SUPREME COURT OF QUEENSLAND

CITATION:	*R v VJ* [2017] QCA 26
PARTIES:	**R** **v** **VJ** (appellant)
FILE NO/S:	CA No 100 of 2016 DC No 1231 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 18 March 2016
DELIVERED ON:	9 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and McMeekin 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:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by jury of one count of maintaining a sexual relationship with a child and of other child sex offences – where the appellant contends that there were inconsistencies between the evidence of the complainant and of other witnesses such that the jury should have harboured doubt as to her credibility – where the appellant submits that the guilty verdicts are "unsafe and unsound" and cannot be supported having regard to the evidence – whether a verdict of guilty was reasonably open to the jury on the whole of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was convicted by jury of one count of maintaining a sexual relationship with a child and of other child sex offences – where the trial judge admitted oral evidence regarding the content of a missing audio recording of a conversation between the appellant and the complainant – where the appellant contends that the trial judge erred in admitting that evidence as its the probative value was

outweighed by its prejudicial effect – whether the trial judge erred in admitting oral evidence of the missing recording

Criminal Code (Qld), s 668E(1)

Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180; [1987] HCA 58, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

COUNSEL: D Caruana for the appellant
T Fuller QC for the respondent

SOLICITORS: Kilmartin Knyvett Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was convicted of maintaining a sexual relationship with a child (count 1); two counts of indecent treatment of a child under 12 (counts 2 and 4); two counts of rape (counts 3 and 5); and three counts of indecent treatment of a child under 16 under care (counts 7 to 9). The complainant in each case was his de facto step-daughter. Count 1 was charged as occurring between 20 January 2005 and 1 January 2014 at Chermside and Hervey Bay. Counts 2 to 5 were particulars of the unlawful sexual relationship in count 1. Counts 7 to 9 were not relied on as part of that relationship and occurred on the one night between 28 February and 1 May 2014 at Clear Mountain.

[2] He has appealed against his conviction on two grounds. The first is that the verdict was unsafe and unsound and not supported by the evidence. The second is that the trial judge erred in admitting the evidence of K and J regarding a missing audio recording between the complainant and the appellant, as the probative value of that evidence was outweighed by its prejudicial effect.

[3] Before stating my conclusions for rejecting both grounds of appeal I will summarise the relevant evidence and events at the trial, as well as the appellant's contentions.

The relevant evidence and events at trial

The complainant's evidence

[4] The prosecution case turned largely on the complainant's evidence which consisted of two lengthy interviews with police from 7.30 am to 8.45 am and 10.21 am to 11.59 am on 6 May 2014. They were tendered under s 93A *Evidence Act* 1977 (Qld). She also gave pre-recorded evidence on 1 July 2015 during which she was cross-examined for several hours.

[5] In the first interview[1] she told police she had come to talk to them about how her step-father had been sexually abusing her. He was the father of three of her half-siblings. She had another sibling who had a different father. She said the abuse had been happening for about 10 years and began when she was six. It stopped when

[1] Exhibit A to the affidavit of Peter Alexander Negerevich sworn 20 October 2016, pp 1 – 34.

she left but she saw him twice afterwards and "he was still doing stuff".[2] The last time was two weeks before the Easter holidays when she stayed over at the Clear Mountain home of the appellant's mother, who was away. The complainant was visiting her little brother, N, who was having an eye operation. The appellant made her sleep in his bed but she "refused to sleep so he wouldn't do anything".[3] Initially, the complainant told police that he had tried to kiss her several times, and felt her body, but that was all that happened.[4]

[6] When police asked her for more details she said the appellant picked her up from school. They went to the shops and she got N off to sleep. She and the appellant talked outside. He asked her about her sexual life and said he was really jealous because she never did anything like that with him. He begged for her to do something to him that night. She did not want to be near him and went into the kitchen where she sat on a bench. He held her legs, slowly moving his hands higher. She told him to go to bed. He begged her to sleep with him.[5] Earlier he had blown marijuana smoke in her face, shoved a bong at her and made her take it.[6] He asked her if she had ever "sucked off a guy".[7] When she said she had, he got really upset, complained, and asked if she would do it for him. She refused. He told her how much he missed her and begged her to take nude photos on his phone for him so he would have something to remember her by. That was when she left and went into the kitchen. He said he was getting turned on. She was disgusted. He told her he loved her more than a daughter and he would rather be with her than her Mum. He offered to give her and her boyfriend tips and be her instructor. He said he envied her then boyfriend, K.[8]

[7] K, she said, hated the appellant because, in February before they started dating, she told him about what the appellant had done to her. K was worried about her spending the night with the appellant.[9]

[8] She returned to what happened whilst she was sitting in the kitchen. The appellant put his hand on her knee and rubbed it as he stood between her legs. She pushed him away (count 7).[10] He kept trying to kiss her and did kiss her when she was not quick enough to avoid it (count 8).[11] He asked her to sleep with him, promised he would not do anything and coaxed her into his room. She lay in bed on her stomach, well away from him, and did not sleep all night because she was scared. He rubbed her back and touched her butt. She was feeling affected by marijuana.[12] N was asleep in his cot at the end of the bed. She agreed to give the appellant a hug. He kept asking for more but she resisted. He eventually fell asleep.[13] Earlier, he tried to undo her bra but she shook him off (count 9).[14]

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2 Above, p 6, l 12.
3 Above, p 6, l 35 – l 36.
4 Above, p 6.
5 Above, p 10, l 1 – l 10.
6 Above, p 10, l 28 – l 30.
7 Above, p 18, l 6.
8 Above, pp 18 – 20.
9 Above, p 21.
10 Above, p 23, l 54 – l 56.
11 Above, p 23 l 59 – p 24 l 2.
12 Above, p 24.
13 Above, p 27, l 50 – l 56.
14 Above, p 28, l 47.

