SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBT* [2016] QCA 343
PARTIES:	**R** **v** **CBT** (appellant)
FILE NO/S:	CA No 28 of 2016 DC No 369 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 19 January 2016
DELIVERED ON:	20 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2016
JUDGES:	Holmes CJ and Morrison JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – VERDICT UNREASONABLE – where the appellant was convicted by a jury of six sexual offences against his granddaughter – where the appellant contends that the convictions were unreasonable – where the appellant relies on inconsistencies between the complainant's accounts – where the appellant contends that the complainant's explanations for those inconsistencies were unsatisfactory – whether the jury could reasonably have found the complainant's evidence credible – whether the convictions were unreasonable APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – MISCARRIAGE OF JUSTICE – where the appellant contends that the trial judge erred in refusing an application for the discharge of the jury – – where the trial judge discharged a juror who revealed that she was unable to render a verdict due to religious beliefs, applying s 56(1)(a) of the *Jury Act* 1995 – where defence counsel's application for the consequent discharge of the entire jury under s 60(1) of the *Jury Act* 1995 was refused – where the appellant contends that the trial judge erred by considering whether there was any reason not to proceed with 11 jurors rather than considering the issue from the premise that the appellant was entitled to trial by a jury of 12 – where the appellant contends

that the trial judge failed to take into account in his consideration other matters which might have created prejudice – whether the trial judge erred – whether there was any miscarriage of justice

Jury Act 1995 (Qld), s 56(1)(a), s 60(1)

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Blackmore [2016] QCA 181, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

COUNSEL: J McInnes for the appellant
G Cummings for the respondent

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

[1] **HOLMES CJ:** The appellant appeals against his convictions by a jury of six sexual offences against his granddaughter, to whom I will refer as "M". The offences on which he stood trial were: maintaining an unlawful sexual relationship with the child between 2 June 2004 and 19 November 2011, when she was under 16; two counts of rape, the first between 2 June 2005 and 2 June 2007, and the second between 2 June 2010 and 19 November 2011; and three counts of indecent dealing with the child, with the further aggravating circumstances that she was under 12 years and was his lineal descendant, all of which were charged as occurring between 2 June 2010 and 19 November 2011.

[2] The notice of appeal contains three grounds: that the convictions were unreasonable; that the trial judge erred in not discharging the jury after it emerged that a juror had performed a Google search to find the meaning of "rape"; and that the trial judge had erred when, after a juror was discharged on the sixth day of the trial, he refused an application for the discharge of the entire jury. In argument, however, the appellant did not rely on the second of those grounds, advancing it instead as part of the context in which the refusal to discharge the jury which was the subject of the third ground occurred.

M's 2012 disclosures

[3] Police first interviewed M on 7 August 2012, when she was 12 years old and in grade seven in primary school. That came about because she had displayed some distress while assisting in the school tuckshop. The adult who was present, a Ms Eaton, said that M was upset and told her that her (paternal) grandfather "had done something to her" when she was six years old. She told M to tell her mother. Two of M's classmates, to whom I will refer as A and B, were present during that conversation. Police conducted interviews with the two girls within a week of M's interview.

[4] A recalled M saying that when she was younger her grandfather had touched her and she had felt uncomfortable. B said that M was crying and was upset because she could not tell her mother about "stuff"; her grandfather had been "sexually harassing" her since she was little and "touching her inappropriately". B also said that before

the Christmas holidays (which would have been about eight months earlier), M had told her that she was "starting to remember" her grandfather "touching her inappropriately". However, cross-examined during her pre-recorded evidence given in 2015, B's memory was that M had spoken to her about her grandfather a couple of weeks prior to the tuckshop incident, and she could not remember what she said.

[5] On the day of the tuckshop incident, M's mother picked her and her friend B up from school. At B's urging, M informed her mother that her grandfather had touched her. In evidence, M's mother said that she was shocked and angry and had pulled the car over. She could not recall her own words, but she agreed that in her statement she said she had asked "What do you mean? Has he stuck his dick in you?" and the child had replied "no". B's recollection was that while she was in the car with M and her mother, M told her mother that her grandfather was "sexually harassing her".

