SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAS* [2014] QCA 347
PARTIES:	**R** **v** **RAS** (appellant)
FILE NO/X:	CA No 106 of 2014 DC No 306 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2014
JUDGES:	Holmes and Morrison JJA and Alan Wilson J Separate reasons for judgment of each member of the Court, Morrison JA and Alan Wilson J concurring as to the order made; Holmes JA dissenting
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – VERDICT UNSAFE AND UNSATISFACTORY – where the appellant was charged with 17 offences concerning his daughter (X) and her friend (Y) – where the counts consisted of two counts of maintaining, three counts of indecent treatment of a child under 16 and under care, three counts of indecent treatment of a child under 16 who was a lineal descendant and under care, seven counts of rape, and two counts of attempted rape – where the two counts of attempted rape were the subject of a *nolle prosequi* – where there was a plea of guilty for two counts of indecent treatment of a child – where the jury returned differing verdicts for the remainder of the counts – where the initial interviews and charges were in 2005 – where the appellant failed to appear to a committal hearing, having absconded from the jurisdiction – where the appellant was not located until December 2012 – where the complainantt Y made a further statement upon the appellants location in 2012 – where there are concerns regarding the reliability of the most recent statement of Y – where the jury found the appellant not guilty for a number of counts referred to in the last statement, but found the appellant

guilty of others – where the grounds of appeal relate to count 1, maintaining a sexual relationship with a child – whether the verdict of guilt for count 1 was unsafe and unsatisfactory and not able to be supported having regard to all of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the grounds of appeal relate to count 1, maintaining a sexual relationship with a child – where the complainant Y made a further statement upon the appellants location in 2012 – where there are concerns regarding the reliability of the most recent statement of Y – where the jury found the appellant not guilty for a number of counts referred to in the last statement, but found the appellant guilty of others – whether the verdict of guilt for count 1 was inconsistent with the verdict with respects to counts 2, 5, 8, 9, 14, 16 and 17

Criminal Code 1899 (Qld), s 668E(1)
Evidence Act 1997 (Qld), s 93A

Jones v The Queen (1997) 191 CLR 439; [1997] HCA 12, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied

COUNSEL: J J Allen for the appellant
J Wooldridge for the respondent

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

[1] **HOLMES JA:** I have had the advantage of reading the judgment of Morrison JA. Unlike him, I have come to the conclusion that the guilty verdict on the maintaining count was unreasonable. But thanks to his Honour's careful setting out of the evidence, there is little of it I need to repeat.

[2] As particularised by the Crown, the maintaining charge required proof of an act of penetration. The jury acquitted on all counts of rape on the indictment, with the exception of one, on which they could not agree. The issue, then, is whether, consistently with those verdicts, they could have been satisfied beyond reasonable doubt that one of the uncharged acts of rape had occurred.

[3] Apart from the maintaining charge, the jury convicted on only four counts of indecent treatment. They involved allegations that the appellant had smeared chocolate paint around the two girls' vaginal areas and had induced them to pose naked while drawing them. Those were allegations which Y had made in police interviews in 2005 and which had some support from what X had said. It may be noted that the jury acquitted on a charge of rape of X which relied on Y's assertion at trial that she had seen the appellant put a vibrator inside the girl, in contrast with her statement in 2005 that she had merely been told by X that the appellant had tried to put a vibrator in her vagina.

[4] In the 2005 interviews (three recorded on audiotape and one on videotape), Y, who was then 13, appears a confident and articulate child able to give considerable detail of the events she described. They did not involve any incident of rape, or, indeed, any form of violent assault on her. Y's evidence given at trial when she was 22 years old was dramatically different from anything she had said in 2005. She gave a graphic account of oral, anal and vaginal rape occurring every time she went to the appellant's house, and frequent beatings in conjunction with rape.

[5] There was no discernible difference in the nature or quality of the evidence Y gave when describing the charged acts of rape (all of which involved penile rape) from that concerning the uncharged acts. The jury plainly did not consider her evidence as to the charged acts of rape sufficiently reliable to convince them beyond reasonable doubt. There was no logical basis on which they could have reached a different conclusion in relation to the uncharged acts of penile rape.

