SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBH* [2007] QCA 348
PARTIES:	**R** **v** **BBH** (appellant)
FILE NO/S:	CA No 123 of 2007 DC No 202 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2007
JUDGES:	Keane and Holmes JJA and Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – where appellant convicted of one count of maintaining an indecent relationship with a child under 16, four counts of indecent treatment and four counts of sodomy – where appellant acquitted of three counts of indecent treatment – where complainant was appellant's daughter – whether evidence of complainant's brother was properly placed before the jury – whether adequate directions given to jury – whether *Robinson* warning necessary – whether acquittals rendered guilty verdicts unreasonable, unsafe and unsatisfactory *R v E* [1999] QCA 58; CA No 370 of 1998, 5 March 1999, applied *Gilbert v The Queen* (2000) 201 CLR 414, applied *R v Johnston* (1998) 45 NSWLR 362, cited *Longman v The Queen* (1989) 168 CLR 79, cited *R v Markuleski* (2001) 52 NSWLR 82, applied *Robinson v The Queen* (1999) 197 CLR 162, considered *R v Sakail* [1993] 1 Qd R 312, applied *R v Kirkman* (1987) 44 SASR 591, cited

Mackenzie v The Queen (1996) 190 CLR 348, applied
O'Leary v The Queen (1946) 73 CLR 566, applied

COUNSEL: N M Cooke RFD QC, with A D Stobie, for the appellant
M R Byrne for the respondent

SOLICITORS: Martinez Quadrio Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 17 May 2007, the appellant was convicted upon the verdict of a jury of one count of maintaining an unlawful sexual relationship with a child under 16 years of age who was his daughter and in his care, four counts of indecent treatment of a child under 16 years of age who was his daughter and in his care, and four counts of sodomy of his daughter. He was found not guilty of three counts of indecent treatment.

[2] On 18 May 2007, for each of the offences of which the appellant had been convicted, he was sentenced to 10 years imprisonment.

[3] The appellant seeks to appeal against these convictions on a number of grounds which may be summarised as follows:

(a) the learned trial judge erred in allowing evidence from the complainant's brother, W, to be placed before the jury;
(b) the learned trial judge's direction to the jury in relation to the evidence of W was inadequate to avoid undue prejudice to the appellant;
(c) the learned trial judge failed adequately to warn the jury of the danger of convicting the appellant on the uncorroborated evidence of the complainant when such a warning was necessary by reason of:
    (i) the age of the complainant at the time of the alleged offences;
    (ii) the lapse of time before the complainant made a complaint about the appellant's conduct;
    (iii) the impossibility of testing the complainant's evidence by medical testimony;
    (iv) the complainant's mental state, as evidenced by her letters to her boyfriend, A, while she was still at school.
(d) the verdicts of guilty were unreasonable, unsafe and unsatisfactory because of their inconsistency with the verdicts of acquittal.

[4] I shall discuss these grounds of appeal after summarising the case at trial.

The Crown case at trial

[5] The complainant was born in July 1983. The appellant is her father. The first count was a charge of maintaining an unlawful sexual relationship related to the period between July 1989 and March 1999.

[6] The second count alleged indecent treatment, and concerned an incident alleged to have occurred between July 1987 and July 1988. According to the complainant, when she was "younger than four" she climbed up on a waterbed in her parents' bedroom in the shed where they lived at that time and the appellant penetrated her digitally and said words to the effect: "When you can fit in two fingers let me know."

[7] The complainant's evidence was that this incident marked the start of a period of sexual abuse when the appellant abused her from time to time: "Sometimes every couple of days, sometimes every couple of weeks or months. He used to put his penis up my arse and his fingers up my vagina." She said that this went on until she was 15 years of age. There were, she said, so many incidents that they all seemed to blur together. Significantly perhaps, bearing in mind W's evidence, the complainant said that sometimes these incidents occurred when the family was on camping trips. The complainant also gave evidence that her anal muscles became loose as a result of this abuse, and she experienced difficulty in keeping her faeces under control.

