go through Ted’s. I wouldn’t take the Monaro through that track.”

Count 4 – the sick horse

¹⁶⁹ AB 157 line 32.

¹⁷⁰ AB 157 lines 35-47.

¹⁷¹ AB 156.

¹⁷² AB 157.

¹⁷³ AB 155-156, AB 157 lines 11-18, AB 158.

[70] Mr FAJ described the allegations: “they’re completely false – completely false – fabrication”.¹⁷⁴ In cross-examination he volunteered that the complainant “never hit me; she never kicked me. That is a fallacy. That is false testimony on her behalf.”¹⁷⁵

[71] Mr FAJ said he and BAJ had made conflicting arrangements for others to stay over for that weekend. He had arranged for the complainant to come over and BAJ had arranged for her son to come over. Neither had told the other about the arrangements, and there was only one spare bed. They had a “disagreement” and BAJ “left the property”.¹⁷⁶ As a result the complainant¹⁷⁷ was left with Mr FAJ for two hours before the conversation about the horse.¹⁷⁸

“[The complainant] was present with me for a couple of hours. There are no allegations of any wrongdoing on my part during those couple of hours.”

[72] In cross-examination Mr FAJ’s description of the fight between him and BAJ was as follows:¹⁷⁹

“Where does the fight happen?---Where doesn’t it happen. It was in the house. It was under the veranda. It was out in the work area where I work on the cars. We had a discussion where neither of us wanted to give ground, because we both felt we were in the right as these things happen when you’re in a relationship. I basically said, well, what do you want to do. And she said that’s easy. I’m – I’m leaving. I’m getting out of here before I say something I regret. And she got in her car and she left.”

[73] In cross-examination Mr FAJ said that he had told the complainant that they would be “going out to dinner as a bit of a reward for helping us with the dogs”. He said that she was looking forward to going out to dinner with him and BAJ, “as we were”.¹⁸⁰ After assisting with the dogs the complainant had a shower and got dressed in a specific outfit that MUM had packed for her, a long black dress.¹⁸¹ However they were not going to go out for dinner.¹⁸² Instead he made some shepherd’s pie done in the microwave.¹⁸³

[74] When MUM arrived he said that as BAJ had left it was not appropriate for the complainant to stay over.¹⁸⁴ He could not recall which car the complainant was in when they drove to VEG’s house, where the horse was. While they were at the horse Mr FAJ had a telephone call from a dog owner who was waiting for him back at his house. He said he was leaving to deal with that, and the complainant went with him. They were away for 10 to 20 minutes. When they got back to the horse

¹⁷⁴ AB 138 line 41.

¹⁷⁵ AB 163 lines 44-45.

¹⁷⁶ AB 137, 159, 160.

¹⁷⁷ Who was there at the time of the fight: AB 159 line 27.

¹⁷⁸ AB 137 lines 42-44.

¹⁷⁹ AB 160 lines 3-9.

¹⁸⁰ AB 160 line 31. It may be noted that evidence is inconsistent with Mr FAJ’s evidence that BAJ did not know that the complainant was coming over.

¹⁸¹ AB 161 lines 5-16.

¹⁸² AB 161 line 23.

¹⁸³ AB 161 line 31.

¹⁸⁴ AB 138, 162.

MUM asked Mr FAJ to take the complainant for a drive, and she would contact him when it was safe to come back.¹⁸⁵

- [75] He and the complainant then drove around some country roads. In cross-examination he said that they were paved roads as he would not take the Monaro on dirt roads.¹⁸⁶ However, he seemed to qualify that in this passage:¹⁸⁷

“All right. So any dirt roads that you would’ve driven on in the Monaro – you would’ve had to have taken it pretty easy, if you ever did?--- Yeah. Yeah. For sure.

Go pretty slow, because you don’t want to bottom out and damage anything?---Yes.

Like you since have?---Correct.”

- [76] He did not stop the car.¹⁸⁸ After “probably half an hour or more”¹⁸⁹ he still had not received a text, and he decided to “pull up at [VEG’s] house and see whether it was safe for [the complainant] to return”.¹⁹⁰

- [77] He said that when they were back at VEG’s house he asked MUM if it was “okay for [the complainant] to come out, and she said yes, only just had we finished what we were doing”. He and the complainant then went to the yard area near the house. He said the man cutting up the horse then appeared, covered in blood. Mr FAJ then said:¹⁹¹

“At that point, [the complainant] backed back from where she was and actually came very close to me, because I think she was scared by the gentleman covered in blood, who looked very much like something out of a horror movie, to be perfectly honest, and that was why she went white. It had nothing to do with me. Had I have done anything to her as alleged, she would have moved away from me.”