[9] The appellant drove her to school the next morning and they picked up K. Once the appellant dropped them at school she told K what happened the previous night. Her male best friend, J, also knew about what happened that night and did not like the appellant.[15]

[10] In the second interview[16] police asked her to remember the first incident of sexual abuse. She said she was in her room watching TV in the Chermside house when the appellant lay down next to her. She was six years old and in foster care. Her mother was pregnant with her little sister, M. He put his arm around her and did "the soft tickle thingy".[17] He kissed her on the mouth and told her everything was alright and just to let it happen. He kissed her and rubbed her back to get her to go to sleep nearly every night. He would push on her chin with his thumb to try and open her mouth. He tried to put his tongue in her mouth. She was too small to push him off.[18] She felt "grossed out" (count 2).[19] She explained, however, that she did like having the appellant's attention and that all she ever wanted was a father.[20] The appellant said that if she told anyone he would hunt her down; he would find out.[21] She was worried that if he found she had told police he would come after her. She tried to explain her many different living arrangements over the years with foster carers, her mother and her maternal grand-parents.[22]

[11] The police asked what was the next incident that stuck in her memory. She said it was when the appellant first got her "to suck him off".[23] This happened in the Chermside house but she could not remember how old she was. She was sick of her sisters annoying her so she went to the laundry to see if she could play PlayStation with the appellant.[24] He grabbed her hand, put it on his penis, tried to play with her boobs, put his hand on the back of her head, pushed her head down onto his penis and moved her head up and down. She described it as "gross".[25] The incident took about 10 minutes. It made her choke and gag (count 3).[26] He would always ejaculate, either in the sink, or on a towel or clothing. She was pretty sure he ejaculated in the sink on that occasion. She thought her sisters were in the lounge room and her mother was either in her room watching a movie or out at a friend's.[27] He would say things like "I love you".[28]

[12] On earlier occasions he had shown her his penis and used her hand to give him "a hand job".[29] He was "really forceful".[30] He made her suck his penis on more than 10 occasions. She stopped letting him do it when she was 11 or 12 but he still made her use her hand on his penis.[31] These incidents occurred in the Hervey Bay house. Sometimes he would say he was teaching her. He did it to her "maybe five

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15 Above, pp 30 – 33.
16 Exhibit A to the affidavit of Peter Alexander Negerevich sworn 20 October 2016, pp 35 – 82.
17 Above, p 37, l 30.
18 Above, p 41, l 11 – l 43.
19 Above, p 42, l 10.
20 Above, p 42, l 10 – l 16.
21 Above, p 42, l 16 – l 19.
22 Above, pp 42 – 53.
23 Above, p 54, l 9.
24 Above, p 55, l 46 – l 50.
25 Above, p 58, l 1.
26 Above, pp 54, 57 – 59.
27 Above, p 60.
28 Above, p 60, l 12.
29 Above, p 58, l 14.
30 Above, p 54, l 29.
31 Above, p 61, l 46 – l 56.

times a week"[32] for a couple of years, either with her mouth or her hand but mostly with her hand.

[13] When she and the appellant were making a treehouse at the Chermside house he told her she could have a mobile phone if she "let him lick [her] out".[33] She refused all day but when her mother was out that night he told her to watch a movie with him.[34] She was wearing her favourite Cookie Monster nightie which he slowly lifted and then took off her underwear. She tried to push him away but he was too strong. He licked her vagina. She ran off crying and went to bed (count 4).[35] About half an hour later he came into her bedroom and told her if she told her mother she would be in big trouble. He "licked [her] out" three other times, all by using force.[36] She once woke up as he was doing it to her whilst she slept.

[14] The first time he tried to "finger" her she was eight or nine years old. She thought she had a reflex reaction and slapped him. He put his finger inside her and it hurt so much she screamed and jumped and ended up hitting him.[37] The fingering occurred only once (count 5).[38] She thought he used his index finger and that it went in about an inch or 3 centimetres.[39] Sometimes he would bribe her with money and make her feel like a prostitute.[40]

[15] When her sister, P, moved into the complainant's room, the appellant would say goodnight to P in the top bunk and make the complainant "do stuff" to the appellant whilst he was standing on her lower bunk.[41]

[16] She eventually made a deal with the appellant that whenever she was dating somebody he would not touch her inappropriately or kiss her; he would be a father. But this did not work and he never actually stopped.[42] At the time of the interview, she had not spoken to the appellant for a while; they had been fighting. She told him that there was never anything between them and never would be. He asked her if she would run away with him to fulfil his dream of living with her in the bush.[43]