[6] It is suggested, however, that the jury could have accepted Y's allegation of rape by digital penetration, made for the first time in 2013. She said in her evidence at trial that the appellant would put his fingers under her knickers. What followed suggested an odd uncertainty:

> "He'd put them and he'd play with me inside of – I don't know what to call it – my vagina?"

The question is whether the jury could reasonably have found Y's evidence any more reliable in respect of this allegation than in respect of her allegations of other forms of rape. Unlike the other members of the court, I do not regard what Y said in 2005 about the appellant's touching her, or the appellant's 2013 admission to touching her "in her private parts" as adding some additional support for it.

[7] Whatever the reason for Y's hesitation in use of the term "vagina" at trial, it is clear that in 2005 she, like many children (and, indeed, some interviewing police officers), did not appreciate the distinction between the vagina and the vulva. It is quite clear that when she talked about being "grabbed on the rear end and the vagina", she was referring not to digital penetration, but to external touching with the hand. That is evident from her description of the appellant massaging her "vagina" over her clothes, when she would push his hand away. The appellant made the vague statement that he had "touched [Y] in her private parts", which he then explained as meaning that he had placed his hand "on her vagina". That form of expression similarly suggests some anatomical confusion; again it seems probable that he meant he placed his hand on her vulva in the area of the vaginal introitus.

[8] Neither the appellant's account, nor Y's as given in 2005, suggests digital rape, as opposed to touching of the external genitalia. To the contrary, Y's explicit description of what occurred makes it clear that it was not penetration.

[9] In my view, the jury's acquittal (or in one instance failure to agree) on all the charged acts of rape against both Y and X, which relied on the former's evidence at trial, indicates that they were not prepared to accept her as an inherently reliable witness. There is no logical basis for supposing that the jury might have found her evidence any more credible when she alleged digital rape. The 2005 allegation of touching and the appellant's own admission cannot supply the explanation, because they did nothing to support the allegation of penetration.

[10] The jury's verdicts of acquittal on the rape charges cannot be reconciled with their verdict of guilty on the count of maintaining an unlawful sexual relationship, which required proof of a rape. The verdicts are inconsistent and the guilty verdict on the latter count is consequently unreasonable. I would allow the appeal, set aside the conviction on count 1, maintaining an unlawful sexual relationship, and enter a verdict of acquittal on that count.

[11] **MORRISON JA:** The appellant was charged with 17 offences concerning his daughter (X) and her friend (Y). In summary there were two counts of maintaining a sexual relationship with a child (one count for each of X and Y); three counts of indecent treatment of a child under 16, and under care (relating to Y); three counts of indecent treatment of a child under 16, who was a lineal descendent and under care (relating to X); seven counts of rape (one concerning X and six concerning Y); and two counts of attempted rape (one concerning X and one concerning Y). The two counts of attempted rape were the subject of a *nolle prosequi*. There was a plea of guilty to counts 3 and 4. The other counts resulted in different verdicts by the jury.

[12] The various counts, the nature of the offence as particularised, and the verdicts of the jury are summarised in the table below.

Count	Nature of count	Complainant	Description of Particulars	Verdict
1	Maintaining a sexual relationship with a child	Y	The prosecution relied on allegations of sexual acts which involved penetration of Y's vagina, anus or mouth; this included all accounts of rape with respect to Y (counts 8, 9, 14, 15, 16 and 17), as well as uncharged acts involving penetration	Guilty
2	Maintaining a sexual relationship with a child	X	The prosecution relied on count 5 (a rape count concerning X), and Y's evidence of other acts of rape committed on X, but not the subject of charges	Not guilty
3	Indecent treatment of a child under 16, under care	Y	The prosecution relied upon the appellant having exposed Y to pornographic video tapes	Plea of guilty
4	Indecent treatment of a child under 16, who was a lineal descent and under care	X	The prosecution relied upon the appellant having exposed X to pornographic video tapes	Plea of guilty
5	Rape	X	The prosecution relied on Y's evidence that the appellant penetrated X's vagina with a vibrator	Not guilty
6	Indecent treatment of a child under 16, who was a lineal descendent and under care	X	This count concerned the appellant's application of chocolate body paint to X's breasts and genitals	Guilty
7	Indecent treatment of a child under 16, and under care	Y	This count concerned the appellant's application of chocolate body paint to Y's breasts and genitals	Guilty