- [78] Later in cross-examination he agreed that he assumed that the complainant was scared and went to him for comfort.¹⁹²

Count 5 – the videos

- [79] Mr FAJ described the allegation as “Absolutely false. Never happened”.¹⁹³

- [80] He explained the broken phone found on the bedside table next to his bed:¹⁹⁴

“I was working on my Monaro. I had put the phone down in the engine bay, and I inadvertently slammed the bonnet and smashed the phone, making it inoperable. It would have been in January of 2014 that that occurred.

So is that before - - -?---Well before – months before.

185 AB 138, 162, 163.

186 AB 163 lines 26-33.

187 AB 164 lines 10-15.

188 AB 138, 163.

189 In cross-examination he said he did not know how long it was: AB 163 line 38.

190 AB 138.

191 AB 139 lines 11-15.

192 AB 165 line 5.

193 AB 139.

194 AB 139 lines 33-40.

Before any of these – before you’d met [the complainant]?---Before I’d even met [the complainant].”

- [81] In cross-examination he explained that his memory of when the phone broke was because the police gave him a record of the information downloaded off it, and “I could see the last data entry was late January 2014”.¹⁹⁵ He then had several phones between then and when the police search was done. He believed that several of the phones were still at his home because the police missed them.¹⁹⁶ He was then asked whether it had been on his bedside table for the three or four months after it broke, and the answer was:¹⁹⁷

“... ---My recollection – it would have been inside the bedside table, along with the other phones.

So police moved it?---Someone moved it. I can’t say who. I wasn’t home.”

- [82] In cross-examination Mr FAJ could not recall whose idea it was that the complainant would go with him to the vet, or when it was, nor what time they got to the vet, nor what phone he was using.¹⁹⁸ He disagreed with MUM’s evidence that he was going to take the complainant out to lunch:¹⁹⁹

“Right. Was there a discussion about taking [the complainant] out for lunch?---No. I think [MUM’s] mistaken. I think she’s confused the times, and it was the time - - -

I’m not asking you about other witnesses?---Okay. Well, no. There was no discussion about her going out to lunch, and she wasn’t dressed up on that occasion.

No. She was wearing dog – what I’d term her “dog clothes”.”

- [83] Mr FAJ responded when it was put to him that he kept porn on his phone by saying:²⁰⁰

“Generally not. No. But there – there – there are occasions where the phones that were seized by police were staff phones, and I’m not privy to what the staff may or may not have had on the phones. I do have internet access on my phone, and I don’t have my phone with a PIN to lock it. So it is possible that someone else has used my phone or borrowed my phone. I’m not in the habit of saying no to people if I can absolutely avoid it. So I can’t tell you how that video that you found on that smashed phone got on there, because I’m not aware of how it got on there.”

Evidence of BAJ

- [84] BAJ said she was Mr FAJ’s partner of 11 years. She was still his partner at the trial, still loved him, and would support him through thick and thin.²⁰¹

¹⁹⁵ AB 141 line 15.

¹⁹⁶ AB 142.

¹⁹⁷ AB 142 lines 18-22.

¹⁹⁸ AB 165, 166.

¹⁹⁹ AB 166 lines 18-23.

²⁰⁰ AB 166 lines 29-36.

- [85] Her evidence mainly concerned count 1, when the dog was whelping.
- [86] She stayed with the dog from 2.45 pm. Mr FAJ and the complainant arrived about 5 pm.²⁰² BAJ was not expecting the complainant to be there.²⁰³ The first puppy was born at about 1 am. BAJ rang MAZ and she arrived at about 12.30 am. At that time the complainant was asleep in the kennel on a mattress, four kennels down from where BAJ was, but in the same room.²⁰⁴
- [87] She said the complainant stayed asleep from 11 pm until 7.30 am the next morning, when BAJ took her to bed in the house.²⁰⁵ In cross-examination she said that the complainant “stirred when the bitch screamed but didn’t actually wake up”.²⁰⁶ She said that in the morning the complainant did not want to see the puppies, she was groggy and walked off to the house.²⁰⁷ The next morning when BAJ woke, the complainant was already up having breakfast and Mr FAJ was there with her.²⁰⁸
- [88] The second puppy arrived at about 3.20 am. At that time BAJ, MAZ and Mr FAJ were there. MAZ left about 7.30 am. Apart from her and the complainant making dinner, which was eaten in the kennels, BAJ did not leave the dog.²⁰⁹ When asked if MAZ went anywhere she said:²¹⁰
- “Did [MAZ] go anywhere?--- Only for when she had a cigarette. She went outside and had a cigarette. I stayed with May and **with [the complainant].**”
- [89] BAJ was asked whether Mr FAJ had left at any stage, answering “Don’t know”.²¹¹ However she said he went to sleep for a while in a nearby kennel. She could not say if that was on one or a couple of occasions as she “was dozing in and out”.²¹² Mr FAJ left earlier than BAJ or MAZ, to go back and help some other people with their dogs.²¹³
- [90] She said there was no time when Mr FAJ was alone with the complainant that night.²¹⁴ She said she saw nothing such as was alleged to have occurred that night.²¹⁵
- [91] BAJ referred to a Facebook screenshot²¹⁶ which contained posts made by BAJ and the owners of the dog. She said the first post (about the dog being in labour) was

²⁰¹ AB 177, 178.