[17] When asked whether her mother knew about the appellant's conduct, she said that she did not know if her mother would support her or say that she was making it up. Her mother had never really supported or been there for her.[44] The only people she had told were her boyfriend, K, her friend, J, another male, MM, and a girlfriend, L, who had also been raped and to whom she could relate. She also told her uncle a couple of months earlier. Everyone she told encouraged her to tell an adult. Her uncle was the first adult she told, and she then told her counsellor.[45] She told her uncle that the appellant had made her "suck his penis and … things like that"[46] but

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32 Above, p 63, l 35.
33 Above, p 64, l 51 – l 52.
34 Above, p 64, l 56 – l 59.
35 Above, pp 66 – 67.
36 Above, p 68, l 33 – l 34.
37 Above, p 67.
38 Count 6, indecent treatment of a child under 12, was an alternative to count 5.
39 Above, p 69.
40 Above, p 72 l 59 – p 73 l 15.
41 Above, p 74, l 3 – l 7.
42 Above, pp 75 – 76.
43 Above, p 76.
44 Above, p 77, l 6 – l 8.
45 Above, pp 77 – 78.
46 Above, p 79, l 1 – l 2.

she had not gone into as much detail as with the police. She thought that probably K knew most about what had happened to her.

[18] The complainant's pre-recorded evidence included the following. On the evening when counts 7 - 9 occurred she decided to record her conversation with the appellant on her phone without his knowledge. She stopped recording when she went inside because she was planning to go to bed. The recording lasted for about two hours.[47] She listened to it a couple of times afterwards. J listened to it at school through headphones in her presence. She also told K about the recording but he did not want to listen to it.[48] At the beginning of grade 10 when she was living with her maternal grandparents in Brisbane she texted the appellant 10 photographs of her.[49]

[19] She explained that when the appellant tickled her, he would start with skin to skin contact over her boobs and then try and go down her pants but she would not let him touch anything. He would continue down her legs, around the "groin line". He would do this most nights.[50] The sexual contact did not happen as much when she was younger, living with her foster carer and only visiting. He did not do anything with his penis until she was about seven or eight.[51] For her fifteenth birthday he bought her a very short and tight dress and said he would love to see her in it and wanted her "to put on a private show" for him.[52] She also identified photographs[53] of other items he had bought for her when she was 14 after she had done something that he asked her to do.

[20] She identified a note[54] which the appellant gave her when he dropped around a bag of her belongings to her grandparents. The previous day he had arranged to meet her at a park down the road from her grandparents, but when her grandparents took her there, he "cracked the shits" and left.[55] The note stated:

> "… here's a few things that you left @ my place pluss a few trinkets from mums that I thought you might want. Sorry I couldn't get more. As it is when She finds out they are missing I'm going to cop it! I'll put together a package when we get back & send it down (including your penny)[56]
>
> PTO
>
> As for yesterday's unpleasantness I'm Sorry if I hurt you by driving off. I waited for a sms to say yes or no & finally gave up, thinking that you didn't want to see me (a logical conclusion after the phone Conversations previously where it seemed you were making excuses not to see me). Then you rock up with the Nanny & Poppa police ready to watch us so I couldn't take you, or, what, Record our conversation so as to use it against me later? I was Hurt. I've been feeling hurt & betrayed by you for weeks now, (did you think of

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47 T1-22, AB 34.
48 T1-23, AB 35.
49 Exhibit 1.
50 T1-24 – T1-25, AB 36 – 37.
51 T1-25, l 24 – l 28, AB 37.
52 T1-25, l 38 – l 39, AB 37.
53 Exhibit 2.
54 Exhibit 7.
55 T1-26.
56 A small skateboard.

that???) But I still defend you from her, causing arguments between her & me

PTO

don't know weather I'll be here to see you get married, have kids etc, therefore want to see you as much as poss & it seems that you don't want to see me (even b4 yesterday). I miss the hell out of you ... & don't want you to remember me when I'm gone as that angry ass who drove off. But if you want I'll go out tomorrow so you can still see your sisters but not have to see me, even tho it will hurt, I'd rather feel hurt than make you feel uncomfortable.

I'm also so so Sorry for anything I've done or not done in the past that may have hurt you in any way. It's not what I wanted. Please forgive me.

Q. What is beautifull, funny, smart and wonderfull? PTO

How corny but → xo xo xo xo xo xo xo
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↑ for all the kisses & hugs missed & that will be missed.

When I'm gone, I want to look up from Hell & see you shine. SHINE GIRL

A. YOU."

[21] During cross-examination she described the laundry in the Chermside house as the appellant's hidey-hole.[57] The other children were not allowed in the laundry. Prior to the first time he put his penis in her mouth she had seen his penis on a number of occasions. He had made her give him a "hand job", perhaps 10 times, mostly in the laundry or her room. He made her start playing with his penis when she was around seven. He would beg and beg and bribe her with money and things.[58] On the occasion when he first put his penis in her mouth, she was pretty sure her mother was pregnant and in her room. Her younger siblings were in the lounge room watching a movie. The entrance to the toilet in the Chermside house was at the top of the laundry stairs. He probably put his penis in her mouth about 15 times at Chermside.[59] Although she found the appellant's "parts" "gross" she did not understand what was going on, she was fond of him as he "was the one person who would pay any attention" to her.[60] She agreed her mother used the toilet and the kitchen next to it, but claimed her mother rarely left her room except for Coke and dinner; she only went to the toilet "maybe once every two days".[61] She also accepted her bedroom in the Chermside house was linked to her mother's room by frosted glass doors through which you could see movement, but not detail.[62]

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57 T1-33, l 2, AB 45.
58 T1-34, AB 46.
59 T1-35 – T1-36, AB 47 – 48.
60 T1-37, l 25 – l 38, AB 49.
61 T1-38, l 3 – l 22, AB 50.
62 T1-31, AB 43.