Count	Nature of count	Complainant	Description of Particulars	Verdict
8	Rape	Y	The prosecution relied upon Y's evidence of penetration of her mouth with the appellant's penis, following on the events of count 7	Not guilty
9	Rape	Y	This relied upon Y's evidence of penetration of her vagina with the appellant's penis, after a massage with massage oil	Not guilty
10	Attempted rape	X	Attempted penetration of the vagina with a vibrator	*Nolle prosequi*
11	Attempted rape	Y	Attempted penetration of the vagina with a vibrator	*Nolle prosequi*
12	Indecent treatment of a child under 16, who was under care	Y	This count relied upon the evidence of X and Y, to the effect that the appellant required them to sit in sexual poses, or to be in sexual poses, and then drawing them	Guilty
13	Indecent treatment of a child under 16, who was a lineal descendent under care	X	This count relied upon the evidence of X and Y, to the effect that the appellant required them to sit in sexual poses, or to be in sexual poses, and then drawing them	Guilty
14	Rape	Y	This relied on Y's evidence of an occasion of penetration of the vagina with the appellant's penis, when he choked her and she blacked out	Not guilty
15	Rape	Y	This relied on Y's evidence of an occasion of sodomy, after which blood was running down her thighs	Hung jury
16	Rape	Y	This relied on Y's evidence of an occasion of penetration of the vagina with the appellant's penis, when he tied her hands to the ends of X's bed	Not guilty
17	Rape	Y	This relied on Y's evidence as to an occasion of penetration of her vagina by the appellant's penis, whilst in a car	Not guilty

Grounds of appeal

[13] The two grounds of appeal both relate to the verdict on count 1. The first ground was that the verdict was unsafe and unsatisfactory, and not able to be supported having regard to all of the evidence, relying on s 668E(1) of the *Criminal Code* 1899 (Qld). The second ground was that the conviction on count 1 was inconsistent with the verdict of the jury in respect of counts 2, 5, 8, 9, 14, 16, and 17. In that respect reliance was placed on *MacKenzie v The Queen*,[1] and *Jones v The Queen*.[2]

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1 *MacKenzie v The Queen* (1996) 190 CLR 348. (***MacKenzie***)

2 *Jones v The Queen* (1997) 191 CLR 439. (***Jones***)

[14] The "unsafe" or "unsatisfactory" ground requires the application of the test laid down in *M v The Queen*[3] and reiterated in *Jones v The Queen*:[4]

> "In *M*, Mason CJ, Deane, Dawson and Toohey JJ said that the test for an unsafe or unsatisfactory verdict was whether the court thought that, upon the whole of the evidence, it was 'open to the jury' to be satisfied beyond reasonable doubt that the accused was guilty. The majority emphasised, however, that it was not the function of the court to answer that question merely by examining the transcript of evidence and the exhibits. Their Honours said that:
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> > '[I]n answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.'
>
> The majority judges explained the application of the test as follows:
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> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonably doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.'"[5]

[15] In *MacKenzie* the High Court referred to the applicable propositions where one has arguably inconsistent verdicts:

> "…Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
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> > 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'

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3 *M v The Queen* (1994) 181 CLR 487, at 493. (***M***)

4 *Jones*, at 450-451, per Gaudron, McHugh and Gummow JJ.

5 *Jones* at 450-451, internal footnotes omitted.