²⁰² AB 171.

²⁰³ AB 181.

²⁰⁴ AB 172.

²⁰⁵ AB 173, 174.

²⁰⁶ AB 182 line 34.

²⁰⁷ AB 182 line 47 to AB 183 line 5.

²⁰⁸ AB 183 lines 19-31.

²⁰⁹ AB 173, 181.

²¹⁰ AB 173 lines 25-26. Emphasis added. This evidence could be considered by the jury to suggest that that the complainant did not remain asleep from 11 pm, in a kennel several away from BAJ. MAZ did not arrive until after midnight, in time for the first puppy.

²¹¹ AB 181 line 45.

²¹² AB 182.

²¹³ AB 173 line 14, AB 182 line 40.

²¹⁴ AB 173.

²¹⁵ AB 176.

²¹⁶ Exhibit 10, AB 239.

sent at about 3 pm. The next by her was at 5.34 am saying that four puppies had been born. The last was at 6.50 am, announcing that it was over.²¹⁷

- [92] As to the occasion of the horse being put down, BAJ said she was not present, having left because of a heated discussion over the fact that Mr FAJ did not tell her the complainant was to stay over, when her own son was due to do so. She went for a drive to cool down and came back later that evening, about 9 pm or 10 pm.²¹⁸
- [93] Asked why the complainant was over that weekend, BAJ said that Mr FAJ thought the complainant would like to accompany BAJ to a Body Shop party that BAJ was holding, but had not realised that BAJ was not allowed to take children. As well they were going out to dinner.²¹⁹
- [94] In cross-examination she agreed that she did not like MUM, but was happy for the complainant to come over. The complainant stayed a couple of weekends, the first time in February.²²⁰
- [95] She said that Mr FAJ was never left alone with the complainant.²²¹ BAJ would normally trial her dogs at Ipswich on Wednesday.²²²

Evidence of COM

- [96] COM was a friend of WEL. He said he was at the house with MUM, waiting for WEL to arrive, when he overheard a conversation between them that caused MUM to pick the complainant up from school.²²³
- [97] He said he was present when MUM and the complainant arrived back, and overheard MUM ask the complainant whether Mr FAJ had been interfering with her. The complainant was right in front of him when she responded “no”. She asked a second time and got the same answer. He and WEL then left to trial some dogs.²²⁴
- [98] In cross-examination he said that after the two questions the complainant walked off.²²⁵

Evidence of MAZ

- [99] MAZ was the neighbour who lived about 1 km from VEG’s house. She was a neighbour of Mr FAJ, and knew both him and BAJ, as well as VEG. She got to know the complainant and MUM.²²⁶ Her evidence concerned the night when she assisted with one of Mr FAJ’s dogs which was having puppies. These are the essential points:
- (a) when she arrived Mr FAJ, BAJ and the complainant were there; she got there just on dark or early evening;²²⁷

²¹⁷ AB 175, 176.

²¹⁸ AB 176, 177, 184.

²¹⁹ AB 184.

²²⁰ AB 178, 179.

²²¹ AB 179.

²²² AB 180.

²²³ AB 186.

²²⁴ AB 187.

²²⁵ AB 190.

²²⁶ AB 94, 95.

²²⁷ AB 95, 96.

- (b) she described where the puppies were to be born, as being in the vicinity of a cold room, and said there was carpet on the floor; she said that was where the complainant was lying down at one stage; the complainant went to sleep on a mattress;²²⁸ she did not agree that the complainant stayed asleep the whole time;²²⁹
- (c) the complainant was awake at one point when MAZ was there, because MAZ spoke to her;²³⁰
- (d) she was going in and out during the birth process; she was not sure if she was there the whole time; she was not sure who was there when she left;²³¹
- (e) she could not say when it was that the complainant went to sleep, as she was focussing on the dog and the pups; she said she “wasn’t really focussing on what was happening around me”; she could not remember the time when the first pup was born and she could not remember when it finished;²³²
- (f) she agreed that the process would have taken some hours, but doubted that she would have been there at the end, and could not remember that anyway;²³³
- (g) everybody would have been coming and going; they were all in there a few times, but she could not say exactly who was where at what time;²³⁴ and
- (h) she was asked if she agreed that Mr FAJ was **not** left alone with the complainant; her response was: “Well, while I was there – no. I think [Mr FAJ] went up to the house at one stage. I – I – I couldn’t tell you.”²³⁵