[8] The complainant said that when she was young some people came to their house and interviewed her and her brothers. From other evidence, it appears that this occurred in 1992, and that the people were officers of the Family Services Department. The complainant said that the appellant told her not to say anything to these officers about what had happened between them. The complainant did not make any complaint to the officers of the Family Services Department. Nor did she make a complaint at a later time when she was interviewed by a counsellor as part of Family Court proceedings.

[9] The third count alleged that, between July 1989 and July 1991, the appellant procured the complainant to commit an indecent act. The complainant said that when she was aged six or seven in grade 1 or 2 at school, she was outside the kitchen and, with her father's encouragement, his dog, Max, licked her vagina.

[10] The complainant's parents divorced. For about a year and a half, she lived at another address with her mother; but then she returned with her two brothers to live with the appellant.

[11] The fourth count on the indictment alleged an incident of indecent treatment between July 1997 and July 1998. The complainant said that she fell asleep on the bed in her father's bedroom and, when she awoke, the appellant was touching her vagina and the vagina of his then girlfriend. She said that she was 14 or 15 years old at the time of this incident.

[12] The fifth count alleged an incident of indecent treatment between July 1997 and July 1999. The complainant gave evidence that, at the end of 1998, her father acquired a television set for his bedroom. On an occasion when she and her father were sitting on the bed, he put a pornographic video on the television and, while they were watching the video, he began rubbing her thighs and touching her vagina. He then took off her pants, sodomised her (count 6) and put his fingers in her vagina. Before inserting his penis into her anus, he used a lubricant which he kept beside the bed.

[13] The complainant said that, on an occasion between January and March 1999, at about the time when her then boyfriend, B, was about to go into the army, the appellant sodomised her and put his fingers into her vagina. It was formally admitted that the complainant's boyfriend, B, joined the army in March 1999, and that he was posted to Sydney in July 1999, although the complainant's evidence was that B left for Sydney in mid-February 1999. This incident was the subject of counts 7 and 8.

[14] On the night after the incident the subject of counts 7 and 8, the appellant sodomised her, put his fingers in her vagina and licked her vagina. She tried to get

away and kneed the appellant in the head in the process. This incident was the subject of counts 9 and 10.

[15] The complainant said that the night after the event referred to in the preceding paragraph occurred, she was in his bedroom when he sodomised her and put his fingers up her vagina. She said to him: "Don't. Please stop". He replied: "What? Don't stop? You don't want me to stop?". This incident was the subject of counts 11 and 12 on the indictment.

[16] The complainant said that, after the incident, she told the appellant: "That's it. No more." She said that he kept "trying to ask why he couldn't be my boyfriend and why we couldn't continue".

[17] After these three incidents, which, as has been seen, were said to have occurred in 1999, the complainant went to live with her mother for about two months before moving on to live somewhere else.

[18] Some time later, when the complainant had her first pap smear, she was required to have surgery on her cervix. She gave evidence that she told the hospital staff that her father had sexually abused her. Shortly afterwards, she wrote a letter to her GP, Dr Haase, in which she said that her father had sexually abused her. She also wrote to her boyfriend, A, and to her mother about the appellant's misconduct.

[19] The complainant was cross-examined in relation to her letter to A. It was suggested that this letter which referred to the complainant having different personalities and a bizarre desire to "suck blood" reflected an overwrought imagination which also accounted for baseless allegations against her father whom she resented for his attempts to discipline her.

[20] The complainant's younger brother, W, gave evidence that, after their parents had separated (which occurred in 1995, with the divorce in 1996), while they were on holidays with their father on a rural property owned by their father's uncle, W returned to the campsite when the complainant and the appellant had been left on their own to find his sister bent over as if touching her toes, and undressed from the waist down. The appellant's hand was on her waist and his face was close to her bottom. In cross-examination, W agreed that what he saw was consistent with the appellant looking for an ant or bee sting.