> …Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt."[6]

The appellant's submissions

[16] The appellant contended that there was a rational basis for differential verdicts when considering the convictions on counts 6, 7, 12 and 13, and the acquittals on counts 2, 5, 8, 9, 14, 16 and 17. It was acknowledged that there was evidence of counts 6, 7, 12 and 13 in Y and X's statements given under s 93A of the *Evidence Act* 1977 (Qld),[7] and their credibility with respect to those counts was supported by evidence of complaint by them. It was contended that the acquittals on counts 2, 5, 8, 9, 14, 16 and 17 were explicable on the basis that neither complainant made any mention of those offences in their 2005 interviews, and there was no satisfactory explanation from Y as to the failure to mention them. Further, the differentiation by the jury could be explained by the fact that in 2005 Y described the chocolate body painting (count 7), but not the alleged rape (count 8) which, according to her trial evidence in 2013, was inextricably linked with that event. Likewise, in 2005 Y mentioned an occasion when she was massaged with massage oil, but did not mention the alleged rape (count 9) which, according to her trial evidence, immediately followed.

[17] The appellant invited the court to view the last s 93A interview by Y,[8] for what it portrayed as to her comfortable and forthright manner, but in particular the conclusion when she confirmed that she had, by then, told police about all relevant matters. The point being made was that Y's claim at trial, namely that she had told the police in 2005 about the extended ordeal of multiple rapes of herself and X whilst tied up under the house, was patently false.

[18] The appellant contended that there was no rational basis for the conviction on count 1, as particularised by the prosecution, and the acquittals on counts 2, 5, 8, 9, 14, 16 and 17. The appellant was acquitted of all counts of rape and therefore count 1 relied upon the jury being satisfied that the appellant had committed more than one of the uncharged unlawful sexual acts of which Y gave evidence at trial. None of those uncharged acts had been the subject of complaint in 2005. It was contended that the unsatisfactory nature of Y's evidence on those counts on which the appellant was acquitted, applied equally to her recounting of the uncharged unlawful sexual acts.

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6 *MacKenzie* at 366-367, per Gaudron, Gummow and Kirby JJ. Internal footnotes omitted.

7 There were three such interviews with X: on 15, 16 and 22 February 2005. There were four such interviews with A: on 15, 16 and 22 February 2005, with two interviews occurring on the 16 February 2005.

8 Exhibit 14.

The jury, therefore, would have entertained a doubt about the uncharged unlawful sexual acts, and acquitted on count 1.

[19] The appellant emphasised the necessity that proof of count 1 be proof of that count as particularised, namely as involving acts of penetration. In that regard the appellant referred to *R v CAZ*.[9]

Sequence of s 93A interviews – 2005

[20] The first interviews took place with Y and X on 15 February 2005. They were initiated because Y and X had spoken to a guidance counsellor and social worker at their school.

[21] At that time Y was 13 years and three and a half months, having been born on 29 October 1991. The topics referred to by Y in the first interview, in answer to a request to tell the police officer about what happened over at X's house, included the following:

(a) that the appellant made them watch "sex movies and stuff like that";[10] Y was able to identify the name of one of the movies, and very specific details of more than one movie;[11]

(b) that they were expected to "wear like little singlets and small little [pantyhose] things like that";[12]

(c) the appellant "sometimes walks in on us while we're having a bath";[13]

(d) the appellant "bought a vibrator and stuff like that";[14] Y was able to describe the vibrators by colour, size and appearance;[15] the appellant told them to use the vibrators and though Y refused, X "had to use it";[16] as explained, it transpired that Y did not see this event, but said that she was told by X that it occurred;[17] all she saw was X lying on her back and the appellant holding the vibrator in a position where it seemed that he was pushing it in X's vagina;[18]

(e) the appellant "smeared … some sort of chocolate over X's rudie dudie bit";[19] Y said that the appellant:

> "made [X] get undressed then … he started smearing chocolate on her stomach and stuff and … he said for me to start smearing it on her stomach and stuff"[20] …[the appellant] started smearing on her …upper top area, then down there… on her vagina area";[21]

Y saw X "lying down and he was smearing stuff over her";[22] Y was able to describe what the tube of chocolate looked like, the details of