[6] The conversation seems to have been reported to the police by a third party, either M's school or a witness to the tuckshop conversation. The upshot was M's first police interview. In it, she said that her grandfather had done "inappropriate stuff" to her, touching her and feeling her from the time she was about six or seven and most recently when she was about 10. Asked about the most recent encounter, she said,

> "Um, he just touched me in, in like, in not very right places but um, yeah he never tried to like um, have sex with me".

He had touched her "private parts", which, she said, she knew to be her vagina and her chest. On that occasion she had been sitting on her grandfather's lap on a couch; it had occurred when she was visiting her grandparents in Buderim on a visit from New Zealand. That was the last time, she was "pretty sure", that touching had occurred; it stopped when her family came to Australia to live. That occasion was the last she could remember; she could not remember other incidents "because it was really long ago". (The evidence was that M's family had moved from New Zealand to Australia in March 2010, living for about a year with the appellant and his wife, who by then had moved to a property near Gympie, and thereafter in their own home at Gympie, before moving back to New Zealand again in March 2013.)

[7] Asked for more detail of the touching, M said that the appellant:

> "… would touch me like, he would just like try and like put his hand down there and he didn't really go much further than that, then, then like trying to put his hand down there. But he didn't really do much more."

His hands were on the top of her underwear, rubbing, and he would also put his hand on top of her shirt and rub. He did not put his hand inside her shirt. She could not really remember what had happened on other occasions because it was so long ago, but she thought it was "all just the same". He would feel her in that way "maybe twice" each time she went to Buderim on holiday.

[8] M said that she would go into her grandparents' room in the morning and watch television with them. Her grandfather would rub her chest and "down there". He touched her underwear under the boxers she wore as pyjamas and put his hand on her chest outside her singlet. She reiterated that the appellant did not try to have sex with her; he did not go any further than touching her. She touched her grandfather's chest and back because she liked the colours of his tattoos. Asked specifically if the appellant had ever asked her to touch, or she had ever touched, his private parts, she

answered "no" to each question. She said she had told her mother about these things and it had upset her to see her mother shocked. Her father had wanted to know if what she said was true, and it was obviously "weird" for him. Her grandfather had always been nice to her and had bought her "stuff"; she was glad when, notwithstanding her allegations, he had wished her luck with her upcoming football game.

[9] In January 2014, two other child witnesses made s 93A statements to the police about disclosures which they said M made to them in 2012. The first of those, D, was the same age as M and had been a friend from about 2009 to about 2011 (when the two girls were aged between 9 and 11). D told police that they lost contact for a period but reconnected through social media midway through 2012. D thought that M was in Australia at this time. Talking to D on a social media site, M said that her grandfather had raped her; D advised M to report it. If D's timing of this discussion as given in her s 93A statement was correct, it took place shortly before M's first police interview. However, cross-examined in April 2015, D thought that M had been in New Zealand when the discussion occurred, which would put it in 2013.

[10] The other witness, E, was a male cousin of M, who was about the same age. He had exchanged messages with M on Facebook at about Christmas 2012. M told him that she had had a bad time at her grandfather's house, saying that he had touched her in inappropriate places. To E's recollection, she had said it happened when she was 12 and over a couple of years before that. He thought that the grandfather would walk around naked near M, but he was "not too sure about that". He said that he had not had contact with M thereafter, because she was given to making up stories; she had spread what he regarded as false rumours about his neighbours and his brother. When cross-examined, he said that he had never observed anything in the interactions between M and the appellant consistent with the allegations M had made to him on Facebook.