[21] The complainant's mother gave evidence that she observed the appellant stroking the complainant's upper thigh when the complainant was a young child. The complainant's mother also said that, on some mornings, the appellant would call the children into the bedroom while he was having sexual intercourse from behind and say to the children: "Give Mum a cuddle". The appellant also told her that sometimes he would call the complainant in to give him a cuddle and that he would have an erection while she was lying on top of him.

[22] The complainant's mother identified the letter of complaint about the appellant sent to her by the complainant. In this letter, the complainant recounted "what happened with dad". It may be noted here that the complainant said that the appellant "used to fuck me up the arse and stick his fingers in my vagina", but no mention was made of the incidents the subject of counts 3 and 4, and a somewhat different version was given of the incident charged in count 2.

[23] The complainant's mother said that she received this letter in 2004, and that "eventually" she took that letter to the police. She also said that, in 1992, she became concerned about the behaviour of the complainant and W, and, at her request, officers of the Family Services Department visited their residence and interviewed the children. She said that the appellant was angry and threatened to kill whoever had dobbed him in.

[24] In cross-examination, the complainant's mother acknowledged that she herself had never seen anything occur between the appellant and the complainant which was consistent with the conduct described in the complainant's letter to her.

[25] The plaintiff's former boyfriend, A, gave evidence identifying a letter from the complainant to him written when the complainant was in grade 12 at school. It would seem, therefore, that it was written in 2000. In that letter, she spoke of her "pain" and that she was:

> "weak mentally and he had done it from such a young age. I did not know how to stop, I always cried after he did it and I kept going back because it felt good, I didn't know how to stop it, I wasn't strong enough – 12 yrs. I put up with it, crying for the last 3 or 5 yrs afterwards, I wanted it to stop but I wasn't strong enough to stop it, I just wasn't strong enough. I so badly wanted to put a stop to it but because my mind enjoyed it and it wasn't strong enough I couldn't stop it …"

It is clear from the context in which these remarks appear that the "he" referred to was her father. A handed this letter to the police after they contacted him in 2004.

[26] Dr Maria Haase gave evidence that she first saw the complainant on 13 March 2000. It emerged in cross-examination that the last time Dr Haase saw the complainant was on 28 October 2001. During the time that the complainant was seeing Dr Haase, the doctor noted her abnormal pap smear and diagnosed the complainant as suffering from depression. At some time, the complainant sent Dr Haase an unsigned letter in which she said that, from an early age, her father used to take advantage of her sexually and that she could not stop this as she was too scared of him, and this continued until she was 15 years old. She also wrote that her father would often beat her and leave marks. The evidence as to the contents of the letter was given by Dr Haase without objection even though the letter in question was not tendered.

[27] Dr Ian Mahoney, a forensic medical officer, gave evidence that the symptoms of faecal incontinence experienced by the complainant could be explained by anal penetration causing a tear in the anal sphincter. Dr Mahoney said that there were other causes which could have caused this condition. Dr Mahoney had not examined the complainant himself. In response to a query put in cross-examination as to the physical symptoms which would be exhibited by a person who has been sodomised over a 10 year period, Dr Mahoney said that studies of children who have been anally penetrated found that 12 months after the last act of penetration "most will have a normal examination".

The appellant's case at trial

[28] The appellant gave evidence. He denied in detail the allegations against him. He said that he had enjoyed a good relationship with the complainant until her

relationship with B which began before she was 14 years old. He said that he disapproved of that relationship and this disapproval, and his attempts to prevent the complainant from following B to Sydney, led to the souring of the appellant's relationship with the complainant.

[29] The appellant said that he and his family had received a visit from officers of the Family Services Department when the children were interviewed. He admitted that he was annoyed about the visit and interview, but denied that he had told the children to say nothing and that he had threatened to kill anybody.

[30] The appellant said that there was only one weekend when he had a television in his bedroom. He said that he had kept lubricant in his bedroom, but he believed he removed it after his separation from his wife.

