

SUPREME COURT OF QUEENSLAND

CITATION: *R v VK* [2017] QCA 39

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

FILE NO/S: CA No 197 of 2016
DC No 291 of 2014

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Cairns – Date of Conviction: 23 June 2016

DELIVERED ON: 17 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 24 November 2016

JUDGES: Margaret McMurdo P and Morrison and Philippides JJA
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 a number of child sex offences including one count of maintaining a sexual relationship with a child with the circumstances of aggravation that she was under 12 and his lineal descendant – where the appellant submits that the guilty verdicts are “unsafe and unsatisfactory” and cannot be supported having regard to the evidence – where the appellant submits that the complainant’s evidence was implausible and full of inconsistencies – where the appellant submits that the partly translated transcript of a pretext phone conversation with the complainant was inaccurate and unreliable – where the appellant accepted the accuracy of the transcript at trial – whether verdicts of guilty were reasonably open to the jury on the whole of the evidence

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

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

COUNSEL: The appellant appeared on his own behalf

M Cowen QC for the respondent

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

- [1] **MARGARET McMURDO P:** The appellant pleaded not guilty to maintaining a sexual relationship with a child between 1 December 1996 and 5 July 2002 with the circumstances of aggravation that she was under 12 and his lineal descendant (count 1); nine counts of indecent treatment of a child under 12 who is a lineal descendant (counts 2 – 10); and indecent treatment of a child under 16 who is a lineal descendant (count 11). Counts 2 to 11 were particulars of count 1. The complainant in each count was the appellant’s daughter. After a four-day jury trial, he was convicted on all counts and sentenced to five years imprisonment on count 1 and to lesser, concurrent terms on the remaining counts. He has appealed against his convictions contending they were “unsafe and unsatisfactory”, that is, under s 668E(1) *Criminal Code* (Qld), they are unreasonable or cannot be supported having regard to the evidence. A consideration of this ground of appeal 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 on each count.¹

The evidence at trial

- [2] The appellant, although self-represented in this appeal, was legally represented at trial and made the following admissions. The complainant was born in July 1986. The appellant rented a unit at address A between 4 November 1996 and 6 March 1997, and at address B between 28 February 1997 and 30 December 2002. The complainant’s passport was stamped as departing Australia on 18 November 1992; arriving in Australia on 18 August 1996; departing Australia on 12 September 1996; and departing the Netherlands on 22 November 1996. She attended a particular Queensland primary school between 28 January 1997 and 17 December 1999.²

The complainant’s evidence

- [3] The prosecution case turned principally on the complainant’s evidence which included the following. She was 29 years old at trial. She was born in Cairns and until she was six years old lived with her Indigenous mother and the appellant in an Indigenous community in Cape York. She described her childhood there as “very charmed” and “very happy.”³ When she was six she travelled with the appellant to Holland. Sometimes when she was frightened of the spirits of deceased people, she slept in the appellant’s bed. Her first memory of sexual abuse was in Holland when her pants were off and the appellant licked her clitoris and it tickled. He told her to keep it a secret, not to tell her grandmother or anyone, smiled and gave her a hug.⁴
- [4] On another occasion she walked in when the appellant was watching pornographic films: naked people with erect penises entering vaginas. He told her it was okay for her to watch.⁵ On another occasion she was in the bathtub with the appellant whilst they were arching their backs and lifting their stomach towards the ceiling. On two

¹ *M v The Queen* (1994) 181 CLR 487, 493 – 495; *SKA v The Queen* (2011) 243 CLR 400, 405 [12].

² Exhibit 2, AB 249.

³ T1-44.

⁴ T1-44 – T1-45.

⁵ T1-45 – T1-46.

or three occasions he touched her vagina with his fingers; this would tickle and she would fall back into the bathtub. He showed her the top of his penis, moving it up and down, and it “looked like a turtle’s head.”⁶ They both giggled and laughed. These events probably occurred in the year they first arrived in Holland.

- [5] She returned to Australia on 18 August 1996 when she was 10 years old and she and the appellant lived with her aunty in Cairns. She heard her parents argue over the phone. The appellant sent her back to Holland and told her that her “mum was trying to steal [her] away.”⁷ She stayed in Holland with an uncle for a couple of months until she returned to Australia on 22 November 1996. She lived with her father in Cairns at address A, across the road from her primary school. Initially she had her own room but when CM, a male friend of the appellant, came to live with them she moved into a separate bed in the appellant’s room. On one occasion in the lounge room whilst she was leaning in to tune the radio he put his right hand up her shorts and touched her vagina on the outside of her underwear. He then put his fingers into her pants, kept them there for quite a while and rubbed her vagina. He was sitting on the couch to her right (count 2).⁸
- [6] When she and the appellant moved to address B, they had separate bedrooms. He had a television in his bedroom and watched pornographic movies. Whilst she was lying on his bed, he showed her a movie which depicted naked people, close ups of vaginas, people licking vaginas and, she thought, penises (count 3).⁹ Whilst they were watching the movie he touched her vagina (count 4).¹⁰
- [7] She recalled the first time the appellant taught her “to play with his penis.”¹¹ She was kneeling next to him on his right hand side whilst he was lying down naked. Her hand was on his penis and his hand was on her hand. He showed her how to move her hand up and down (count 5).¹² He asked her if she liked lollipops and her favourite flavour. She said strawberry. He waved his penis around and asked her if she wanted to lick it like a strawberry lollipop. She complied so as not to upset him. She put her mouth over his “knob.” She did not like the taste and licked it instead (count 6).¹³ He grabbed and pulled her over to his face and licked her vagina (count 7).¹⁴ She did not remember what happened after that, but she remembered that he kissed her, put his tongue in her mouth and kissed and sucked both her breasts (count 8).¹⁵ He said he wanted to try something and got on top of her and rubbed his penis on her vagina. He was very heavy and sweaty. He then became angry, agitated and frustrated. He got off and did not want to talk to her. That was the only time he was on top of her (count 9).¹⁶
- [8] On another occasion, he grabbed her leg, put it over his, put his penis on her vagina and rubbed the “knob” of his penis on her vagina (count 10).¹⁷