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9 *R v CAZ* [2012] 1 Qd R 440.
10 AB 306.
11 AB 307-313.
12 AB 306.
13 AB 306.
14 AB 306.
15 AB 317, AB 320.
16 AB 317.
17 AB 318-319.
18 AB 318.
19 AB 306.
20 AB 320.
21 AB 320.
22 AB 321.

the paint brush used to smear it on, and the name of the product;[23] she described where the appellant smeared the chocolate on X, and how, and the fact that a piece of blue tarpaulin was used so it would not get on the carpet;[24] the appellant also smeared chocolate on Y, some on her breasts and some on her stomach and then "down near my vaginal area";[25]

(f) the appellant "touches us and stuff like that";[26]

(g) the appellant gave them "Playboy books" to look at;[27] Y recalled considerable details of what was revealed in those books;[28] the magazines had been given on a number of occasions, starting when she was 12;[29]

(h) on another occasion the appellant had "some creamy stuff" and "he was like giving us a back massage and stuff like that";[30] in doing so "he went like down and just to the bottom area and did the bottom area";[31]

(i) the appellant bought Y and X lingerie including G-strings, panties and bras; some of them were from an adult shop, which Y was able to name;[32] Y and X had to wear what he had bought like a uniform, and they would:

> "do little parades and stuff like that. Like we'd parade around and stuff like that just to keep him happy … dance around and stuff like that, just to keep him happy";[33]

Y described that they would do little stories while wearing the "uniform", "just to keep him happy. Keep him off our backs. … Keep him from doing stuff that we didn't want to do.";[34] and

(j) Y described the incidents of touching as being "[w]ell … he touches me and [X] up near the … breasts … and down near the vagina and the behind";[35] he grabbed X "on the rear end … and on the boob and he grabbed me on the rear end and the vagina"; and he would "sort of like massage" her vagina, but over her clothes;[36] the same spots were touched "every day" and the appellant was "feeling our behind" and "near the buttocks".[37]

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23 AB 321.
24 AB 322-323.
25 AB 324-325.
26 AB 306.
27 AB 313-314.
28 AB 313-314.
29 AB 315.
30 AB 324.
31 AB 324.
32 AB 326.
33 AB 326-327.
34 AB 328-329.
35 AB 329.
36 AB 330.
37 AB 331.

[22] On the night of 15 February 2005 X was interviewed and a s 93A statement was produced. That interview followed the one with Y. The transcript reveals that X was obviously upset, and crying and reluctant to speak to the police officer. Her evidence included the following:

(a) when Y came over to X's house, there were times when the appellant put "sex movies" on in the lounge room;[38]

(b) X also described the fact that the appellant had "porno magazines", which he put on the couch;[39] she and Y looked at the front cover;[40] she had seen the magazines a couple of times at her home;[41]

(c) the appellant "brought a vibrator for both of us but we didn't touch them";[42] she and Y were in X's bedroom when the appellant gave them the vibrators;[43] X described that the appellant got the vibrators when he "went to the adult shop";[44] she then described the appearance and colour of the vibrators; she denied that the appellant said anything about how to use them, or that either she or Y did anything with them;[45]

(d) in relation to the chocolate body paint, X said "we had to put it on each other's body", "put it all over"; it was the appellant who said to do that;[46] Y put the chocolate on her, and she put the chocolate on Y, on arms and legs;[47] she denied that anyone else had put chocolate on her; however she confirmed that the appellant had put a blue tarpaulin on the lounge room floor so they would not get the chocolate on the floor;[48] the appellant had obtained the chocolate paint from "the adult shop", which she knew because the appellant "told us he was going there";[49] she said that the appellant was outside when she and Y put chocolate on each other;[50] she and Y were wearing swimsuits at the time;[51] and

(e) in relation to the underwear, she described them as "panties and stuff like that", "tops and, like, a see-through part on top";[52] when they did the dances they "wore the panties", and "a white top and that and the knickers";[53] the appellant made the decision to buy the clothing, and that included "a pair of G-strings";[54] X denied that they had worn the G-strings, but simply "stuck 'em in the drawer and didn't touch them".[55]