M's 2013 disclosures

[11] On 4 September 2012, M's complaint was withdrawn. In March 2013, M returned to New Zealand in advance of her parents and lived for a time with her maternal grandmother. Her grandmother gave evidence that on 10 April 2013, because M had been crying a great deal, she asked her what was wrong. M responded that she had been raped, and when asked whether the man had put his penis inside her, said that he had. She did not identify whom she was talking about. In cross-examination, M's grandmother confirmed that for about a year M's family lived in a unit below her house. During that time she collected the child from school every day and the two were very close. In fact, they had had a close relationship over the entire period during which M had made visits to her grandparents in Australia, between 2005 and 2010. After the family had moved to Australia, M had made regular school holiday visits, staying with her grandmother for about a fortnight on four or five occasions. The grandmother had also visited the family twice when they lived in Australia.

[12] Subsequently, having been alerted by her own mother, M's mother asked M what was wrong and was told that the appellant had raped her. M was then interviewed again, this time by New Zealand police, in May 2013. She said that when she was younger her grandfather had touched her in the wrong places and had raped her on some occasions: when she visited him on holidays, in a hotel room and during the period her family had lived with him and his wife.

[13] The first occasion of rape which M could identify took place when she was five or six and visiting her grandparents in Buderim on a holiday. Her grandmother had left

for work and her grandfather was still in bed. He told her to join him and watch cartoons. He was naked and removed M's clothes. They were lying on their sides, facing each other. Using his hand, the appellant inserted his penis into her vagina. It was "really painful". M made a noise and he stopped what he was doing; his penis had not entirely gone into her vagina, which was painful afterwards. (That allegation was the subject of count 2 on the indictment, which charged rape.) M had visited her grandparents from New Zealand, once or twice a year, usually for a week or two. During those holidays, her grandfather had not raped her every time, but he always touched her. On occasions he joined her in the pool naked and instructed her to take her clothes off. On some of those occasions her grandmother was present.

[14] M recounted another incident, when she was six or seven and her grandparents had visited her family in New Zealand. They had taken M to see her grandfather's sister. That evening she wanted to stay with them because she liked hotels, and they obtained permission from her parents to do so. She had slept with the appellant in a double bed, with her grandmother in a single bed next to them. When the room was in darkness, and her grandmother had started to snore, the appellant had positioned himself on top of her and raped her. She had made no noise so as not to wake her grandmother.

[15] M said that the rapes had continued from the time she was six until she was 11. She described the most recent, which occurred when she was ten or 11, and her family was living with her grandparents at their Gympie property. She had returned from school. Her parents and grandmother were all at work. The appellant took her into his bedroom and began rubbing and touching her. He put his hand first inside the top of her t-shirt and then below it and under, and then moved his hand into her pants and rubbed her vaginal area. M said that she could feel the rubbing in the "higher up part" of her vagina, "inside". The appellant removed her shirt and brassiere and then took his own trousers down and made her touch his penis. M said that he told her if she did not do so he would put her head in water. He then removed her pants and underwear, positioned himself on top of her and raped her. (That account gave rise to count 3, the second count of rape on the indictment.) M said she was always afraid to refuse the appellant because she felt he might hurt her or put her head under water as he had threatened. She always made a noise to make him stop. After this instance of rape, he dressed and told her to do the same. They then moved to watch television; she sat on his knee and he put his hands up her top and rubbed her chest (giving rise to count 4, indecent dealing). On another occasion, M said, she was walking from the bathroom to her room wearing a towel and her grandfather had told her to take it off.

[16] M was asked whether "any other stuff" had happened in New Zealand. She said that earlier her grandparents had lived in Whangarei. She could not remember if the appellant had raped her there, but he used to put his fingers in her vagina and touch her chest, talking to her when he touched her as though nothing abnormal were happening. (None of those allegations, nor the allegation of the motel rape was the subject of any charge, not having occurred within this jurisdiction.) The interviewing officer asked M whom she had spoken to about the incidents and she mentioned B, C and Ms Eaton. The officer asked M to consider while she, the officer, left the room if she had told her "everything". On her return a minute later, she asked whether M had thought of anything; M responded that the appellant used to undress in front of her.

[17] Asked by the interviewing police officer why she had not told any adults about what happened, M said that she was frightened the appellant would hurt her. She still did not think she would be able to tell her mother because it was "not an easy thing to

do". Because she was so young she had not appreciated that what was happening was wrong, but had thought it was normal.