6 T1-46, l 23.

7 T1-47, l 18.

8 T1-48 – T1-49.

9 T1-49.

10 T1-49.

11 T1-49, l 34.

12 T1-49.

13 T1-49.

14 T1-49 – T1-50.

15 T1-50.

16 T1-50.

17 T1-50.

- [9] He would often touch her or make her move his penis up and down. When her hand became tired he would masturbate himself. This happened both during the day and at night “a lot of times.”¹⁸
- [10] She and the appellant drove to visit family in a Cape York town where they stayed with her grandmother for about a week. On the return trip to Cairns they stopped in a rural area. One night whilst they were sleeping on a mattress in the back of the vehicle he touched her vagina for a couple of minutes. She thought she was in grade seven at the time (count 11).¹⁹
- [11] The appellant continued to touch her sexually, she thought, through grades eight and nine. They moved to address C when she was in grade 10 and 11. She remembered watering the plants when the appellant gave her “this stare that he would always make when he wanted to do his sex acts on [her].”²⁰ She told him she did not feel like it anymore. She showed through her body language that she was not interested. The appellant then stopped touching her. She thought this was in grade 11 or 12.²¹
- [12] She graduated from high school in 2004. She returned to live with her mother in the Indigenous community where she became an administration assistant with the Indigenous shire council. She met her husband, LS, there. They travelled to Europe where they married in 2006 and their son was born the following November. They lived in Germany for three years.²² She was “having a lot of personal issues with what had happened to [her].”²³ They returned to Australia when their son was about two years old and lived at address D with the appellant. She felt the need to tell her husband what had happened. After she did so, he confronted the appellant who left. She has not seen him since.²⁴
- [13] Sometime later she spoke with ES from the Victims Assist Office about what had happened. She did not think she went into much detail but she said that the appellant had sexually abused her when she was a child. ES made notes which she offered to give to the complainant but the complainant told her to look after them. ES contacted a police officer who contacted the complainant. The complainant told the police officer that she was sexually abused by the appellant as a child. He told her to write a timeline of what had happened. She was not “ready mentally and emotionally.”²⁵ Some years later on 2 October 2013 she made a complaint to police.
- [14] The following day she participated in a pretext phone call with the appellant both in Dutch and English. Where necessary, it was translated into English by an interpreter who gave evidence at the trial. The accuracy of her translation was not challenged at trial. It included the following. The appellant said he missed her so much. She replied that it had been “a very long time” since they spoke: 2010, around three years ago.²⁶ She talked about her university studies. He said he was glad she called. She reminded him of the day her husband sent him away and said

¹⁸ T1-50 – T1-51.

¹⁹ T1-51.

²⁰ T1-52, 111 – 112.

²¹ T1-51 – T1-52.

²² T1-52.

²³ T1-53, 12.

²⁴ T1-53.

²⁵ T1-54, 19.

²⁶ Exhibit 4, AB 250 – 251.

she wanted to talk about it. Their conversation which has some significance in this trial continued:

[APPELLANT]: ... Well, he told me you know that I had done that to you, but I have never done that to you, you know, you were still, you know, a virgin (inaudible) something might have happened but that might have all been, you know, (inaudible) I know everything what happened, how you grew up. But he is also thinking that I was sort of teaching you to play with yourself but I don't know if I have done something, with you

[COMPLAINANT]: Yes, well I just wanted to understand, you know, because you know I was little and I just thought well, you know, you're my Dad and you are only teaching me that's normal

[APPELLANT]: Yes

[COMPLAINANT]: You know, that's what I thought

[APPELLANT]: Yes and that's what I thought, yes.

[COMPLAINANT]:

[APPELLANT]: Yes

[COMPLAINANT]: Yes, well. Because I just wanted to just – well my Dutch is not so good yet – I can only think better when I am talking English

[APPELLANT]: Yes, well I know both. If it's easy, English.

[COMPLAINANT]: Well I want to, because we didn't have the time cause I just thought I wasn't ready you know to talk at the time when you wanted to talk.