[23] The next s 93A interview was with X, on the morning of 16 February 2005. That interview followed a search which was conducted at her house the night before, and

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38 Exhibit 4, page 6.
39 Exhibit 4, page 7.
40 Exhibit 4, page 7-9.
41 Exhibit 4, page 8.
42 Exhibit 4, page 9.
43 Exhibit 4, page 9-10.
44 Exhibit 4, page 10.
45 Exhibit 4, page 10.
46 Exhibit 4, page 10.
47 Exhibit 4, page 11.
48 Exhibit 4, page 11.
49 Exhibit 4, page 11.
50 Exhibit 4, page 11.
51 Exhibit 4, page 12.
52 Exhibit 4, page 13.
53 Exhibit 4, page 13.
54 Exhibit 4, page 15.
55 Exhibit 4, page 15.

the questions were directed to various items discovered during that search, including a purple vibrator, lingerie including G-strings and singlets, a pornographic video with a name matching that identified by Y, and a pornographic magazine. X's evidence included the following:

(a) the appellant had got the vibrator and given it to X, and she hid it under one of the pillows on her bed;[56] X said she had never used the vibrator, and that the appellant did not say anything when he gave it to her;[57] X had been told by Y that the appellant had put the vibrator in Y's vagina, and that he was "just showing Y how to use it";[58] she denied that there was any time when the appellant had showed her how to use the vibrator;[59]

(b) the appellant had bought X and Y "some knickers";[60] she said that they only wore them when they were doing "the dance thing" like "Dancing with the Stars", in the lounge room;[61] the appellant had purchased the knickers for Y;[62]

(c) she denied that anything else had happened at her home;

(d) in relation to the pornographic video, the appellant put that on, but "we tried to look away", because "we didn't know if it was right … the video wasn't right for us";[63] and

(e) there were two pornographic magazines, which the appellant put on the lounge;[64] at one time she found such magazines on her bed.[65]

[24] The next s 93A interview was with Y, on 16 February 2005. It is apparent from the transcript that this interview followed the one with X on the same morning. Y's evidence included the following:

(a) in relation to the issue of the vibrators, Y was initially embarrassed and nervous, and reluctant to speak about them, as "there's a boy around", a reference to a male police officer who was present; once he left Y said that the appellant had just brought the vibrators out and "said what to do with it and stuff like that";[66] she denied X's version that the appellant may have put the vibrator in her body, but said that the appellant had turned the vibrator on, and touched her on her hands;[67]

(b) Y was asked whether she could remember anything that she had not revealed the previous night; at that point there was a long pause and she replied "no, not really".[68]

[25] The next s 93A interview occurred on 16 February 2005, but at 2.25 pm. The transcript reveals that the police officer had gone back to Y's school because she had been told that Y had something she wanted to tell her. Y revealed the following:

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56 AB 337.
57 AB 338.
58 AB 344-345.
59 AB 346.
60 AB 339.
61 AB 339-340.
62 AB 340.
63 AB 341.
64 AB 342.
65 AB 343.
66 AB 352.
67 AB 352.
68 AB 353.

(a) in relation to the vibrator, the appellant "did try and actually yeah, put it in there";[69] she said that the appellant first did it to X, and "[t]hen he did it to me";[70] each of the girls had been saying "No";[71] the appellant was "trying to put it in" X, but she was pushing it away; X was sitting up so that Y could not actually see what he was doing but from what X told her "[h]e was trying to put it in her vagina", having said something along the lines of "I'm going to teach you how to use a vibrator";[72]

(b) Y described that the appellant tried to insert the vibrator in her vagina, but "he couldn't 'cause I wouldn't let him";[73] she described how the appellant attempted to open her legs by using his hands on her knees, but she resisted;[74] she knew that he was attempting to put the vibrator in her vagina, "'cause he told us";[75] the appellant had said that he wanted X and Y to "learn something", that he wanted to "show something so you can learn it";[76] and

(c) she believed X as to what X said happened to her, "because it happened to me … I have no doubts".[77]

[26] The next two s 93A interviews took place on 22 February 2005. They occurred because Y and X had been in to see their guidance officer at school and (as Y put it) gave her more information or evidence. As a consequence the police interviewed the girls again.