M's 2015 evidence

[18] M gave pre-recorded evidence in April 2015. Asked whether everything she said in the 2012 interview was true, she said that it was, but she had not told the police officer everything that had happened. However, she had in the 2013 interview tried to give as complete an account as she could. She was asked whether she could remember anything happening at her grandparents' Gympie property. She said that on one occasion, when her grandmother was in the kitchen, her grandfather had taken her to the bedroom and touched her vagina and chest area, putting his hand under her clothing. (That conduct was the basis of count 5 on the indictment, indecent dealing.) She thought that she had asked for a charger and her grandfather had taken her to the bedroom to obtain it for her. The incident ended when her grandmother came to the bedroom.

[19] On another occasion, when her grandmother was in the lounge, M was in the bedroom watching television with the appellant. He touched her vagina and chest area underneath her t-shirt and shorts and then pulled down his shorts and made her touch his penis, which was hard. This was the basis of the final count of indecent dealing, count 6. The two charged rapes and the three charged indecent dealings were relied on as the acts constituting the maintaining of an unlawful sexual relationship which was the subject of count 1.

[20] In cross-examination, M said she did not think she had told either the New Zealand police or the prosecutor about the incidents she had recounted in evidence, although in relation to the incident when she went to collect the charger, she had told her mother and maternal grandmother. On the hearing of the appeal, the question arose of when the allegations underlying counts 5 and 6 first emerged. The court was informed, without challenge, that they were contained in an exercise book which M provided to the New Zealand police. In cross-examination at the pre-recorded hearing, M was asked whether she had written in the exercise book that her grandfather had used his tongue on her vagina and said that she remembered doing so. (She had not made that allegation in the police interviews.)

[21] M agreed that when she was in grades three and four she had a school friend, C. On an occasion when her grandparents were visiting New Zealand, C was present when M was sitting on her grandfather's knee and he had his hand on her stomach. The following day, she said to C something to the effect, "Was that a bit weird that my grandfather had his hand on my stomach?" and C answered that it was not. M accepted that that was the only conversation she had had with her friend about her grandfather. (C, interviewed by police in May 2014, gave a similar account of the incident and conversation; giving evidence in 2015, she said that as a younger child she had thought what she saw was normal.)

[22] M did not remember the details of what she had said to Ms Eaton or her friends A and B, but she agreed, when it was put to her, that she had told B she had been sexually harassed when she was little and was starting to remember things about it, and that she had told A that her grandfather had touched her and made her feel uncomfortable. She was asked about the fact that between the conversation with C and her conversation with Ms Eaton in mid-2012, she had not told anyone about her grandfather and what

he was doing. She said that after she had "asked [C]", she did not think there was anything to worry about. She agreed that she was close to A and B in mid-2012. M confirmed that her complaint to the police in 2012 was withdrawn. She said that originally her father had told her to lie to the police, but then resiled from that view and told her not to do so. She could see that he was distressed and hurt by the allegations, which made her decide not to proceed.

[23] M agreed that although she was regularly raped during her visits to Australia, she nonetheless was keen to visit her paternal grandparents. Once her family had moved to Australia in 2010, she had made return trips to New Zealand to stay with her maternal grandmother on four occasions before talking to the Australian police in 2012, and had visited again over Christmas 2012, but at no stage did she reveal to her grandmother anything which had happened to her in Australia. It was put to M that her grandfather had never threatened to put her head under water and she responded, "No, I don't know why I said that". It was put to her that on the occasion when she stayed at her grandparents at a motel, her grandfather's sister also stayed with them, sleeping in the single bed, while she and her grandparents shared the larger bed. She said she did not remember that occurring. M agreed that she had attended a medical examination arranged by the New Zealand police, but she "did not do everything that they wanted to do". (No medical evidence was adduced in the case.)