[31] The appellant said that he did not recall ever having to look for an ant bite or a bee sting on the complainant while they were camping. He said that if he had had occasion to do so, he would have done so in the way described by W.

[32] In the course of cross-examination, the conversation alleged by the complainant in which she said that the appellant asked why he could not be her boyfriend was put to him. To this cross-examination, he responded to the effect that he had a girlfriend; why would he want another?

[33] Margaret Carkeek gave evidence to the effect that, for about a year, she and the appellant had a sexual relationship. She denied that she and the appellant had ever been in bed together with the complainant when the appellant touched the complainant's vagina.

The arguments on appeal

[34] I turn now to address the arguments advanced on behalf of the appellant in support of his grounds of appeal. Before I deal with these arguments in detail, I should mention at the outset that, in two respects, the arguments advanced on the appellant's behalf were affected by basic misunderstandings of the law which robbed those arguments of much of their force. The first of these errors is reflected in the appellant's invocation of the hoary myth that charges of sexual assault are "easy to make but difficult to disprove". In *Longman v The Queen*,[1] Deane J deprecated as an "encouragement of a miscarriage of justice" such "disparagement of the complainant" which involved placing her in "a special category of suspect witnesses". Almost 10 years ago, in *R v Johnston*,[2] Spigelman CJ, with whom Sully and Ireland JJ agreed, said:

> "At one stage, the courts displayed a distinct scepticism towards complainants. There was a practice of directing a jury that it was unsafe to convict on the uncorroborated evidence of an alleged victim of a sexual assault. Furthermore, it was established that as a general rule a court should direct a jury that a complainant's failure to complain 'at the earliest reasonable opportunity' was something they could take into account in 'determining whether to believe her': *Kilby v The Queen* (1973) 129 CLR 460 at 465.
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> There is no doubt that the criminal courts do have a body of experience that is not shared by the ordinary juror. For many years it

1 (1989) 168 CLR 79 at 93.

2 (1998) 45 NSWLR 362 at 367.

> was thought that practice with respect to warnings about complainants in sexual assault cases reflected such superior experience. It is now clear that the practice in fact reflected the limitations on the experience of judges, who were almost invariably male."

[35] This myth was given its quietus in Queensland by the enactment of s 632 of the *Criminal Code* in 1997. In truth, the making of a complaint of sexual assault is, as is now well-recognised, often a harrowing experience for a complainant who may be most reluctant to undergo the ordeal involved in the prosecution of such a charge.[3] Indeed, in this case, the complainant did not directly approach the authorities herself with a complaint about her father: her shame and feelings of guilt are clear from the passage from her letter cited at paragraph [25] above.

[36] The second basic error which undermines the submissions made on behalf of the appellant is the failure to recognise "the principle that an appellate court should respect the constitutional role of the jury"[4] as the tribunal of fact, and not jump to the conclusion that a jury has acted unreasonably in arriving at a verdict of guilty[5] simply because the jury has reached different verdicts on multiple counts involving the credibility of the same complainant.

The evidence of W

[37] This evidence was admitted at trial over the objection of counsel for the appellant. On the appellant's behalf, it is argued that this evidence was, at best, so equivocal that it should have been excluded altogether. Alternatively, it is argued that the learned trial judge did not adequately warn the jury as to the limited use which might legitimately be made of this evidence.

[38] In this regard, the learned trial judge said to the jury:

> "The other evidence that I need to give you a specific direction about is the evidence from the mother and from [W]. That is the evidence from the mother talking about the rubbing of the thigh in a way when the child was very young that made her uncomfortable, the calling the children into the bedroom while sexual intercourse was happening, and [W's] evidence of what he saw on the camping trip. That evidence has been called by the prosecution because they say it is evidence of the relationship between the complainant and the accused and part of the background against which evidence of their conduct or the accused's conduct falls to be evaluated, that it gives you a true and realistic context which will assist you in deciding whether the complainant's evidence against the accused in respect of the charges is true. Put another way, they say it's evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter.
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> But before you can use it in that way you must be satisfied of these things: first of all, you must be able to satisfy that it's honest evidence, so that the mother is telling the truth about it, what she

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3 *R v Markuleski* (2001) 52 NSWLR 82 at 132 – 133 [240].