[APPELLANT]: Yeah

[COMPLAINANT]: And I just thought well I might as well give you a call because you tried to contact me for the second time and I just thought well I'm gonna give Dad a call and just have a good phone conversation and talk about what happened and why it happened

[APPELLANT]: Yes (inaudible) I think you have forgotten all of that from you know when you were (inaudible) years old, but maybe we can talk some time, not on the phone, you know, and we don't have to see each other again, as long as we have a good farewell, you know.

[COMPLAINANT]: Yes

[APPELLANT]: That's entirely up to you.

[COMPLAINANT]: Was I, the first time I went to Holland yes, I was about six, right?

[APPELLANT]: Six, well three, yes six you were, but nothing happened there either right?

[COMPLAINANT]: Um, well, you did, that is the first time that we together in bed and I remember that you know that you were, you know, you were yeah you were just between my legs for the first time and you know that's what you did hey, do you

[APPELLANT]: Hey but I don't remember anything about that, you know, but I am thinking, I am thinking about what exactly happened when she was little, you know, (inaudible) the first time I remember we were in the bath together, after all we are father and daughter, like [LS] would have a shower or something with [the complainant's son], you know?

[COMPLAINANT]: Yes yes that, where was that the first time?

[APPELLANT]: That was in (inaudible) when we were lying in the bath (inaudible) you know, you fell over in the bath and couldn't (inaudible)

[COMPLAINANT]: Yes yes

[APPELLANT]: And around that time, you know

[COMPLAINANT]: That was (inaudible)

[APPELLANT]: Yes it was in (inaudible) and then us in the bath there you know and (inaudible) you know, want to suck on it or something and I said no, no, and I didn't do that, and then Ario came and I went downstairs and you were in the bath, but I don't remember at all that I have done anything to you there or something, you know, you are my daughter.

[COMPLAINANT]: But you did, you did do it. You just wanted to do your father daughter thing and you just I don't know you give me experience or something so I can learn

[APPELLANT]: Yes, you know, because I don't know if you remember, but when we returned from that island to (inaudible) yes? I had a little house there, but I don't know if you remember? Everybody was home, I went to work once, I forgot something

[COMPLAINANT]: Yes

[APPELLANT]: Yes and then you were sitting there with a girl, you know, you were between her legs, well I don't know if you remember but I saw that, but I didn't make any comment, I just raced in and out I think, you know I have seen more things like that with the kids that you did, you know

[COMPLAINANT]: I can't remember anything about that. I can't remember anything about that.

[APPELLANT]: No, but I do think, I have tried very hard to (inaudible) forget, you know, and I am saying if you don't remember I don't want to talk about it anymore, you know, about what happened, I am glad you can't remember. So now it's (inaudible) and I don't know. But I think it is normal that you (inaudible) your daughter, I don't want you to, how do you say it, you know, I want

you to finish school, that everything is okay, you know, and there is nothing wrong about you having played with yourself. I do the same, everybody does it, it's nobody's business, you know.

[COMPLAINANT]: Well I do remember that it happened in Holland. Yes, and when we returned, remember, we moved across from Diane's place remember [address A]?

[APPELLANT]: Yes

[COMPLAINANT]: In that little unit just across the house and I remember it happened there, and

[APPELLANT]: Yes

[COMPLAINANT]: and I remember that it happened at [address B] when I went to school, remember that?

[APPELLANT]: No, [address B] school, nee

[COMPLAINANT]: There was a, yes. And I just wanted to talk about it so that, you know that, just a good conversation so that we can just understand.

[APPELLANT]: Well yes but I have other memories than you, I don't know why they are so mixed up.

[COMPLAINANT]: Yes, yes.

[APPELLANT]: Like in [address B] you know, when I took a walk or something, you would follow me, you wanted me too, (inaudible) I would just walk on you know, walk on, but no no you know they are just (inaudible) game. And it's not as if there was just nothing (inaudible) But I am glad that you married [LS] and everything, hey, you are happy about that too, you know, and he takes good care of you.

[COMPLAINANT]: Yes. Everything is going well but I just you know I just thought that I would just give you a call so that we can just get it behind, you know, because it has been on my mind a lot, hey?

[APPELLANT]: Yes on mine as well, every day. Every day.

[COMPLAINANT]: Yes, to you know just to bring a piece of mind too, you know.

[APPELLANT]: Could I just call you some time, or you can call me if you need something? But if you want me to leave you alone, I really don't want to mind your business, you know, you are grown up now.

[COMPLAINANT]: No I just thought that, you know, I will just give you a call because I needed to do this, just just get it off my chest and you know, memories you know.

[APPELLANT]: Yes I don't know if we are keeping a secret, for me you are really ... [LS] is saying I have assaulted you or something, do

you even know what that means? That is, I haven't actually entered you, you know? Do you know what I mean?

[COMPLAINANT]: Yes, but you did, you did have your penis against you know, against my .. yes

[APPELLANT]: Yes, but I did it, you know, just to keep you away from that boy, you know, (inaudible) you have experience, but I didn't want you to (inaudible) at such a young age, all the friends we have, (inaudible) and no pregnancy, I am also telling you no, you mustn't do that, finish school.