[24] In re-examination, M was asked why she had not disclosed all that occurred in her first police interview. She said that she was scared and uncomfortable with the detective and her father had not wanted her to speak, so that she had felt that she should not. She had not wanted to tell her friend C what had happened, because "even though she had said that it's okay, it still felt wrong". She began to appreciate the wrongness of what was happening when she had sex education classes when she was ten or 11. She had not felt close enough to her grandmother, when visiting, to tell her what had happened. When her mother asked her whether her grandfather had "stuck his dick in [her]" she had denied it, because it was too difficult to talk to her mother about it.

[25] M said she was keen to visit her grandparents, notwithstanding what was occurring, because the appellant bought her many gifts and took her to theme parks, and in any case it was not always her choice to visit. M said that she had tried to tell her now deceased uncle, whom she liked, and who was living at her grandparents' Gympie property when she visited between 2008 and early 2010, about what was occurring, but he "just laughed". Although there were occasions when the incidents took place when her grandmother was about in the house, she had felt unable to call out or say anything, and similarly on an occasion when her mother was in the house at Buderim she had stayed quiet.

The defence case

[26] The appellant gave evidence, denying the allegations M had made. He confirmed that he and his wife had lived at Buderim until late 2007, when they moved to acreage near Gympie. M had visited them at Buderim twice in 2006, staying about a week each time, and twice again in 2007, on one occasion for a week and on another for about a fortnight. On the last occasion she was unaccompanied. After the appellant had moved to Gympie, M made an unaccompanied trip to visit her grandparents for about a week in April 2008. She visited again with her father for a week in 2009 and returned with her mother and father for the funeral of her uncle, staying for about five days in January 2010.

[27] The appellant conceded that M had occasionally got into bed with her grandparents in the mornings, and might briefly have been alone with him watching television. He would not have been naked; he always made sure he had shorts and a top on when the child came into the bedroom. He had agreed to get into the pool with M when both were naked; she was enthusiastic about "skinny-dipping". He recalled that happening twice. He and his wife had made a trip to New Zealand during which M had asked if she could stay in a motel room with them. They had slept in a double bed, with his wife between him and M. Another friend (not his sister, as put to M) had slept in a single bed with them in the motel room. He accepted that on that trip he had M on his lap with his hand in the area of her stomach, as C described.

[28] The appellant's wife, M's paternal grandmother, gave evidence that she had never seen any form of sexual contact between her husband and M and that the latter had never shown any reluctance to be with her grandfather. M had slept in a double bed with her and her husband the night they had stayed in the New Zealand motel; she denied that there had been any sexual activity. There were no occasions on which her husband had watched television alone with M, and she and her husband dressed before the child entered their bedroom in the morning.

[29] The friend who had shared the motel room in New Zealand gave evidence. He said he had slept in a single bed and was not aware of any sexual activity occurring on the evening in question. He accepted that he had been feeling the effects of alcohol, but he had not slept soundly.

The contentions on the unreasonable verdict ground

[30] Counsel for the appellant contended that the fundamental inconsistencies between M's accounts and her unsatisfactory explanations for those inconsistencies were such that the jury ought to have had a doubt as to the veracity of her evidence. It was not suggested that there was generally anything about M's demeanour in the recordings of the two police interviews or in her taped evidence which would have a bearing on her credibility. However, it was pointed out, M appeared matter-of-fact and not overtly uncomfortable in the first interview, at one stage laughing at a joke by the police officer and having no apparent difficulty in talking about intimate parts of the body. It was significant, counsel said, that in that interview M volunteered the information that the appellant had never tried to have sex with her. That was consistent with her denial to her mother that the appellant had penetrated her, but at odds with her later claims. Similarly, her statement in the first interview that the appellant had never got her to touch any "gross" places on his body contradicted her account in the second recording of his threatening to put her head underwater if she did not touch his penis.