Evidence of JAV

[100] JAV was the niece of WEL. She received a call from WEL, about the complainant. She spoke to the complainant, who told her:

- (a) a man “tried to touch her a few times, and she’s tried screaming. He’s taken her places”;²³⁶
- (b) that was at a house somewhere in Mt Tarampa; a two-storey house like a Queenslander, and there was a boat at the side; she said the complainant told her:

“... that she was laying on her bed at this house and that [her brother] was asleep – that ... her brother, was there at the time, but he was asleep. And he tried to finger her. She then screamed. [Her brother] was still asleep. And that’s – it stopped right there. She just began to cry.”

“...after she told me that he tried to finger her and ... that she screamed and [her brother] didn’t wake up, that’s when she started getting really, really upset ...”²³⁷

228 AB 96, 97.

229 AB 100 line 14.

230 AB 100 line 18.

231 AB 97, 98.

232 AB 99.

233 AB 99.

234 AB 100.

235 AB 100 line 24.

236 AB 102.

237 AB 102.

- (c) he had taken both the complainant and her brother to the house; that is where he tried to finger her;²³⁸
- (d) the complainant told her that the man used to take her and her brother out on the boat;²³⁹ and
- (e) he took a pair of her underpants, which he kept under his pillow so he could smell them every night.²⁴⁰

Police evidence

- [101] A police officer gave evidence of having executed a search warrant at Mr FAJ's house. A Sony mobile phone was found, in Mr FAJ's bedroom on a bedside table. The screen was smashed. The contents were examined and three videos were located, similar to the description given by the complainant.²⁴¹ In cross-examination the officer said that four phones were found, three of them Nokias. Of them, two of the Nokias had no relevant videos on them.²⁴² The other one could not be examined as it was inoperable.²⁴³
- [102] The officer also located a building that matched the description given by the complainant of the old house. The complainant was taken to the building for a filmed walkthrough.²⁴⁴

Admissions at trial

- [103] There were some admissions at the trial:²⁴⁵
- (a) “[The complainant] attended ... School between 4 February 2014 and 7 March 2014 and was in grade 5.
 - (b) ... School records reflect that [the complainant] was absent on Monday 3 March 2014 and Thursday 6 March 2014.
 - (c) [MUM] signed a tenancy agreement for a property at ... Mt Tarampa to commence on 14 March 2014.
 - (d) Queensland Racing records reflect that [BAJ] registered five puppies (two bitches, three dogs) born to Dam Smart Blonde and Sire Prince Elite. The whelping date is recorded as 3 March 2014.
 - (e) Queensland Racing records reflect that [BAJ] registered five puppies (four bitches, one dog) born to Dam Maybe Elite and Sire Magic Sprite. The whelping date is recorded as 6 March 2014.
 - (f) RACQ records reflect job details created on 7 March 2014 at 8.30 pm, in the name of [FAJ]. The vehicle details were for a white Ford Falcon Forte Sedan, that would not start and a tow was required. The job was at Bennett's Road, Norman Park. The RACQ patrol arrived at 9:54pm.”

²³⁸ AB 103.

²³⁹ AB 102, 103.

²⁴⁰ AB 103, 104.

²⁴¹ AB 108.

²⁴² AB 110.

²⁴³ AB 111.

²⁴⁴ AB 110.

²⁴⁵ AB 238.

Summing up

- [104] The learned trial judge gave a series of directions in the course of the summing up. On the appeal there was no criticism of the adequacy of the directions. They included: (i) the complainant was the key witness in the case as the prosecution relied entirely on her evidence; (ii) the need to very carefully scrutinise the complainant's evidence; (iii) the defence case was that the incidents simply did not occur; (iv) they could only convict Mr FAJ of any of the charges if they were satisfied beyond reasonable doubt that the complainant's evidence was both true and accurate regarding the particular charge that they were considering, despite the sworn evidence of Mr FAJ and his witnesses; and (v) that a reasonable doubt on one charge might be taken into account when assessing the evidence on other charges.
- [105] Not surprisingly the summing up also contained a summary of the prosecution and defence cases.