4 *R v Markuleski* (2001) 52 NSWLR 82 at 100.

5 *R v Kirkman* (1987) 44 SASR 591 at 593; *Mackenzie v The Queen* (1996) 190 CLR 348 at 367 – 368.

> saw, or that [W] is telling the truth, is being honest about it. That it's reliable. That they haven't been mistaken about it, that they are accurate about what they saw. Then you must be satisfied that what it was that they saw does show a sexual interest, you know, an unnatural or unexpected natural interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of those things, then the prosecution say the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used."

[39] In accordance with the approach of this Court in *R v E*,[6] the evidence of W:

> "was relevant to the issue of whether there was a sexual attraction on the part of the appellant to the complainant, to show the relationship that existed between the parties, and to provide the context in which the particular charged offences occurred."

[40] In my opinion, W's evidence was relevant, as was the complainant's mother's evidence of the way in which the appellant treated the complainant and the complainant's evidence of uncharged acts of sexual abuse, because it was apt to render more intelligible and credible allegations which otherwise might be seen to be unintelligible and incredible in terms of the usual relationship between father and daughter.[7] If the jury accepted this evidence as truthful, they might be inclined to consider that they would be acting on a false basis if they were to assess the other evidence in the case on the understanding that an ordinary relationship between father and daughter obtained between the appellant and the complainant.

[41] W's evidence was also relevant because it tended to establish the maintaining offence, in that it revealed a sexual relationship between the appellant and the complainant. The jury were given a clear direction to consider whether there was an innocent explanation for what W saw. The suggestion that the appellant was looking for an ant bite or bee sting might well have been thought to strain credulity too far.

[42] That the complainant herself did not give evidence of the incident to which W referred does not render W's evidence inadmissible.[8]

[43] The weight to be accorded to this evidence bearing on the nature of the relationship between the appellant and the complainant, or any component of this evidence, was, of course, a matter for the jury.

[44] On the hearing of the appeal, it was argued on the appellant's behalf that the learned trial judge erred in failing to direct the jury that they could not act on W's evidence unless they were satisfied beyond reasonable doubt that W's evidence, considered in isolation from the other evidence in the case, established "a sexual act" between the appellant and the complainant. There is no authority binding on this Court which supports that proposition.[9] It was not necessary for the learned trial judge to apply

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6 [1999] QCA 58 at [18].

7 *O'Leary v The Queen* (1946) 73 CLR 566 at 577 - 578.

8 *R v E* [1999] QCA 58; *R v Sakail* [1993] 1 Qd R 312.

9 Cf *Tully v The Queen* (2006) 231 ALR 712 at 746 – 747 [140] – [146].

this approach to ensure that the appellant received a fair trial. The learned trial judge's direction was sufficient to ensure that the jury understood that they could not act on W's evidence unless they were satisfied that the incident did occur and that it did not have an innocent explanation. That direction was clearly sufficient to ensure that the jury did not misuse this evidence.

[45] For these reasons, I reject the first two grounds of appeal.

A *Robinson* warning

[46] The appellant argues that, in conformity with the decision of the High Court in *Robinson v The Queen*,[10] the learned trial judge should have warned the jury of the danger of convicting the appellant on the basis of the evidence of the complainant alone. On the appellant's behalf, it is said that the warning given by the learned trial judge was inadequate because it did not mention the lack of corroboration, the age of the complainant, the delay in the making of a complaint, the impossibility of testing the complainant's evidence by medical testimony and the complainant's mental state, which included fantasies in her letters and her sexual activity while at school.