[31] M's explanation that because C had seen nothing untoward in the appellant's rubbing her stomach, she did not think there was anything to worry about was not credible if in fact she had been the subject of rapes. Her statement in the second interview that she complied with the appellant's demands because he had threatened to put her head under water lost any force, given her concession in cross-examination that he had never said that. The account of M's being raped by the appellant in the New Zealand motel room while his wife lay either next to him or in the next bed was inherently improbable. It was suggested that the allegations giving rise to counts 5 and 6, which had not been mentioned in either police interview, bore the hallmarks of recent invention. Similarly, it was said, it was remarkable that the allegation of cunnilingus, a very different type of conduct from the other forms of assault alleged, emerged only in cross-examination by reference to what M had written in her exercise book.

[32] Counsel for the respondent Crown referred to the jury's advantage in having seen and heard the witnesses[1]. Although all of M's evidence was recorded and available to this Court, he emphasised the significance of the jury's having seen her mother and maternal grandmother as witnesses. It was difficult for this court to assess M's relations with both women, and whether she was likely to have confided in them, without seeing them give evidence. Counsel contended that there were a number of other reasons for M to be hesitant about making full disclosure of what the appellant had done. She had a mixed relationship with the appellant; he was a generous grandfather. It was submitted that M's realisation that what the appellant was doing to her was wrong took time to develop: C had reassured her; her uncle had been dismissive of her allegations; it was not until she had had sex education in primary school that she appreciated that what was happening was not normal. Her father's distress and her mother's anger were disincentives to her confiding in them. Once M was removed from the appellant's vicinity on her return to New Zealand, she was able to make her revelation to her maternal grandmother.

[33] M's evidence did not "lack credibility for reasons... not explained by the manner in which it was given"[2]. The prosecutor in his address at trial had made it plain to the jury that the Crown case depended entirely on their acceptance of M's evidence; it was evident from the summing up that the defence counsel had made similar points to those made on appeal about the deficiencies in M's evidence; and the trial judge had given a *Markuleski*[3] direction. The jury had nonetheless accepted her evidence and was entitled to do so.

Conclusions on the unreasonable verdict ground

[34] The strongest argument against M's credibility is the fact of her volunteered and repeated denials in her first police interview that the appellant had ever gone beyond touching her or tried to "have sex" with her; which, of course, was in direct conflict with what she told her grandmother and police in New Zealand nine months later. However, it seems to me that the jury could regard that conflict as rationally explicable, having regard to a number of features of the case. The first is M's difficulty in communicating with her mother. She had told B in August 2012 that she could not tell her mother about "stuff"; she told the New Zealand police in May 2013 that she still could not do so. The dramatic reaction by her mother to the disclosure of touching, angrily demanding to know if the child had been penetrated, might well have produced not only an apprehensiveness about disclosing more serious acts but an anxiousness pre-emptively to deny them.

[35] A second factor is M's relationship with her grandparents. It is clear that they had indulged her; the evidence is replete with references to gifts and treats they had given her, and she acknowledged that she enjoyed visiting them. She obviously put store in her grandfather's affection for her: tellingly, she expressed relief in her first interview that he was not angry with her. A third consideration is the inevitable impact of the more serious allegations on her family's relations with her grandparents. Her initial disclosures had, not surprisingly, distressed her father. The family had been close to the appellant and his wife, living with them for some months, and remaining near them until the return to New Zealand. Although M did not have contact with the appellant after her August 2012 police interview, her father continued to take her to his property to visit her grandmother.

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1 *M v The Queen* (1994) 181 CLR 487 at 492.
2 *M v The Queen* supra at 494.
3 *R v Markuleski* (2001) 52 NSWLR 82.

[36] In light of those features, it would not be hard for the jury to understand that M may have found it very difficult to maintain her original allegations, let alone disclose the more serious assaults. They may well have accepted that she did not feel able to do so until she was physically away from the appellant's influence, with her family soon to follow.

[37] I do not consider, then, that M's initial denial of more serious assault should have led the jury to reject her evidence. Her explanations for why she did not reveal earlier what had happened to her were not all logical (for example, that C had seen nothing wrong in the appellant's rubbing M's stomach) or reliable (the allegation of a threat to put her head in water was later retracted) but there was a consistent theme of a growing realisation that what was happening was abnormal, coupled with a difficulty in talking to the adults close at hand about it.