[27] Y revealed the following in this interview:

(a) the appellant had given X and Y drinking mugs, with pictures of naked women and men on them;[78] the naked men and women were "just standing there and I think they were touching each other … in their front places and then there was a naked man and woman having sex";[79] the mugs were accidentally broken;

(b) on one occasion the appellant had walked in while they were in the bath, without knocking;[80] after that "he was just talking to us and he put some books on the bed and the vibrator and stuff like that";[81]

(c) the appellant "got me and X to do like a pose and we weren't wearing anything";[82] he did one of X, one of Y and then of one of them together; Y described what happened as "he made X sit with her legs spread and he made her put her fingers in her – yeah"; at this point of the interview Y indicated with her hand to an area below her waist, but then identified that X had put her fingers in her own vagina;[83] she

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69 AB 355.
70 AB 355.
71 AB 356.
72 AB 356.
73 AB 357-358.
74 AB 358-359.
75 AB 359.
76 AB 360.
77 AB 362.
78 Exhibit 14, page 3.
79 Exhibit 14, page 4.
80 Exhibit 14, page 6.
81 Exhibit 14, page 6.
82 Exhibit 14, page 7.
83 Exhibit 14, page 7-8.

described that she had to do the same thing after X, except that "I didn't have to put my fingers … in there";[84]

(d) Y described that "actually there were two he did with us together";[85] she described it as:

> "the first one was – I was sitting there with my legs spread and X had her leg over one of my legs. Um, and she had one hand down near my area and I had one hand on her breasts";[86]

(e) Y was questioned as to her account of X having her hand down near "your area", and asked was it touching; her answer was that X's hand was touching her vagina, and then explained that it was "mostly her fingers" and that it was on the inside of her vagina;[87]

(f) Y described the second occasion has having occurred on a couch that could be turned into a bed, and:

> "I remember I had to lie down and X had to pretend she was a boy … [a]nd, um, I think she had to hold the vibrator on the top of my [indicating her vagina] – well, she had to make it look like the vibrator was in my vagina";[88]

she explained that she was "on [her] back with my legs spread", and X, who was standing up, put the vibrator "on the couch near my vagina";[89] and

(g) Y described another occasion when she and X were in the bath, and the appellant washed X's back;

> "then he reached around and grabbed her – grabbed her, um, nipples, then he did the same to me when I – when he washed my back".[90]

[28] Y was again asked at the end of that interview whether she remembered anything else and she said that she could not remember anything else.[91]

[29] X was also interviewed on 22 February 2005. She was asked about things that she had told the guidance officer, but which she had not yet told the police interviewer. The items dealt with in her interview were:

(a) she described the mugs that had been provided by the appellant, and which contained pictures on them of "naked woman and that";[92] she also described how they were accidentally dropped and then put in the bin; the naked men and ladies were described as "just standing there", but "[t]hey didn't have anything on";[93]

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84 Exhibit 14, page 8.
85 Exhibit 14, page 9.
86 Exhibit 14, page 9.
87 Exhibit 14, page 10.
88 Exhibit 14, page 9.
89 Exhibit 14, page 9.
90 Exhibit 14, page 12.
91 Exhibit 14, page 12.
92 Exhibit 15, page 2.
93 Exhibit 15, page 3.