Discussion

Count 1

- [106] Senior counsel for Mr FAJ contended that BAJ's contemporaneous records (the Facebook posts) supported her evidence that she was present all night at the kennels, and until after the last birth. Those records showed the complainant to be an unreliable witness, and therefore the jury should have had a reasonable doubt about count 1. In turn that doubt should have led to a reasonable doubt about the other counts, but particularly 2, 3 and 4.
- [107] The central reasons advanced were the inconsistencies between the complainant's version of the events over the evening and morning concerned. They can be summarised as follows:
- (a) the complainant said she was awake until the first puppy was born but the others said she was asleep from 11 pm to 7.30 am, and therefore the kissing incident could not have occurred;
 - (b) the complainant said she remained in the kennels until BAJ came back from the house to take her up, whereas BAJ and Mr FAJ said that BAJ woke her and took her up to the house in the morning;
 - (c) the complainant's first account in the police interview was that the kissing had taken place in a kennel, whereas in her trial evidence she said that it was in an air-conditioned room in the kennels.
- [108] The inconsistencies were all put before the jury in addresses and the summing up. The jury were appropriately warned of the fact that the prosecution relied almost solely on the complainant's evidence, and the need to scrutinise her evidence very carefully before coming to a conclusion as to whether they were satisfied beyond reasonable doubt on each charge.
- [109] There are a number of reasons why it was open to the jury to reject all or some of the evidence of Mr FAJ, BAJ and MAZ.
- [110] As to Mr FAJ, the jury plainly rejected his evidence. Senior counsel for Mr FAJ did not urge before this Court that the jury could not have done so, instead focussing on the other inconsistent evidence, and including in the complainant's accounts. For that reason his evidence can be put to one side.

[111] As to BAJ:

- (a) first, she was the long term, loving partner of Mr FAJ and candidly agreed that she would “support him through thick and thin”; that could lead to the jury discounting her evidence;
- (b) secondly, on the night she was totally focussed on the dog, never leaving it at all during the night; the jury may well have concluded that she was not really aware of where Mr FAJ was, nor the complainant;
- (c) thirdly, on her account the complainant was sleeping several kennels away from where she was, intent on the dog; when BAJ was asked whether Mr FAJ had left at any stage, she answered “[d]on’t know”, and said he went to sleep for a while in a nearby kennel; further, she could not say if that was on one or a couple of occasions as she “was dozing in and out”; the jury may have come to the view that she could well have missed the comings and goings of Mr FAJ;
- (d) fourthly, her evidence seemed to suggest that the complainant was in with the dog during at least part of the time when MAZ was there; when asked whether MAZ went anywhere BAJ said MAZ went outside for a cigarette, at which time BAJ “stayed with May²⁴⁶ **with [the complainant]**”; since on all accounts MAZ did not arrive until after midnight to assist with the first puppy (which was born about 1 am), the jury may have accepted this evidence and concluded that the complainant did, in fact, stay awake and witness the first puppy’s birth; and
- (e) fifthly, on her account the complainant, who was keen to help with the dogs and eager to witness the puppies being born, was not at all interested in seeing the puppies when she woke in the morning; the jury may well have thought that was a most unlikely thing, and therefore something that told against BAJ’s credit.

[112] As to MAZ:

- (a) first, she did not agree that the complainant stayed asleep the whole time; in fact she spoke to the complainant, which means the complainant was awake at some point between about 12.30 pm and the morning;
- (b) secondly, her own account did not support that of BAJ; she was going in and out during the birth process and was not sure if she was there the whole time; everybody would have been coming and going; she could not say exactly who was where at what time; she could not say when it was that the complainant went to sleep, as she was focussing on the dog and the pups; she “wasn’t really focussing on what was happening around me”; she was not sure who was there when she left;
- (c) thirdly, she doubted that she would have been there at the end, and could not remember that anyway; and
- (d) fourthly, she was asked if she agreed that Mr FAJ was **not** left alone with the complainant; her response was: “Well, while I was there – no. I think [Mr FAJ] went up to the house at one stage. ... I couldn’t tell you”.

[113] The Facebook posts do not, in my view, show that the complainant was an unreliable witness. All they show are three points of time: that the dog’s labour

²⁴⁶ The dog.

started at about 3 pm; that four puppies had been born by 5.34 am; and that the last puppy was born by 6.50 am. The contention was that those posts supported BAJ's evidence that she was there with the dog all night.