[38] As to the other matters pointed to by the appellant, the New Zealand police asked M to identify the most recent incident of rape and the earliest, and whether anything had happened in New Zealand and to give details of the touchings which had occurred in that country. She was not asked to give details of other assaults occurring in Australia. Towards the end of the interview she was given a minute to think about anything else she might want to raise. It is not, then, particularly damaging to her credibility that she did not describe the touchings which were the subject of counts 5 and 6 or the cunnilingus to which reference was made only in cross-examination; those matters were, however, contained in the exercise book which she gave to the New Zealand police. And, finally of the matters raised, a rape with M's grandmother in the next bed would certainly have been brazen and foolhardy, but that did not render it impossible or even, necessarily, improbable.

[39] For completeness, I should say that I have watched the video recordings of M's police interviews and evidence. She strikes me as more ill at ease and hesitant in the first interview than in the second. In giving evidence, she appears distressed from time to time, particularly under cross-examination, but she is forthcoming, making concessions at various points. Generally there is nothing in her demeanour in those interviews, as counsel for the appellant conceded, which would excite concern about her truthfulness.

[40] As counsel for the respondent pointed out, defence counsel at trial made submissions as to why the jury should not believe M's evidence. It is plain that the jury did not find those arguments compelling, and accepted M as a witness of truth. They were entitled to do so and on her evidence to be satisfied beyond reasonable doubt that the appellant was guilty of each count of which he was convicted. The appeal against conviction should be dismissed.

The refusal to discharge the jury

[41] It remains, then to consider the trial judge's refusal to discharge the jury during its deliberations. By way of background, on the fourth day of the trial, after the evidence was complete but before counsel's addresses, a juror brought to the attention of the bailiff the fact that she had performed a Google search of the word "rape". Another juror told her that she should not have done so; consequently, she raised her action with the bailiff. Questioned by the trial judge as to what definition she had found, she said that it was "penetration in the vaginal area"; there being some debate in the jury room about whether genital touching could amount to rape or whether it was necessary that the vagina be penetrated.

[42] Defence counsel unsuccessfully sought the discharge of the jury, arguing that the juror had ignored the trial judge's direction not to make enquiries. The trial judge noted that he had not specifically told the jury not to look at external sources to ascertain the meaning of particular words. The fact that the juror disclosed what she had done indicated that she was prepared to act in compliance with her obligations as a juror, while there was no clear indication of a lack of preparedness to follow judicial direction. His Honour then had the jury return to the court and explained that the allegation in the present case was one of penile penetration of M's genitalia. While digital penetration would also constitute the office of rape, that was not the Crown's allegation, nor the issue that had to be decided.

[43] On the sixth day of the trial, while the jury was still deliberating and after the trial judge had given a *Black*[4] direction, a juror indicated by note to the trial judge that she could not render a verdict. She referred to a religious belief encapsulated in a passage from the Old Testament, to the effect that sin was to be established through the word of more than one witness. The trial judge, applying section 56 (1)(a) of the *Jury Act* 1995, concluded that the juror ought not be allowed to continue, and discharged her. Defence counsel then applied for the discharge of the entire jury under section 60(1) of the *Jury Act*, on the basis that the juror must have known from very early in the trial that the prosecution case relied on the evidence of one witness, and that her view might have inhibited proper consideration by the jury as a whole of the evidence throughout the trial.

[44] The trial judge then made the ruling which is the subject of the remaining ground of appeal:

> "In this matter, having discharged a juror in the circumstances where that juror had indicated, in effect, a lack of preparedness to decide the matter, because of a particular belief, the question which arises is effectively whether I exercise the power in section 57(1) of the Jury Act, to direct that the trial continue with the remaining jurors.
>
> It is my conclusion that the trial should so continue. There is, in my view, no reason for, or no sufficient reason, for concluding that there is any reason why the trial should not continue with the verdicts of the remaining 11 jurors being taken in due course, in accordance with the law.
>
> As was pointed out in submissions, although we have not yet reached the time when such an option would be open, the law now recognises that a majority verdict in the form of a verdict of 11 of 12 jurors might be taken legally and appropriately in a particular case and, further, to the extent that the court has information as to the course of the deliberations of the jury to date, there is nothing indicated which would [suggest] that there's been any prejudice created to the position of either party, in terms of the issue that has emerged that has led to the individual juror being discharged this morning. Accordingly, the direction is that the jury continue with the remaining – sorry, the trial continue with the remaining 11 jurors."