[22] As to the incident in the tree house, she said the appellant had bought her a mobile phone and promised to give it to her if she let him lick her vagina.[63] Later that night when her mother went out, he called the complainant in to watch her favourite movie, *Pirates of the Caribbean*. She was wearing her Cookie Monster nightie. He was begging and begging, spread her legs, took off her underwear, put his arms around her legs so that she could not move and licked her vagina for about 10 seconds. He also tried to put his finger in her but it hurt and she accidentally kicked him when she jumped.[64] She agreed that the appellant's tickling of her did not initially start as sexual touching but as she got older he began touching parts of her body inappropriately whilst tickling her.[65] She agreed she watched her video-recorded interviews with police before giving evidence.[66] She agreed that during those interviews she got mixed up as to time frames and that the appellant's licking of her vagina first happened when she was 11 or 12, not eight or nine.[67]

[23] She agreed that on the night counts 7, 8 and 9 were said to have occurred, the complainant told the appellant about her then boyfriend, K, and assured the appellant she was doing the right thing and was still a virgin. She maintained that the appellant asked her to provide him with sexual services that night. She accepted that she and the appellant had disagreed about her smoking cigarettes but maintained that he provided her with cannabis and made her inhale cannabis smoke.[68]

[24] She said that she told her uncle that the appellant had been kissing her and had made her suck his penis. Her uncle told her to tell somebody.[69] She went to a counsellor through an organisation called Headspace, Mr Wiens, the day before the police came to her home.[70] She could not really remember when she first told her former boyfriend, K, about the appellant's behaviour, nor could she remember what she told him but it was probably the same as she told her uncle. She told K she had the recording of the night of counts 7 - 9 but he did not want to listen to it. She told him a little bit about what happened that night: that the appellant was interested in their sexual life and that he felt he was an instructor for her and K.[71] K was "really grossed out and disgusted" and basically wanted to kill the appellant.[72] About three or four weeks later she told J what she had told K, who was also present. It was not a matter of her telling one who told the other.[73] She did not know what had happened to the recording of the incident on her phone. One day she went to listen to it and it was gone. The police had been unable to retrieve it.

[25] She agreed that over the years she came to the appellant for fatherly help and advice; he was the closest thing she had to a father; he actually paid attention to her, listened to her and cared. That was the one thing she liked about him. She maintained that the offences occurred, largely as she described to police. She was

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63 T1-38, l 29 – l 31, AB 50.
64 T1-39 l 46 – T1-40 l 12, AB 51 – 52.
65 T1-40, l 36 – l 40, AB 52.
66 T1-66, l 28 – l 29, AB 78.
67 T1-48, l 4 – l 7, AB 60.
68 T1-78 – T1-79, AB 90 – 91.
69 T1-68, l 31 – l 44, AB 80.
70 T1-69, l 1 – l 10, AB 81.
71 T1-69, AB 81.
72 T1-69, l 43 – l 45, AB 81.
73 T1-70, AB 82.

not cross-examined about her conversation with Mr Wiens or her mental state either at that time or when she spoke to police a few days later.

[26] In re-examination she said she told K and J about what happened because she needed people to talk to. She said she did not tell her mother about what had happened because the appellant threatened to hunt her down, adding:

> "... apparently he's been to jail before, and apparently he has helped people dump bodies in rivers. He scared the absolute crap out of me. ... He also tried using some excuse against me once saying he was dying, which was a complete lie, and he wouldn't let me tell his mother. ...
>
> I was scared that, if I told my mother, that she wouldn't take my side because she has never been there for me".[74]

Other relevant evidence

[27] K gave evidence by way of his statement to police on 4 June 2014, tendered under s 93A.[75] He said that he and the complainant were dating and that she had told him about her unwanted sexual experiences with the appellant. She said the appellant made her "blow him a couple times".[76] On one occasion she had recorded her conversation with the appellant on her phone. K did not remember what was recorded but recalled that the complainant and the appellant were both stoned and the appellant said:

> "... something about her getting sexual when she's stoned and then [the complainant] saying that um, she doesn't so there's no point in trying anything. ... it sounded like he stormed out".[77]

[28] The recording went for an hour but he only heard snippets. He said the complainant told him she put her brother to sleep. K could not remember anything more. She also told K other things he could not remember, something like they were "all lovey-dovey like hugging and stuff and kissing".[78]

[29] K gave pre-recorded evidence on 1 July 2015 during which he was cross-examined. He confirmed that the complainant told him the appellant had forced her to give him oral sex multiple times.[79] She told him that she and the appellant had a "sort of couple relationship".[80] She said they had oral sex and kissing but did not mention any other type of sexual impropriety.[81] She played him the recording on her phone. K met the appellant for the first time the day before he listened to a few minutes of that recording. He remembered the complainant saying, "I don't get sexual while I'm stoned, so don't try".[82] He did not remember anything else but the appellant did say