- [114] Strictly speaking, they do not do that as any of the posts could have been sent from anywhere, not necessarily from the kennel. However the jury did not have to go to that point in order to set them aside. It was quite possible that the jury did as they were directed they could do, namely accepted parts of the complainant's account and rejected other parts. Thus they could well have concluded that the complainant should be accepted as to the events except that part about BAJ having gone up to the house when the kissing occurred. That could follow by the jury accepting that the kissing occurred before she went to sleep after the first puppy was born. Such a conclusion could be supported by acceptance of MAZ's evidence that the complainant was awake at one point while MAZ was there, as MAZ spoke to her. That places the complainant being awake at some time between 12.30 pm and when MAZ left.
- [115] Alternatively it was open for the jury to reject that part of the complainant's evidence as to the time of the morning when the kissing happened,²⁴⁷ and nonetheless conclude that the kissing happened when BAJ said she was going up to the house to sleep after all puppies had been born and MAZ had gone.
- [116] The complainant's evidence had a level of consistency about it from the start. When she first wrote down an account, unassisted, it referred to his kissing her, and "it all started to happen when his dog May had puppies, when his partner was asleep in their house". What she said about being there on that night and morning was true, and that MAZ was there when the puppies were being born. She did not say she was awake the whole time but said she slept part of the time, when May was having her second puppy. In other words she saw the first puppy being born. Further, in her police interview she said, unprompted, that "May started licking that, what's it called, that bag ...".
- [117] The jury could well have come to the view that her account contained a significant level of detail, which was given in an unprompted manner, and therefore had the ring of truth about it. Especially is that so, given that she went there specifically to see the birth of the puppies.
- [118] Further the jury could have concluded, accepting part of the evidence of the relevant witnesses, that the likely correct version of events was that after the last puppy was born BAJ went back to the house to sleep, leaving the complainant and Mr FAJ alone, and that is when the incident happened.
- [119] I am unable to conclude that it was not open to the jury to be satisfied beyond reasonable doubt about count 1.

Count 2

- [120] The only possible witnesses to the conduct the subject of count 2 (the touching time) were the complainant and Mr FAJ.
- [121] The complainant's evidence on this topic remained consistent throughout. In the police interview she read out what she had written, unassisted, which identified that Mr

²⁴⁷

In the police interview she said it was about 2 am or 3 am.

FAJ had touched her on her breasts and put his hand in her underpants and touched her inside her underpants.²⁴⁸ She described it in the interview (which took place relatively close in time to the events) and then gave a similar account in her trial evidence.

- [122] The evidence of BAJ and Mr FAJ showed there were times when Mr FAJ and the complainant were alone together at the kennels, such as when BAJ took dogs trialling.
- [123] Reliance was placed on the complainant's mixing up where it was said this count occurred. In the interview she said count 2 was "in the dog kennels", "in the corner [of] the front room", "the front room of the big dog, aircon dog kennels". She said count 1 occurred in the "puppy pens", "on a concrete floor in the dog kennel". In her trial evidence she said had got the places where counts 1 and 2 occurred round the wrong way. She said, by reference to photographs of the kennels, that count 1 occurred in the "air-con rooms", and count 2 occurred around a blue cage area shown on photograph 6.
- [124] In my view, the different accounts do not necessarily lead to a conclusion that the complainant was an unreliable witness. The jury may well have discounted the difference in accounts on several scores: first, at the interview the complainant did not have the photographs to assist memory; secondly, the fact of precisely **where** the events happened may not have been so significant to the complainant's memory as were the events themselves; thirdly, the precise place was not objectively significant as both were in the kennels, and the area of count 2 was just outside the air-conditioned rooms and kitchen; and fourthly, the complainant corrected the error herself, in her evidence in chief, which could be seen as her effort to be a reliable witness.
- [125] Apart from the foregoing, before this Court the contention was that the verdict on this count was unsafe, not because of the evidence that pertained to it alone but because of the knock-on effect if the verdicts on count 1 and count 4 were set aside as being unsafe.
- [126] Looking at the evidence concerning this count I cannot conclude that it was not open to the jury to find it proven beyond reasonable doubt.

Count 3 – the Brisbane day

- [127] On this count reliance was placed principally upon the knock-on effect if the verdicts on count 1 and count 4 were set aside as being unsafe. However there were the additional facts that when she got home, only 10 to 15 minutes' drive from the site where she said it happened, she was asleep in the car, and her demeanour as observed by MUM was contrary to what one might expect if she had truly been subject to the events she related.
- [128] There are several reasons why those matters would not necessarily lead to a reasonable doubt that the events had occurred as the complainant related them. First, unless Mr FAJ's evidence was accepted, it is speculation that he drove straight home from the building where the complainant said the events occurred. Secondly, the complainant herself said from the start that she had been asleep before that, and

²⁴⁸ The words used were: "touched my boobs, put his hand in my knickers".

went to sleep once she was back in the car. Thirdly, there had been no expression of distress from any of the prior incidents. Fourthly, as the jury were told,²⁴⁹ different people react in different ways to situations of stress. Fifthly, when WEL met the car that night it was late and the jury may have doubted that he paid close attention to her demeanour, so that when he said he did not remember anything unusual it did not carry much weight. Sixthly, the jury may have concluded that absence of any outward signs of stress the next day was a reflection of the complainant's general nature, described by MUM as being that she was "just quiet and doesn't say much".