[COMPLAINANT]: Yes, okay.

[APPELLANT]: (inaudible)

[COMPLAINANT]: I don't talk details with other people. I just brought it up and you know.

[APPELLANT]: Yes, but I did, I do absolutely nothing, you know, to hurt you, or whatever. Or to, you know, your memories.

[COMPLAINANT]: Because I do have the memories and you have the memories too. And it's what happened you know.

[APPELLANT]: Yes, yes, but my memories are not as you think they are.

[COMPLAINANT]: Yeah because well because I just remember because it's the first time that I've, I've you know, done these different things, and I just remember it, whereas you as an adult you have already done it, you don't, you know, remember all the details of what happened,

[APPELLANT]: Yes, no

[COMPLAINANT]: but me as a as a as a child, you know, that first time all of it, the first time, I remember that, I yeah so

[APPELLANT]: Well I am sorry about everything I have done, the way you see all of that, hey, and honestly I am truly very sorry, and I am glad you have talked to me.

[COMPLAINANT]: Yeah I thought it would be, you know, just a good thing to do.

[APPELLANT]: Yes

[COMPLAINANT]: To just give you a call. Hey?

[APPELLANT]: Yes. No, I just don't trust anybody, you know. When everybody is sitting around talking, they might make it worse than it is, and maybe it is (inaudible) I don't know.

[COMPLAINANT]: Who is talking?

[APPELLANT]: Nobody.

[COMPLAINANT]: Oh okay.

[APPELLANT]: Nobody. Well, nobody knows about this.

[COMPLAINANT]: Okay. All right.

[APPELLANT]: It's just you, [LS] and me.

[COMPLAINANT]: Yes

[APPELLANT]: But I never meant anything by it, I have, I thought I was helping you by (inaudible) until you were old enough, you know (inaudible)

[COMPLAINANT]: Okay, okay. And, yes. Fine. Yes, I really don't know what to say. I don't know what to say. I just want to just, you know just talk

[APPELLANT]: Yes okay thank you, hey, for calling. If anything's up sometime, hey, I won't call you then.

[COMPLAINANT]: Yes

[APPELLANT]: But you can call me.

[COMPLAINANT]: I am not ready yet, I am just not ready yet okay?

[APPELLANT]: That's why yes, that's why.

[COMPLAINANT]: Just a step, a step at a time.

[APPELLANT]: Thank you.

[COMPLAINANT]: A step at a time, hey?

[APPELLANT]: Yes

[COMPLAINANT]: Okay

[APPELLANT]: (inaudible) But you must tell him that I have not done anything to you, you know, that you were still a virgin

[COMPLAINANT]: still a what?

[APPELLANT]: still a virgin, meaning that I did touch you with the penis and such, but I never, you know, went inside. He was the first, not me, you know. Because he gives me that feeling, that it was me, but okay hey, thank you, hey, I am not going to talk about it anymore now.²⁷

- [15] During cross-examination she agreed that on one occasion she had allowed the appellant to babysit her son. Photographs of the complainant were tendered,²⁸ including one with the appellant in Germany. She agreed that when she lived in Germany with LS from November 2005 until November 2008 the appellant stayed with them for three months but she did not invite him or welcome him into their home. She allowed him to play with their grandson under supervision.²⁹ She agreed that in 2008 the appellant gave her a four-wheel drive vehicle. This enabled her to travel to remote regions to visit her mother. She denied the appellant had access to her son during this time. Her husband remained in Cairns when she

²⁷ Above, AB 250 – 255.

²⁸ Exhibit 5.

²⁹ T2-10.

travelled with the appellant in 2010 to a different Indigenous community where they visited family and went to a sacred site where she heard a voice. She could not remember if there was a ceremony.³⁰ A series of photographs from this visit were also tendered.³¹ She denied that, after the appellant received a payout for a back injury, her husband demanded he buy a house for their son.³² She agreed that between 2006 and 2010 the appellant had contact with her son under supervision.³³ Counsel tendered photographs of her smiling in Holland in 1996;³⁴ with relatives in Holland in 1993; and of her playing happily with friends and relatives in Cairns between 1997 and 2003.³⁵ In answer to a question she initially said she did not socialise with school friends in Holland but then explained that she did socialise with them whilst she lived in Holland.³⁶