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74 T1-80, l 26 – l 34, AB 92.
75 Exhibit A to the affidavit of Peter Alexander Negerevich sworn 20 October 2016, pp 83 – 92.
76 Above, p 86, l 5 – l 6.
77 Above, p 88, l 5 – l 11.
78 Above, p 89, l 24 – l 25.
79 T1-7, l 39 – l 42, AB 19.
80 T1-11, l 12, AB 23.
81 T1-11, AB 23.
82 T1-10, l 25, AB 22.

something. He recognised the appellant's voice but he could not remember what he said.[83]

[30] J gave evidence by way of his statement to police on 30 June 2014, tendered under s 93A.[84] He said that the complainant told him the appellant had molested her since she was about six years old. K first told him that the complainant had been molested since she was six. J then asked the complainant about it. She told him and they became really good friends. She said that the appellant told her to do "stuff" and forced her. He could not really remember what "stuff" but the appellant made her touch him sexually. He was not sure of the details.[85] He listened to the recording on her phone in which the appellant was jealous about what she had done with guys but would not do with him.[86] She said that he had refused to feed her because she would not do anything with him and he had tried to rape her. He heard this on the recording and also from the complainant. The recording went for nearly an hour. During the recording the appellant was jealous of her and her ex-boyfriends as she did a lot of "stuff" with them that she would not do with the appellant. She told him that once the appellant tried to feel her up, touch her inappropriately. There were two voices on the recording, the complainant's and the appellant's. He had not heard the appellant's voice before. The complainant told him that the appellant had tried to rape her but had not given further detail.[87] At first the complainant did not want him to listen to the recording but when K left she said he could. He kept what he heard on the recording to himself although K knew he was listening to it.[88]

[31] J gave pre-recorded evidence on 15 July 2015 during which he was cross-examined. He confirmed that the complainant told him the appellant had been touching her inappropriately since she was six and bribing her with money for sexual favours.[89] He could not remember her going into any great detail. She told him that the appellant tried to rape her and that she had kneed him. This incident happened in a bed. He listened to a recording on her phone which lasted between 50 minutes and an hour. She said she had recorded the appellant when they were together one afternoon in the preceding couple of weeks. He asked to listen to the recording and she eventually agreed.[90] It was about how she had sexual activity with ex-boyfriends and how she would not do it with the appellant. The male voice said: "Well, why can't you do that with me?" The male "was getting jealous. ... There was a lot of jealousy moments".[91] J could not remember the actual words used. The complainant also told him that the appellant was jealous of her previous boyfriends. At first he said he was not 100 per cent sure whether she told him that before or after, but he then stated that she told him this after he listened to the recording.[92] He sometimes discussed the matter with K. Both K and the complainant had told him that the appellant had molested the complainant since she was six.[93]

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83 T1-10 – T1-11, AB 22 – 23.
84 Exhibit A to the affidavit of Peter Alexander Negerevich sworn 20 October 2016, pp 93 – 111.
85 Above, pp 96 – 98.
86 Above, p 99.
87 Above, pp 100 – 103.
88 Above, p 105 l 51 – p 106 l 8.
89 T1-13, l 29 – l 36, AB 25.
90 T1-14, AB 26.
91 T1-16, l 34 – l 37, AB 28.
92 T1-16 – T1-17, AB 28 – 29.
93 T1-17, l 27 – l 36, AB 29.

[32] The complainant's uncle gave evidence that he was living with his parents at the end of 2013 when the complainant moved in with them for a few months. She had come from Hervey Bay. After midnight one evening in early 2014, he asked her how things were going. She told him that the appellant did things to her when she was a child. He tried to bribe her to do sexual things to him. He tried to kiss her. He was asking her to "suck his cock".[94] In cross-examination he agreed that she did not say the appellant had done these things, only that he was pressing her to do them.[95] Prior to her coming to live in his parents' house he did not have much to do with her; she was much younger than him. He agreed that although she was pretty much a stranger to him, a few weeks after moving in she made these disclosures.[96]

[33] Maxwell Wiens gave evidence by telephone but the answers to the questions he was asked, both in evidence-in-chief and cross-examination, have not been recorded. They were invariably transcribed as "[indistinct]".[97] The response to queries made by the Director of Public Prosecutions to Auscript at the Court's request came from Auscript's National Account Manager and included:

> "... I have conducted a full investigation into this quality query and can advise the following.
>
> Auscript's Quality Department performed a full sound check of this transcript between the times of 2.58 pm and 3.07 pm, and have confirmed that the indistinct words could not be identified due to the poor quality of the audio.
>
> The poor audio quality was a result of an issue with the Court's equipment on the day which affected the phone conference facilities. At the time, Auscript worked with the Department's Court Services Centre to investigate further to ensure this fault has been resolved internally."[98]

[34] This is most concerning and entirely unsatisfactory. An efficient, fair and accountable criminal justice system depends on an accurate record of court proceedings. This is particularly crucial to the appellate process. It is imperative that this mishap is not repeated.

[35] Mr Wiens' evidence as summarised by the judge in her directions to the jury, without dissent from counsel, was as follows. He was a psychologist at Headspace. He spoke to the complainant on 5 May 2014. She told him that she had some hallucinations around that time.