- [129] On this count the complainant gave very detailed evidence from the start. Her first recording of this event was in the unassisted note she made. It said that Mr FAJ "kissed my private". The next note was more fulsome, referring to the drive home, being asleep, the old house, and he "sticked his tongue in my private". Then came her interview. Her description of the building was, the jury may well have thought, remarkably accurate given that she did not have the assistance of photographs or drawings at the time of her interview. She accepted that because she fell asleep at one point that she may not have remembered the events properly. And she was at pains to make clear that he did not stick his tongue into her private, but only licked it. The jury may well have thought that if the complainant was an unreliable or fantasising witness that was a chance to embellish the story, yet she chose not to.
- [130] Mr FAJ's evidence admitted the fact that the journey occurred, the children were alone with him, and they got back very late. More importantly, he admitted that he had taken the complainant to the public toilet before "on several occasions", and that there would have been occasions when it was just himself and the complainant.
- [131] As to this count I am unpersuaded that it was not open to the jury to accept the complainant's evidence, and be satisfied beyond reasonable doubt that the charged acts occurred as the complainant described.

Count 4 – the sick horse

- [132] The contentions here focussed upon:
- (a) the differing accounts as to what she was wearing, jeans or a dress; it was said that what she was wearing was an integral part of her account as to how the rape occurred, in that she described how Mr FAJ tried to pull her jeans down, she resisted, and he then pulled them down to her ankles; however there was other evidence that she wore a dress;
 - (b) the inherent implausibility of Mr FAJ managing to pull down her jeans, while she resisted, and at the same time drive the car;
 - (c) the complainant's quiet and calm demeanour when she returned to where her mother and the others were is inconsistent with the events having occurred;
 - (d) the complainant's failure to complain to her mother;
 - (e) the absence of any medical evidence to support the fact that penetration had occurred; and
 - (f) the preliminary complaints were inconsistent with rape.

Medical evidence

²⁴⁹

- [133] The medical evidence was inconsequential as the doctor said that the passage of time could mean any injuries were already healed.

Failure to complain to her mother

- [134] The failure to complain to her mother was explained by the complainant as being that she was “afraid she was going to be shocked”. In cross-examination there was no exploration of what she meant by that.
- [135] The reason for her failure to complain to her mother about count 1 (the kissing time) was explored in cross-examination. The complainant explained that she did not tell because she was scared: “I thought I would get punished” because “I thought it was wrong, and I didn’t know what to do. I was only young then”.²⁵⁰
- [136] Thereafter on each count, the fact of not telling her mother was the subject of cross-examination, but not the reason for her not telling. That approach was no doubt the result of a deliberate forensic decision on the part of the cross-examiner, but it left the jury in the position where they could infer that the reason for not telling the mother about count 1 continued and therefore applied for the other counts.
- [137] Further, in re-examination the complainant gave a reason for not telling others, namely her only friend, various people at her school, BAJ and MAZ:²⁵¹

“Why is that, can I ask?---Because no one needs to know about it. My friend ... didn’t need to know about. My teachers didn’t need to know about it. The school chappy didn’t need to know about it. The principal didn’t need to know about it.

Thanks, Now, ... you were asked why you didn’t tell [BAJ] or [MAZ] about it, and you said that they would get up you. What do you mean by that?---I thought that they might, like, scream or yell, maybe hit me.”

- [138] Once again the jury were left in the position whereby they might infer the same reason as applicable to not telling her mother.

Preliminary complaints inconsistent with rape?

- [139] The preliminary complaints were consistent with rape. When her mother took her out of school and gave her paper to write on, what the complainant wrote was consistent with rape. She said Mr FAJ put “his finger in my private” and put “his finger in and out”. Further, she told JAV that he “tried to finger her”.

The complainant’s demeanour

- [140] Aspects of the complainant’s general nature have been explored above: paragraph [128]. There are two additional aspects that apply to this count and set it apart from the others.
- [141] First, when the complainant returned from the drive, the setting was, on all the evidence, a confronting one. The horse had been butchered, and before the complainant had a chance to speak to her mother,²⁵² a man appeared covered (to one degree or other)

²⁵⁰ AB 30 lines 30-38.

²⁵¹ AB 39 lines 35-42.

²⁵² The complainant was getting out of the car to come into the property.

in blood. As well VEG was present and, on her own evidence, extremely upset about her mare being put down. Given those facts, the jury may well have concluded that the failure to speak about the events was understandable.

- [142] Secondly, VEG was present when the complainant arrived back. The complainant's evidence was that she was scared of telling VEG about the incidents. That is another reason, the jury may have thought, for the complainant to have remained quiet.

Inherent implausibility of the actions

- [143] There was no evidence offered at trial to support this contention. It was simply based on the assertion that it was inherently implausible that Mr FAJ could drive his car and at the same time forcibly pull down the complainant's jeans. This was a matter for the jury to assess. I am unpersuaded that they could not reach the conclusion that both were possible.