- [16] She agreed the prosecutor had given her a copy of her statement³⁷ which she “just skimmed over” before giving evidence.³⁸ When asked whether she had ever seen the appellant ejaculate, she said “I think just once.”³⁹ She agreed she told police that on one occasion when she was 10 or 11 she saw him ejaculate. She did not remember telling ES “he would always ejaculate.” She maintained that she could recall only seeing him ejaculate once but said she could have seen him do this on many occasions; she remembered the first time that she saw him ejaculate.⁴⁰ She agreed she and the appellant commonly spoke Dutch when they lived together and that there was only one occasion when she had a bath with the appellant and that was in Holland. She disagreed that they were each wearing pants. The bathtub was long enough to fit them both and was big enough for her to do back bridges. She agreed that once she fell over and lost consciousness in the bathroom in Holland. She woke up in the lounge room in the presence of the appellant and his friend.⁴¹
- [17] She agreed that the appellant emphasised the importance of staying away from boys at school as long as she could. She agreed that most of the time she shared a bed with her father they were both clothed but added that when he touched her sexually, some of her “bottoms would be off.”⁴² She conceded it was possible that on one occasion the appellant woke up in the morning with an erect penis, inadvertently touched her body with it and apologised.⁴³
- [18] She accepted that she told police she began to question what her father was doing to her when she started high school in year eight. At this stage she was interested in a boy, M. She agreed that by the time she was 16 she knew that what the appellant had done was wrong and that he only told her once to keep it a secret.⁴⁴ She agreed that sometimes she kept a diary. In 2001 she had described the appellant as

30 T2-11 – T2-15.
 31 Exhibit 6.
 32 T2-15.
 33 T2-16.
 34 Exhibit 8.
 35 Exhibit 10.
 36 T2-16 – T2-17.
 37 T2-20.
 38 T2-20, l 17 – l 18.
 39 T2-20, l 29.
 40 T2-21.
 41 T2-21 – T2-24.
 42 T2-26.
 43 T2-26.
 44 T2-28 – T2-29.

“cool.”⁴⁵ On another occasion she wrote “I love my dad so much. He has been nothing but a loving, caring dad. He has always been there for me.”⁴⁶ She wrote that she was “proud” of him and described him as “the best dad anyone could ever have. ... you mean everything to me. ... You are true and will always be true and, Dad, most of all, I wanted to say is that I really love you.”⁴⁷ She accepted that on about 63 occasions she had written “I love Dad.”⁴⁸

- [19] She accepted that they may have moved to address D in December 2002 when she was in grade 10.⁴⁹ She said she could not recall what she told ES.⁵⁰ She did not know whether the appellant had ever penetrated her with his penis, even though on one occasion he was on top of her. She agreed she did not tell police that his penis went into her vagina. She maintained that all the occasions of sexual touching about which she gave evidence did occur and that the appellant had shown her pornographic movies.⁵¹
- [20] In re-examination she said that she did not write in her diary about the appellant’s conduct because he had told her to keep it a secret.⁵²

Other prosecution evidence

- [21] The Dutch interpreter who translated the Dutch portions of the pretext telephone conversation gave evidence by telephone. The bailiff at first gave her the affirmation for interpreters but she explained that she was giving evidence, not interpreting. She then took the affirmation for witnesses. The transcript of this exchange was not included in the Appeal Record Book but because of the appellant’s submissions it was obtained by the Court after the hearing. She gave evidence that she listened to the recording of the telephone conversation and provided an accurate transcript of it in English. The recording was played and it⁵³ and the transcript tendered.⁵⁴ Defence counsel did not cross-examine her.
- [22] CM gave evidence that he lived with the appellant and the complainant for about 18 months commencing in 1996. At address A, he lived with the appellant alone until the complainant moved in a few months later and shared the appellant’s room. At address B they all had their own rooms.⁵⁵ In cross-examination he agreed that the complainant seemed to be a happy, well-adjusted young child. He noticed nothing unusual in her relationship with the appellant. He was “a doting father.”⁵⁶ The complainant did not speak to CM about anything the appellant had done. He had had no contact with either of them for many years.⁵⁷
- [23] The complainant’s husband, LS, gave evidence that one morning in late October 2010 she woke him at 2.00 am crying. She said, “baby, it was my dad. ... He abused

⁴⁵ T2-31, 15.

⁴⁶ T2-32, 11 – 12.

⁴⁷ T2-33, 15 – 112.

⁴⁸ T2-35.

⁴⁹ T2-35.

⁵⁰ T2-36.

⁵¹ T2-37 – T2-38.

⁵² T2-38.

⁵³ Exhibit 3.

⁵⁴ Exhibit 4.

⁵⁵ T2-44 – T2-45.

⁵⁶ T2-46.

⁵⁷ T2-46 – T2-47.

me when I was a child.”⁵⁸ She said that it was “plainly disgusting ... he never inserted it into her, and that she was just disgusted by her father, and never wanted to see him again.”⁵⁹ She said it started when she was a young girl in Holland and it continued until her early teens until she came to realise it was wrong. She gave no further details. In late November 2010, the first appropriate opportunity to discuss this with the appellant alone, he told the appellant of the complaint. The appellant asked what she had said. LS replied, “come on, you know what you did to her. Are you aware she has to live with that for the rest of her life?” The appellant laughed it off and said, “hey, she came to me first. All I wanted to do was to give her some experience and at least I left her a virgin.”⁶⁰ After further words were exchanged, the appellant left and they have not spoken since.