> "She could see and hear her mother and [the appellant] everywhere but that they weren't actually there. She was paranoid that people were out to get her in Hervey Bay. She was seeing people and at the same time her friends were telling her that no-one was around. She had feelings she could take on the world once a week and she'd stayed awake for seven days at a time and couldn't sleep."[99]

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94 T3-42 – T3-43, AB 155 – 156.
95 T3-44, l 40 – l 43, AB 157.
96 T3-45, AB 158.
97 T3-57 – T3-58, AB 170 – 171.
98 Letter from J Oey to P Negerevich dated 9 November 2016.
99 Summing-up (17 March 2016), T3, l 24 – l 29, AB 211.

She also told him that she was sexually assaulted by the appellant from the age of six until she left home in November 2013 aged 14.[100]

[36] The complainant's mother gave evidence confirming the complainant's living arrangements during the dates charged on the indictment.[101] She explained the layout of the Chermside and Hervey Bay houses, identifying photographs, including of the laundry of the Chermside house.[102] When the complainant was 14 and a half she ran away from the Hervey Bay house and stayed with a friend for two days. She lived with them for another six months but then started to run away again. She became involved with a boy at school and moved in with him and his mother. She lived with her maternal grandparents at the beginning of 2015.[103] She did not know what the complainant had done since.

[37] After the appellant was charged with these offences, the mother's relationship with the appellant was sporadic. They separated but kept in contact for the sake of the children. They were most recently in a relationship in 2015.[104] On 30 July 2014 during a period of separation she ran into him at a shopping centre. He walked with her grocery trolley to her car. Whilst helping her put the groceries into the car, he put his head to the ground, shrugged his shoulders forward and said: "I don't know whether I should tell you this but I had sexual fantasies over photographs of [the complainant]."[105] The mother stated that she was absolutely disgusted and drove off.[106]

[38] In cross-examination she explained she gave birth to the complainant just after she turned 16. She said she had loved and trusted the appellant and he was adamant that he had not committed the offences. Despite the conversation on 30 July 2014, she renewed their relationship and they had another child although they had since separated again. She maintained that he did tell her on 30 July 2014 about his sexual fantasies concerning the complainant.[107] She agreed that if you stood at the top of the stairs of the Chermside house you could usually have a full and unimpeded view of what was happening in the laundry. Although she sometimes stayed in the bedroom or lounge room watching movies, she frequently went into the kitchen, or to the toilet, or to check on the children playing in the backyard. The other children were regularly in the laundry as it was the pathway from upstairs to the backyard. The complainant was never left alone with the appellant. Until the complainant's great-grandmother died in 2007 the mother would invariably take the complainant to visit her great-grandmother. There were very few occasions prior to the great-grandmother's death when the complainant and the appellant were alone together, unless the mother was grocery shopping.[108] She agreed that at one stage the appellant was having a lot of headaches from a blood clot in his brain or something; he was concerned for his health but would not seek treatment.[109]

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100 Summing-up (18 March 2016), T19, l 34 – l 36, AB 262.
101 T3-5 – T3-7, AB 118 – 119.
102 Exhibit 6.
103 T3-15 – T3-16, AB 128 – 129.
104 T3-20 – T3-21, AB 133 – 134.
105 T3-23, l 5 – l 6, AB 136.
106 T3-22 – T3-23, AB 135 – 136.
107 T3-23 – T3-24, AB 136 – 137.
108 T3-29 – T3-30, AB 142 – 143.
109 T3-33, AB 146.

[39] The complainant's maternal grandmother gave evidence that in March 2014 when the complainant was living with her she arranged for her to visit her brother, N by staying overnight with the appellant at his mother's house at Clear Mountain.[110]

[40] The investigating police officer, Jodie Jordan, gave evidence that she had not been able to locate MM or L who the complainant claimed to have told about the appellant's conduct. She obtained material from the mobile phones of the appellant and the complainant including text messages and images they exchanged during 2014.[111] There was no recording on the complainant's phone relating to the evening when counts 7 – 9 were alleged to have occurred. The text messages included one on 26 March 2014 from the appellant to the complainant:

> "Making out in class, you hussy you. P.s i hope the little fella knows how lucky he is to be with a beautifull specimen such as yourself. We're talking, fall out of an airoplane at 30,000 ft, hit the ground at mock 5, and not only survive with no damage but find a winning lotto ticket, lucky!"

[41] Another text message from the complainant to the appellant on 10 April 2014 included:

> "I'm sorry if I have hurt you but you need to get over it there is never going to be anything between us and there never was. (And you needed to hear it, before I put you through any more pain) …"

[42] The appellant did not give or call evidence.

The judge's directions to the jury

[43] The judge's directions to the jury included that if they had a doubt about the complainant's credibility on one count that must be taken into consideration in assessing the truthfulness or reliability of her evidence generally.[112] Her Honour also referred to the long delay in the complainant's reporting of the alleged offences, which had denied the appellant the chance to assemble exculpatory evidence in a timely way.[113] The judge pointed out that the charges spanned a lengthy time period which also made it difficult for the appellant to counter the allegations. Her Honour noted that the complainant was a child remembering back to when she was six, seven, eight or nine years old and that this would affect the strength of her memory. Mr Wiens' evidence as to her mental state was also a concern. Because of these matters, her Honour warned the jury that the fairness of the trial had necessarily been impaired and that:

> "… it would be dangerous to accept as reliable her evidence alone in relation to any of the sexual activity that she says happened unless, after scrutinising it with great care and considering the circumstances relevant to its evaluation and paying heed to this warning, you're satisfied beyond reasonable doubt of its truth and accuracy".[114]

[44] In relation to the evidence of K and J her Honour stated:

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110 T3-52 and T3-54, AB 165 – 166.
111 Exhibits 8 -12.
112 *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290.
113 *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.
114 Summing-up (17 March 2016), T3, l 37 – l 41, AB 211.