His Honour then informed the remaining members of the jury of the discharge of one their number. They reached a verdict half an hour later.

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[4] *Black v The Queen* (1993) 179 CLR 44.

The appellant's contentions on the refusal to discharge the jury

[45] Counsel for the appellant conceded that the refusal to discharge the jury in the first instance, after the juror investigated the meaning of the word "rape", would not of itself warrant setting aside the verdict. There was no complaint of the discharge of the juror with the Biblical concerns; the focus was on the continuing of the trial with the remaining 11. The trial judge, it was contended, had made two errors. The first was that, although he had referred to s 57(1) of the *Jury Act*, which provides

> "[i]f a juror … is discharged after a trial begins, and there is no reserve juror available to take the juror's place, the judge may direct that the trial continue with the remaining jurors",

his language indicated that he had wrongly approached the issue by considering whether there was reason not to continue with the jury of 11. Instead he should have started from the principle that the appellant had a right to trial by 12 jurors, and considered whether there was a reason to go ahead with 11 jurors [5].

[46] The second error for which counsel contended was the trial judge's failure to consider the issue in the context of the allegedly prejudicial effect of the first juror's conduct. He submitted that his Honour's direction about rape by digital penetration added to that prejudice, highlighting the fact the appellant had been guilty of conduct which met the legal definition of rape, but had not been charged in respect of it. That context, taken with the trial judge's mistaken approach amounted to an aggregation of circumstances which constituted a miscarriage of justice.

Conclusions on the refusal to discharge the jury ground

[47] I should begin by saying that I do not consider the earlier developments, concerning the juror's investigation of the word "rape" or the trial judge's explanation of its meaning as including digital penetration, add anything to the consideration of this question. The direction given was clear and appropriate, ensuring that the jury were focussed on the issues which had to be decided, and there is no reason to suppose some residual prejudice.

[48] In dealing with the later discharge application, his Honour identified the discretion under s 57(1) and expressed himself satisfied that no prejudice had been created by the discharge of the juror. He referred to the possibility of a majority verdict's being taken in a context where the jury had already deliberated for several hours. The fact that the trial had reached that advanced stage, so that within a couple of hours a verdict of eleven jurors would have sufficed was, in my view, a relevant consideration, one which the trial judge properly took into account as a positive factor in favour of continuing the trial. Another factor, the fact that the events had occurred over a period starting several years previously and they involved a child complainant who at the time of trial was still only 14, was not articulated, but may also have weighed on his Honour.

[49] I do not think that the trial judge applied any wrong test. Even if he had, the circumstances and stage the trial had reached were ample reason to proceed with 11 jurors. That did not, in my view, entail any miscarriage of justice.

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[5] See *R v Blackmore* [2016] QCA 181 at [43] and the cases cited therein.

Order

[50] I would dismiss the appeal against conviction.

[51] **MORRISON JA:** I have read the reasons of the Chief Justice and agree with those reasons and the order her Honour Proposes.

[52] **NORTH J:** I have conducted a review of the evidence including watching the video recordings of the police interviews of Ms M and the recording of her evidence.

[53] The successive recorded interviews and evidence of Ms M after the first interview on 7 August 2012 demonstrate a developing maturity and confident demeanour. Notwithstanding the points well made by counsel on behalf of the appellant on the unreasonable verdict ground, substantially for the reasons given by the Chief Justice, I agree that the verdicts were not unreasonable.

[54] Upon the other ground of appeal I agree with the reasons of the Chief Justice. I agree with the order proposed by the Chief Justice.