[24] In cross-examination he stated that his English was very good at the time he spoke to the appellant. He had studied English since fifth grade and had lived in Canada as well as in Australia. He agreed that what he told police and what he gave in evidence about his conversation with the appellant may not be word perfect.⁶¹ He agreed that he helped the appellant understand what he should get from his damages payout for a back injury and explained legal terminologies. He denied asking the appellant to buy a house for the son of the complainant and LS. He denied that their relationship deteriorated from that point.⁶² He agreed that he told the appellant after the confrontation that, if he ever contacted the complainant or their son again, he would “make sure he’s not walking around anymore”.⁶³ After the appellant drove off, LS sent him a text message to the effect that he was “a disgusting paedophile.”⁶⁴ He denied suggesting to the appellant that he had had sex with the complainant. He remembered that the appellant said, “I only wanted to give her some experience, and at least I left her a virgin and she came to me first.”⁶⁵ He did not make notes of that conversation but a few weeks later he gave a statement to police. Defence counsel called for the statement.⁶⁶ Following an adjournment, during which the statement was provided, defence counsel asked if LS spoke to police on 21 December 2010. LS agreed, adding that he told police at that time about his conversation with the appellant in late November 2010.⁶⁷

[25] ES gave evidence that in 2010 she was working for Victims Assist Queensland as a court support officer. She referred to her notes of her conversation with the complainant on 22 October 2013. The complainant told her that she had told her husband about the allegations of sexual abuse on 12 October 2010. It commenced in Holland and continued until she moved to address C. The appellant told her to keep it a secret. When she was in high school she realised it was wrong and started ignoring him. Most incidents occurred in his bedroom, at night, two to three times a week. Her first memory was in Holland of him licking her vagina and then bathing her. He touched her vagina in the bath. He showed her pornography and would touch her vagina. They were both clothed. There were two incidents where he touched her

⁵⁸ T2-49, 1 30 – 1 31.

⁵⁹ T2-49, 1 34 – 1 36.

⁶⁰ T2-50, 1 16 – 1 18.

⁶¹ T2-51.

⁶² T2-55 – T2-56.

⁶³ T2-57, 1 18 – 1 19.

⁶⁴ T2-57, 1 20 – 1 21.

⁶⁵ T2-57, 1 34 – 1 35.

⁶⁶ T2-58.

⁶⁷ T2-64 – T2-65.

vagina at address A, one in the bedroom and one in the lounge room. At address B all incidents occurred in the bedroom. He licked her vagina when her pants were off.⁶⁸ ES's notes recorded, "Blow jobs, once penetration, still at primary school. ... Showed pornography, TV in bedroom. ... He would always ejaculate."⁶⁹ ES wrote the notes as the complainant spoke to her, recording her actual words, but the complainant had not signed them.

The appellant's evidence

- [26] The appellant gave evidence which included the following. When the complainant was about six years old, they lived in Holland for about four years. He denied any sexual contact at this time. The bath in their unit was 1.5 metres long, 75 centimetres wide and 40 centimetres deep. He once had a bath with her and they were both wearing underpants. The bath was too small for the complainant to have done back bridges. At no stage did he touch her vagina. On one occasion she had a fall in the bath. He heard a thump and found her lying on the ground with her eyes rolling back. He resuscitated her and took her downstairs where a friend tried to ring the hospital. Although she was disoriented, she quickly recovered. He accepted he had some pornographic videos in Holland but he kept them locked in a cupboard and had never shown the complainant a pornographic video.⁷⁰ He tendered a photograph taken in Holland.⁷¹
- [27] After his return to Australia they lived at Address A where CM lived with them for about 18 months. All three then moved to address B. Until the complainant returned to her mother's Indigenous community when she was 17 or 18 she did not have much contact with her mother.⁷² The appellant was solely responsible for her care. He had discussions with her about puberty, explained the importance of hygiene, that she must not get pregnant like some of her friends, and that she should finish school. She regularly had friends for sleepovers and stayed for sleepovers at her friends' homes.⁷³ He and the complainant had a very good relationship and were always happy. She mainly slept in her own bedroom but occasionally she slept in his when she was scared or uncomfortable alone. On those occasions they were always clothed.⁷⁴ One day when he woke up he had an erection. She said, "Ooh."⁷⁵ He explained that boys sometimes get erections when they wake up. He thought this incident occurred at address B. Photographs of her childhood were tendered.⁷⁶
- [28] In 2008 or 2009 they travelled together to an Indigenous community because the complainant's husband had taken their son to Germany and she was frightened living alone. He decided that they should visit her mother.⁷⁷ He identified the photographs taken at the time.⁷⁸

⁶⁸ T2-70 – T2-71.

⁶⁹ T2-71, 134 – 144.

⁷⁰ T3-6 – T3-7.

⁷¹ Exhibit 8.

⁷² T3-9.

⁷³ T3-10.

⁷⁴ T3-11.

⁷⁵ T3-11, 126.

⁷⁶ Exhibit 10.

⁷⁷ T3-11 – T3-12.

⁷⁸ Exhibit 6.