> "… they're both pretty vague on the exact conversation, but the Crown says they're both clear that there is – this conversation that implies that he was jealous of her behaviour with the other boyfriends, wanting to know why she wasn't doing it with him. In relation to that, firstly, you have to be satisfied that there was a recording and that that was said on the recording, and, secondly, you have to be satisfied that it was true before you can do anything with it. Now, if you are satisfied that things like that were said and that it was true, then that does support, in part, the version of what she says happened, that there was a conversation of a sexual nature out on the back verandah, or the outside area, and she says that was the time when there was the touching on the knee. But, of course, if you are not convinced that that occurred at all then you simply put that to one side. It's a matter for you, ladies and gentlemen."[115]

[45] Her Honour referred to the complainant's evidence of the appellant's threats to her and his statement that he had been to jail and helped dump bodies in rivers. The judge told the jury that, even if they accepted those threats were made, there was no evidence that they were true. It would be wrong, the judge warned, to reason that because he had been guilty of other criminal behaviour, which may well have been a lie in any case, therefore he was guilty of this behaviour.[116]

[46] The judge told the jury that J and K's evidence about the phone recording, the complainant's evidence that the appellant bought her a tight dress and asked for a private showing, and the texts and comments on photos were all evidence that the jury could, if they chose, treat as evidence supporting the complainant's evidence. Her Honour noted that the prosecution said this evidence showed the appellant considered himself an upset lover with a sexual interest in the complainant. The defence position was that the complainant was a troubled young girl who had run away and the appellant responded as a father figure who loved her. The evidence of the complainant's mother that the appellant told her he had sexual fantasies over photographs of the complainant, if the jury found it occurred, was also capable of demonstrating that he had a sexual interest in the complainant. But, her Honour warned, even if the jury found that he had a sexual interest in her, they still had to be satisfied beyond reasonable doubt of every element of every charge before convicting.[117]

Ground 2

[47] It is logical to deal first with the appellant's ground of appeal that the evidence of K and J should have been excluded as its probative value was outweighed by its prejudicial effect.

The appellant's contentions on this ground of appeal

[48] The appellant submits that the evidence of K and J was vague. K only heard snippets of the recording and could recall little of it. He had met the appellant but briefly once and yet had purported to identify his voice. J's recollection of the recording was poor. The recording had been deleted from the complainant's phone

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115 Summing-up (18 March 2016), T10, l 11 – l 22, AB 253.
116 Above, 10 – 11, AB 253 – 254.
117 Above, 12 – 14, AB 255 – 257.

and was not able to be played in evidence. There was no explanation as to why it was unavailable. It was of little probative value but it was left to the jury as capable of providing independent support for the complainant's evidence, particularly to the fact that the appellant had a sexual interest in her. K and J were juveniles whose evidence may have been tainted by what the complainant told them before they heard the recording. The appellant contends that this aspect of their evidence was of poor quality, had little weight and was unfairly prejudicial so that it should have been excluded. He accepts that no objection was taken to the admission of the evidence during the trial. But he submits that, as it was capable of supporting the complainant's account, it may have deprived him of the chance of an acquittal and resulted in a miscarriage of justice.

Conclusion on this ground of appeal

[49] It is regrettable that the recording of the complainant's conversations with the appellant on the evening when counts 7 to 9 were said to have occurred had disappeared from her phone and so was not available at trial. The best evidence was the recording, not K and J's evidence about what they heard when they listened to it. That does not mean that K and J's evidence was inadmissible. Although for many purposes a document includes an audio recording, the best evidence rule does not appear to extend to audio recordings. Trials are rarely conducted on perfect evidence and, save in the case of written documents where the best evidence rule may still apply, secondary evidence as to what was contained in a recording which is no longer available goes to the weight of that evidence rather than its admissibility.[118] It was uncontentious at trial that the complainant and the appellant had a conversation that night about the complainant's then boyfriend so that the appellant's identity as the male person in the recorded conversation which K and J heard was not in issue. The complainant gave evidence that during that conversation the appellant importuned her to have sexual relations with him after hearing of her relationship with her boyfriend K. That account was supported by the evidence of both K and J as to what they heard on the recording. Their evidence was highly relevant to the central issue: the credibility of the complainant in her claim that the appellant had sexually abused her. It was evidence of his inappropriate sexual interest in her, was capable of supporting her credibility and was admissible. Whilst it was not possible to be satisfied as to exactly what the appellant and the complainant said, it was persuasive evidence that the appellant importuned the child complainant, his de facto step-daughter, for sexual favours after hearing about her sexual relationship with K.