Differing accounts - jeans or a dress

- [144] There was evidence both ways on this issue. The complainant said she wore jeans. In cross-examination she was asked only this:²⁵³

“And did your mother give [you] a black dress to wear for the – so you could wear it out to dinner, something nicer?---I don't know.

Could it be the case that you were actually wearing a black dress that day?---I don't know.”

- [145] MUM was asked no questions on the topic.
- [146] VEG said it was not jeans but her evidence could be understood as quite unsatisfactory on what it was, and whether she was paying enough attention to truly remember: see paragraph [49] above. Her observations were all in the context that she was crying and “absolutely devastated about losing my mare”, and only saw the complainant briefly, all of which suggests strongly that she was not really paying attention to what someone irrelevant to the proceedings was wearing.
- [147] Mr FAJ said it was a long black dress, put on because they were going out to dinner as a treat: see paragraph [73] above. However there are features, quite apart from the obvious fact that the jury rejected his evidence, that tell against reliance on that. BAJ had gone after an acrimonious fight with Mr FAJ. There was no apparent promise of her returning that night. The arrangement to take the complainant out to dinner involved BAJ as well. By the time that the complainant had showered, and MUM arrived, Mr FAJ knew that BAJ had left, and since he said it was inappropriate to take the complainant out without BAJ,²⁵⁴ they were not going out for dinner.²⁵⁵ Therefore, it must either be that he had not told the complainant that they could not go, or he had, in which case why would she have dressed up.
- [148] That being the state of the evidence it does not follow that the jury was obliged to conclude that the complainant was wearing a dress, or anything other than jeans, as

²⁵³ AB 34 lines 15-19.

²⁵⁴ AB 161 line 28.

²⁵⁵ AB 161 line 23.

she said. Once the jury (substantially at least) rejected Mr FAJ's evidence, as they did, that left VEG's evidence, which was neither precise nor compelling in quality.

[149] In any event what the complainant was wearing was not central to her narrative of the events. She consistently described an attack in which digital penetration of her vagina occurred, in Mr FAJ's car, while they were driving on the day the horse was put down. Given that he was driving, the car had a centre console, and the complainant resisted, his gaining access whatever was being worn would not have been a simple task. Whilst what she was wearing was an important detail, far more important in the scheme of the evidence was establishing the day, the occasion that led to her being driven alone with Mr FAJ, the time away from others, and the precise nature of the attack. On some of those matters there was no issue. More generally, the quality of her evidence as to those matters was the most important factor. The jury had the undeniable distinct advantage of seeing her evidence and that of VEG and Mr FAJ. Whilst this Court could see the interview and pre-recorded evidence it cannot see or hear the evidence of VEG and Mr FAJ.

[150] In my view, it was open to the jury to accept the complainant's evidence of what she wore, or reject the complainant's account of what she wore while still accepting that the penetration took place.

[151] I am unpersuaded that it was not open to the jury to be satisfied beyond reasonable doubt that count 4 occurred as the complainant said.

Count 5 – the videos

[152] On appeal this count was given little attention, except to include it in the knock-on effect of grounds 1 and 4. One can understand why. There was an occasion, just as the complainant described, when Mr FAJ drove to Brisbane to take dogs to a vet, and took the complainant along. Mr FAJ's phone, kept on his bedside table, contained several videos of the very type that the complainant described. She said that the naked girls in the videos were "sticking things in their privates". She identified the things as "pens" and "textas". The videos on Mr FAJ's phone were tendered in evidence and shown to the jury. They revealed young naked women inserting coloured vibrators into their vaginas. They could very easily have been described by someone, who had not seen a vibrator, as textas.

[153] Further, from the start the complainant had described being shown videos. In the first note she referred to the fact that Mr FAJ "showed me yucky videos", and in the second that he "showed me these gross videos one time".

[154] Mr FAJ's defence was that the incident never happened. He suggested that some staff member must have had access to the phone when it was a staff phone, and, presumably, loaded the videos on without him knowing. Or, that somehow the complainant got hold of his phone without him being aware of it and saw the videos that way. The main problem with both lines was that there was no evidence to support his assertion, and in the latter case it was not put to the complainant.

[155] There is no basis to conclude that it was not open to the jury to be satisfied, beyond reasonable doubt, of this count.

Conclusion

- [156] Having examined the whole of the evidence, and making full allowance for the advantages enjoyed by the jury, I am not persuaded that it was not open to the jury to be satisfied beyond reasonable doubt as to the guilt of Mr FAJ on each count. I do not consider that there is a significant possibility that an innocent person has been convicted.²⁵⁶
- [157] I would dismiss the appeal.
- [158] **PHILIPPIDES JA:** For the reasons given by Morrison JA, I agree that the appeal should be dismissed.

²⁵⁶ *MFA v The Queen* (2002) 213 CLR 606, 623.