- [29] The appellant injured his back and sought compensation. In 2009, prior to a settlement conference to determine the amount of compensation, LS gave him a document with work injury compensation calculations written on it.⁷⁹ After he received his compensation money he bought the complainant a four-wheel drive.⁸⁰ He also gave LS and the complainant plane tickets to Germany and helped set them up in a house with furniture and white goods. At a barbeque at the appellant's home, LS put his hands on his hips and asked why the appellant had not bought their son a house. The appellant told LS to buy their son a house. LS looked angry and the complainant was upset.⁸¹
- [30] On 11 October 2013,⁸² LS approached him at a fast pace and said that the complainant had told him everything from when she was a little girl.⁸³ The appellant asked what he meant. LS responded, "Yeah, she told me everything ... you paedophile."⁸⁴ He said that the complainant and her son never wanted to see him again. The appellant said, "she's getting on to me."⁸⁵ LS told the appellant to go before he lost his temper and the appellant left. He explained that in using the phrase, "getting on to me" he meant that as the complainant was growing up she sometimes heard "some weird little thing" and would grab him by the groin.⁸⁶ He would tell her not to do this. She treated it as a bit of a joke but he made clear to her that it was not a joke to do such a thing. He had no further contact with the complainant, LS or their son.
- [31] He received a phone call from the complainant on 3 October 2013. He was taken to the transcript of the phone call,⁸⁷ which he agreed was accurate. He then explained those answers which could be seen as inculpatory.⁸⁸ His reference to the complainant still being a virgin, he said, related back to the earlier discussion between the appellant and LS; he was conveying that she had not been penetrated. In saying, "Something might have happened" he was referring to the occasion when he had an erection in bed in the complainant's presence. He referred to an occasion when he spoke to her about masturbation when she was probably about 14 or 15. He had encouraged her to masturbate rather than to have sexual experiences with boys. He referred to an incident when she was about five or six and living in an Indigenous community when he caught her and other children sexually experimenting and kissing. There was an incident when he found the complainant between another girl's legs and on another occasion he saw the complainant kissing another girl. He had never mentioned these incidents to her because he wanted her to forget them. He understood the complainant's reference to his penis being against her as the incident when he had the erection in bed. He was apologising to her, not because he had done anything wrong, but because he wanted to "make things good."⁸⁹

⁷⁹ Exhibit 11.

⁸⁰ A photograph of it is Exhibit 7.

⁸¹ T3-14.

⁸² The evidence of the complainant and LS is that this conversation occurred in 2010.

⁸³ T3-15 – T3-16.

⁸⁴ T3-16, 11 – 12.

⁸⁵ T3-16, 13.

⁸⁶ T3-16, 17 – 19.

⁸⁷ Exhibit 4.

⁸⁸ T3-16 – T3-22.

⁸⁹ T3-21, 117 – 118.

- [32] He denied ever rubbing or touching the complainant's vagina and the only occasion when he touched her with his penis was that incident when he woke up with an erection and may have inadvertently touched her. He denied each episode of sexual abuse alleged by the complainant and maintained that account in cross-examination.

The appellant's contentions in this appeal

- [33] The appellant was born in Holland and English was not his first language, although he has lived in Australia for a great deal of his life. He prepared two bundles of hand-written submissions totalling about 20 pages and including a document, 'Feedback from Neuropsychological Assessment' dated 24 November 2015, and a 'Confidential Neuropsychology Report' dated 9 December 2015. He has not, however, applied for leave to adduce further evidence in the appeal.
- [34] The documents referred to his self-reporting of worsening difficulties with memory and concentration following an alleged assault on 15 May 2015. He first noticed memory problems around the time the court case with his daughter started. The neuropsychologist concluded that he was significantly below expectation in verbal memory, verbal fluency, verbal reasoning and mental flexibility. He had difficulty maintaining attention and concentration. He reported severe symptoms of depression, stress and moderate anxiety and required a comprehensive psychiatric assessment to examine the possibility of post-traumatic stress disorder. The results may be influenced by his psychological state and emotional stress resulting from the court case with his daughter and the assault.
- [35] That material could have no direct bearing on the outcome of the appeal but given these reports and his language difficulties, the Court arranged for a Dutch interpreter to be present during the appeal. The hearing proceeded, with the agreement of the appellant and the respondent, on the basis that the appellant would call on the interpreter if and when he wished to have anything translated from English into Dutch; and if he was more comfortable addressing the court in Dutch, then the interpreter would translate his submissions into English. He did not call on the interpreter during the hearing.
- [36] The appellant's many contentions were essentially as follows. He and the complainant were victims of LS. The complainant's evidence was implausible and full of inconsistencies the most important of which were, he claimed, the following. It was impossible for her to do back arches in the small bath in Holland. She said she had a doctor's appointment at the time LS confronted the appellant with her allegations, whereas LS said she was out with her mother. The appellant stated, although he did not give evidence of this at trial, that they were both home when LS confronted him. He claimed that she was untruthful when she said her husband was in Cairns when she and the appellant visited the Indigenous community. In fact, the appellant contended, LS was overseas and the appellant had paid his airfare. Again, the appellant did not give this evidence at trial. She said that when she and the appellant lived at address A, CM moved in later, whereas CM's evidence was that he and the appellant lived together initially and the complainant moved in later. The appellant did not give any evidence on this point at trial. The complainant said there was a radio in count 2, but they did not have a radio. He did not give this evidence at trial and nor was it put to the complainant. She said she left her position with the Indigenous council to travel to Germany whereas the appellant contended she went first to Holland where she stayed with his mother before travelling to Germany. He did not give this evidence at trial. She denied that when she and LS were living in Germany they