[47] The direction which the learned trial judge gave the jury was relevantly in the following terms:

> "The other thing is this: the complainant has obviously taken a long time to complain about these incidents, and it has an important consequence, and that is this: her evidence cannot be adequately tested or met after the passage of so many years, because the accused [has] lost, by reasons of delay, the means of testing and meeting her allegations which might have otherwise been available. Same thing. If someone said to you last week 'You robbed the ANZ bank', well, you can pretty well say what you were doing last week, but of course the longer ago the time is the harder it is to meet allegations. So, by the delay the accused has been denied the chance to assemble soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when according to the complainant the incident happened. Had the complaint instead been known to the accused soon after the alleged event it would have been possible then to explore the pertinent circumstances in detail and perhaps to gather and to look to call at trial evidence throwing doubt on the complainant's story, opportunities lost by the delay. So the fairness of the trial has necessarily been impaired by the long delay, but that's not the end of the matter.
>
> But I warn you it would be dangerous to convict upon the complainant's testimony alone. If you find that it is her testimony alone, unless after scrutinising it with great care, considering the circumstances relevant to its evaluation and paying heed to this warning, you are satisfied beyond reasonable doubt as to its truth and accuracy.
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> In any case where the evidence rests on the word of one person you would, of course, scrutinise the evidence of that person with great care. But what I've said to you is that in circumstances where there has been this delay it would be dangerous to convict on her

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[10] (1999) 197 CLR 162.

> testimony alone, unless after scrutinising it with great care, looking at the circumstances relevant to its evaluation and paying heed to the warning, you are satisfied beyond reasonable doubt as to the truth and accuracy of the complaint. That, of course, also applies to the uncharged acts.
>
> You take into account there too that there has been a lengthy delay, and in deciding whether you're satisfied those things happened, you should, in respect of those uncharged acts, take care, scrutinise the evidence carefully, and I would warn you it would be dangerous to accept as reliable her evidence of those other alleged incidents in which she says sexual activity happened, unless after scrutinising it with great care, considering the circumstances relevant to its evaluation and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy."

[48] That the complainant was a child when some of the incidents of which she complained were alleged to have occurred was obvious. The direction given by the learned trial judge clearly instructed the jury that there was no direct support for the complainant's evidence. The learned trial judge stressed the "danger" of convicting the appellant on the unsupported evidence of the complainant. There is no suggestion in the reasons of the High Court in *Robinson v The Queen*[11] that it was necessary for the trial judge to use the technical term "corroboration" to convey to the jury the need for close scrutiny of the unsupported testimony of the complainant.

[49] The jury were also clearly alerted to the complainant's delay in making a complaint and to the disadvantage which the appellant suffered as a result in assembling evidence which might have assisted his case.

[50] Whether the complainant was sexually active at school was irrelevant to the credibility of her complaints against the appellant. That she was sexualised at an early age does not diminish her credibility: indeed, it is consistent with her complaints that she was sexually active at an inappropriately early time in her life. Similarly, the fraught fantasising in her letter to A, even if it were to be regarded as revealing an abnormal mental state, was not at all inconsistent with her being a victim of the conduct of which she complained. If the learned trial judge had mentioned these matters, it would have been necessary for the learned trial judge also to mention these points to preserve balance in her comments. One can well understand why the experienced counsel who represented the appellant at trial did not seek any redirection to ensure that these matters were not mentioned to the jury as matters demonstrating that it would be dangerous to convict.

[51] In any event, it was unduly to the appellant's advantage to describe the complainant's evidence as unsupported. W's evidence was, as I have said, capable of affording support to the complainant's evidence.[12]

[52] The learned trial judge's directions to the jury were in no way apt to prejudice the appellant's entitlement to a fair trial. The jury's verdict in relation to counts 2, 3 and 4 shows that they were fully alive to the need to scrutinise the evidence of the complainant with great care. Accordingly, I reject the third ground of appeal.

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11 (1999) 197 CLR 162 esp at 170 – 171 [25] – [26].