[50] This was certainly prejudicial but probative evidence invariably is. The most probable reason defence counsel did not apply to have the evidence excluded is that such an application would be highly unlikely to succeed. The judge did not err in allowing the evidence to be given as there was no application to exclude it. Her careful directions to the jury on the use to be made of K and J's evidence ensured the jury did not misuse it. Its admission has not resulted in any miscarriage of justice. This ground of appeal is not made out.

Ground 1

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118 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 194 – 197; [1987] HCA 58.

[51] The appellant submits that the guilty verdicts are "unsafe and unsound and [were] not supported by the evidence", that is, under s 668E(1) *Criminal Code* (Qld), the verdicts are "unreasonable, or cannot be supported having regard to the evidence". That requires this Court to review the whole of the evidence and determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[119]

The appellant's contentions on this ground of appeal

[52] The appellant emphasises that the prosecution case turned on the complainant's evidence which, he contends, was insufficient to allow the jury to be satisfied of the charges beyond reasonable doubt. He particularly emphasises Mr Wiens' evidence of the complainant's mental state and that she had been having hallucinations about the appellant when he was not actually present. She gave her statement to police the day after she saw Mr Wiens when she was clearly in a fragile mental state. He submitted that the jury could not rule out the possibility that her evidence as to the appellant's alleged offending was an hallucination.

[53] He also emphasises that she made no complaint until early 2014 although some of the alleged offending occurred long ago. He contends that the preliminary complaint evidence was weak and points out that the complainant did not tell police that she had recorded a conversation with the appellant. Whilst conceding that there was evidence of an unorthodox relationship between the appellant and complainant, in light of the complainant's dysfunctional relationship with her mother this should be construed as the appellant, a concerned adult, trying to assist the troubled complainant. Even if, as the complainant's mother said, the appellant had stated he had sexual fantasies about the complainant in 2014, that did not mean the jury could be satisfied beyond reasonable doubt that each alleged offence actually occurred, some as early as 2005.

[54] The appellant points out inconsistencies between the evidence of the complainant and her mother. It was implausible, he submits, on the mother's evidence as to the layout of the Chermside house, that the offences could have occurred in the way the complainant claimed. The photos of that house and the mother's evidence made clear that the toilet was directly outside the internal entry to the door-less laundry and the complainant's bedroom was right next to the mother's room which, the complainant said, she seldom left. Anyone walking to the toilet would have witnessed the sexual abuse which the complainant said happened about 15 times, with count 3 lasting about 10 minutes. He submits the complainant clearly exaggerated, for example, by saying the other children were not allowed in the laundry. The mother's evidence that they used the laundry on the way to play in the backyard was much more likely. He also emphasises inconsistencies between the complainant's evidence and the complaint witnesses: her uncle, J, K, and Mr Wiens. For all these reasons, the appellant submits that the jury should have had a doubt as to her credibility on each count and acquitted him.

Conclusion on this ground of appeal

[55] The complainant gave a reasonably consistent account of the particularised charged offending to police and during her lengthy cross-examination. The layout of the Chermside house and the nature of the large family living in it did not preclude the

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[119] *M v The Queen* (1994) 181 CLR 487, 493; [1994] HCA 63, [9].

jury from being satisfied beyond reasonable doubt that the complainant was truthful and reliable in her account of each offence. Offences like this usually occur at times when other members of the household are occupied elsewhere. The mother's evidence, which in any case may have been tainted by her poor relationship with the complainant, did not go so far as to establish that there was no opportunity for the appellant to offend against the complainant in the Chermside house.

[56] The evidence of the complainant's mental state was not provided by an expert in the field but came from her self-reporting of symptoms to Mr Wiens. It was not suggested to the complainant that her account was based on hallucinations arising from her mental state. The judge correctly highlighted these matters for the jury and warned them to scrutinise her evidence carefully before acting on it. The limited evidence as to her mental state the day before she made the complaint to police did not require the jury to reject her evidence, even when combined with her dysfunctional background, her young age and the delay in reporting the offending. These features, alone or in combination, are not unusual in cases of this kind.

[57] I am not persuaded the complainant's evidence was tainted by exaggeration. On the contrary, she was often careful to limit her account of the extent of the appellant's sexual abuse and frequently stated her fondness for him. Nor am I persuaded that the minor and understandable inconsistencies in the complainant's evidence or between her evidence and that of the complaint witnesses required the jury to reject her evidence, especially in light of the evidence discussed in the next paragraph.

[58] The evidence of K and J as to the recording, together with the mother's evidence of the appellant's statement that he sexually fantasised about the complainant, the note[120] and some of the text messages and photos exchanged between the appellant and the respondent were persuasive evidence that he had a sexual interest in her. This supported her evidence in a general way. The judge warned the jury that, even if they found general evidence of a sexual interest, they must still be satisfied beyond reasonable doubt of the elements of each individual offence before convicting. There is no reason to suppose the jury did not follow those clear judicial directions. The appellant gave evidence capable of supporting each count. Having reviewed the whole of the evidence at trial I am satisfied it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty. This ground of appeal fails.

Orders

[59] As the appellant has not made out either ground of appeal, the appeal against conviction should be dismissed.

Order: The appeal against conviction is dismissed.

[60] **GOTTERSON JA:** I agree with the order proposed by McMurdo P and with the reasons given by her Honour.

[61] **McMEEKIN J:** I too agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

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120 Set out at [20] of these Reasons.