invited the appellant to visit but, he contended, she invited him and he spent three months with them. When they visited the Indigenous community in 2008, the appellant contended they went to a ceremony consistent with the photographs in Exhibit 6. She said she could not remember a ceremony. He submitted that if she could not remember that event, how could her memory of these alleged offences be relied on as accurate. He also contended she falsely denied he did not have access to her son during a period when he babysat him between five and seven times, on one occasion taking him to visit his sister and her children. He emphasised that initially she said she did not socialise with school friends in Holland when in fact she did, as the photographs established.⁹⁰

- [37] On a number of occasions he referred to an earlier trial and stated that the complainant's evidence was different at the first trial from her evidence at this trial. However, as these alleged inconsistencies were not raised in this trial, the Court cannot consider them. He also stated that there were other people apart from CM who lived with the complainant and the appellant from time to time, apparently suggesting that this made his offending less likely and threw doubt on the complainant's credibility. He stated that while his court case was going on he saved someone's life. He also emphasised that the complainant said she went to work with the Indigenous council after she graduated from school but in fact she could not get a job in Cairns after leaving school and he encouraged her to go there.
- [38] He particularly emphasised the transcript of the pretext phone conversation which he said was full of "inaudibles" and therefore unreliable. This, he contended, suggested that it had been edited and changed.⁹¹ He was concerned that the Appeal Record Book did not have the full transcription of the affirmation of the interpreter and claimed that she said something about giving a translation for the benefit of the complainant.

Conclusion

- [39] Many of the issues raised by the appellant were raised at trial but their significance was reasonably rejected by the jury. Others plainly have no bearing on this appeal, for example, whether he saved someone's life or whether other people may have lived at Address A or Address B during the timespan of the alleged offences. The primary judge warned the jury to scrutinise the complainant's evidence with great care before relying on it to convict the appellant, pointing out the delay between the time of the alleged incidents and the time the appellant was told of the complaint; the broad timespan of the alleged offences; the complainant's young age at the time; and the inconsistencies between the accounts the complainant had given. The judge specifically pointed out that she told police she saw him ejaculate once when she was nine or 10 but she told ES that he always ejaculated. His Honour went on to warn the jury that it would be dangerous to accept as reliable the complainant's evidence unless after scrutinising it with great care and paying heed to the warning they were satisfied of its truth and accuracy.⁹²
- [40] The difficulty for the appellant is that the jury were entitled to reject his account and to accept the complainant's account beyond reasonable doubt as it was capable of being supported in a general way by the pretext telephone call. The jury were

⁹⁰ Handwritten Submissions dated 14 October 2016, filed 7 November 2016.

⁹¹ Above, 2.

⁹² Summing-up, pp 5 – 7, AB 206 – 208.

entitled to reject the appellant's unlikely explanations for his admissions against interest during the phone call. It constituted persuasive evidence that the appellant had had an inappropriate sexual interest in and contact with the complainant. His Honour also ensured the jury understood the specific elements which had to be proved beyond reasonable doubt in respect of each count. The complainant's credibility received further support from the evidence of LS, particularly the appellant's admission against interest to him. The complaint to ES was also broadly consistent with the complainant's account. The inconsistency about ejaculation may have arisen through a miscommunication but, in any case, it was not such as to require the jury to reject the complainant's evidence. When considered together with the other evidence in the case, the various alleged inconsistencies in the complainant's evidence, even where established rather than merely asserted, whether alone or in combination, did not require the jury to have a reasonable doubt about the truthfulness and accuracy of the complainant's evidence concerning each offence.

- [41] The appellant's attack on the mode of affirmation of the interpreter who translated the pretext telephone call is unfounded. As noted earlier, the transcript makes clear that the bailiff initially gave her the interpreters' affirmation, which is to interpret between the defendant and the Court and between him and all persons conversant with the English language. When the interpreter pointed out that she was giving evidence as a witness she was then given the correct affirmation. The appellant's contention is without substance. I note that the appellant at trial gave evidence accepting the accuracy of the transcript and sought to explain away those parts which could be construed as inculpatory. The interpreter was not cross-examined. Having conducted the trial on the basis that the transcript was accurate, his contention now that it is inaccurate and unreliable cannot be entertained.
- [42] None of the appellant's many contentions have any merit. I have, nonetheless, independently reviewed the evidence at trial and am confident it was well open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on each count. It follows that his appeal against conviction must be dismissed.

Order:

Appeal against conviction dismissed.

- [43] **MORRISON JA:** I have read the reasons prepared by the President. I too have reviewed the trial evidence, and agree with the President's reasons and proposed order.
- [44] **PHILIPPIDES JA:** I agree that the appeal against conviction has no merit and should be dismissed for the reasons given by McMurdo P.