12 *R v Sakail* [1993] 1 Qd R 312 at 316 – 319.

Inconsistent verdicts

[53] On the appellant's behalf, it is submitted that there is no rational basis on which the verdicts of guilty can be reconciled with the verdicts of acquittal in relation to counts 2, 3 and 4. It is said that the jury considered their verdict for 27 hours and then, after being given a *Black*[13] direction by the learned trial judge, returned their verdicts within a further hour. It is said that, in these circumstances, the verdicts of guilty "smack of compromise on the part of the jury" because the quality of the evidence was the same in respect of the counts on which the appellant was convicted as the evidence on which he was acquitted. In my opinion, this submission is without substance.

[54] There were, in truth, significant differences in the quality of the evidence which supported the verdicts of guilty compared with the evidence relating to the counts on which the appellant was acquitted. In relation to counts 2 and 3, the jury may have been concerned that the incidents in question were alleged to have occurred long ago when the complainant was an infant. More importantly perhaps, the jury may have been concerned that, in the complainant's letter to her mother in 2004, she made no mention of the digital penetration alleged in count 2 or of the incidents in counts 3 and 4. Further, the complainant's account of the incident alleged in count 4 was denied by Margaret Carkeek. These are all reasons why a rational jury may have been prepared to entertain a doubt as to the appellant's guilt on these counts, while at the same time being satisfied beyond reasonable doubt of the reliability of the complainant's evidence in relation to the balance of the charges against the appellant.

[55] The jury was well aware that their doubts about the reliability of the complainant's evidence in respect of particular counts should be taken into account in assessing the complainant's reliability on other counts. In this regard, the learned trial judge directed the jury:

> "A reasonable doubt, with respect to the complainant's evidence on any specific count, should be taken into account and considered by you in your assessment of her credibility generally, however, it remains a matter for you as to what evidence you accept and what evidence you reject."

[56] This Court cannot proceed on the assumption that the jury might have chosen to disregard what they were told by the learned trial judge.[14] The jury were made well aware, even if they were not already aware by reason of their own common sense, that any doubt about the complainant's credibility on any specific count had to be taken into account in assessing her credibility generally. There were good reasons why the jury could have considered that such doubts as they did have should be resolved in favour of the complainant on count 1 and counts 5 to 12.

[57] The jury may have regarded W's evidence as supporting the complainant on count 1. The jury may also have regarded the self-blaming complaint summarised in paragraph [25] above as strongly bolstering her credibility in relation to counts 1 and 5 to 12, and especially her account of the three incidents after which the sexual relationship with the appellant was terminated. The jury may well have thought that the complainant would not have revealed such terrible things about herself, and

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13 *Black v The Queen* (1993) 179 CLR 44.

14 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13], 425 – 426 [31] – [32], 431 [52].

reproached herself as bitterly as she did, if her complaint was not true. The jury may have thought that there was no reason to think that the complainant could be in any way advantaged by making up these allegations about her father. Whether or not the jury did reason in that way cannot, of course, be known. It is sufficient for present purposes to say that this Court cannot say that it was not open to the jury, who had the advantage of seeing and hearing both the complainant and the appellant give evidence, reasonably to conclude on the whole of the evidence that the appellant was guilty beyond reasonable doubt of the offences charged in count 1 and counts 5 to 12.

[58] The differences in the verdicts do not represent "an affront to logic and commonsense", nor do they suggest "a compromise of the performance of the jury's duty."[15] If anything, these differences tend to confirm that the jury performed conscientiously the difficult task which confronted them.

[59] Accordingly, I reject this ground of appeal.

Conclusion and order

[60] In my respectful opinion, none of the grounds of appeal are made out.

[61] I would dismiss the appeal.

[62] **HOLMES JA:** I agree with the reasons of Justice Keane and the orders he proposes.

[63] **LYONS J:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the reasons and the orders proposed by Keane JA.

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15 *Mackenzie v The Queen* (1996) 190 CLR 348 at 368.