(b) X described the occasions when the appellant sketched the two of them; she said "we had to pose for him", but when asked what sort of pose said that she "[c]an't really talk about it", but "we weren't really wearing anything";[94] X said that they did one pose by themselves, and then "we did one together"; she was asked how did she know how to sit or to pose, and she said "me and Y just figured out some stuff";[95] apart from having no clothes on, she said they did not have to do anything else;[96] more specifically she denied that they had to put them arms and legs in any particular spot;[97] and

(c) X described an occasion when the appellant heard Y saying to X that she would wash her back, and instead volunteered to wash their backs himself, which he did;[98] she was asked whether anything else got washed by the appellant and she said "no", and "no" also to the question as to whether anything else had happened that she did not like.[99]

[30] X made it plain on 22 February 2005 that she was worried about what was going to happen. The video s 93A statements, and the transcripts, show that X was having considerable difficulty speaking, not just on that occasion but at all times, about the subject matter of the questions, especially where they were directed at the appellant's conduct towards the two girls, and what actually happened in terms of physical acts. That reluctance was also evident at the trial, where most answers were that she had forgotten most things. As referred to below, in paragraph [61], the Court was invited to watch Y's last s 93A video statement for what it portrayed. I have watched and listened to all of the s 93A statements. Those for X add considerably to the bare transcript, including in relation to: her evident discomfort, and at times distress, at referring to body parts, revealing the details of physical acts or her father's conduct; the very long pauses between some questions and answers or non-responses; the nods and shrugs (not recorded on the transcript) that answered some questions; and the hand movements used to indicate body parts. This was in contrast to the level of detail that she told the guidance counsellor and social worker. The jury could well have formed the view that X's evidence was characterised by an unwillingness to reveal distressing events, particularly as they involved her father, rather than a loss of memory.

Interview with the appellant – 16 August 2013

[31] The appellant was charged in February 2005, initially only with two offences, but then more as further disclosures were made by Y and X. In August 2005 he failed to appear at a committal hearing, having absconded from the jurisdiction. He was not located until December 2012. By that time Y was about 21 years of age, and X 20 years and eight months.

[32] The appellant was interviewed on 16 August 2013 whilst in custody. By then he had been charged with all offences. He said the following in his interview:

(a) "I think I was inappropriate with [Y] … [a]t certain times. I've touched her";[100] when asked for more information about the touching, he said:

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94 Exhibit 15, page 4.
95 Exhibit 15, page 4.
96 Exhibit 15, page 4.
97 Exhibit 15, page 5.
98 Exhibit 15, page 7.
99 Exhibit 15, page 7.
100 AB 374.

> "Oh well, I know I touched her in the areas that I shouldn't have touched her. Like, I touched her, it's hard to make … [o]nce at my house … I inappropriately touched her in her private parts";[101]

(b) having said that he touched Y "in her private parts", he went on to say, when asked to give further details, that he "placed my hand on her vagina", and when pressed as to whether he meant "on the skin of her vagina", he responded, "[o]h well, I just, yeah, I was doing something that was inappropriate … I can't be any more specific than that";[102]

(c) the appellant was asked whether Y was wearing any clothes at the time of the touching and the answer was: "Um, no, she probably wasn't", and he confirmed that Y would have been naked;[103] he was then asked for Y's reaction to being touched and he said:

> "Well, she didn't run, try to run away from the house … [o]r scream or rant and rave or, you know, … I was the adult, she was the child … [s]o what I was doing was wrong";[104]

(d) the appellant was asked how many times the touching happened, and he identified that:

> "it would have probably happened once or twice", then confirming that at the time that Y was naked and he put his hand "on her vagina";[105]

(e) the appellant repeatedly denied any suggestion of sexual intercourse or penetration;[106]

(f) the appellant admitted that he exposed Y and X to pornographic videos, blaming it on the fact that he was "addicted to pornography at the time";[107]

(g) the appellant insisted he was there to tell the truth, and said:

> "I didn't force my daughter … [o]r [Y] to do anything they didn't want to do … [i]n other words there was no, there was no pressure, there was no threats, there was no, there was never any of that";[108]

(h) the appellant denied molesting his daughter in this way:

> "But I didn't molest my daughter as in I didn't have sexual, you know, relations with my daughter. And I didn't certainly have sexual, other than physical, just touching with my hands … [y]ou know, and like that, with [Y], ever";[109]

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101 AB 375.
102 AB 375-376.
103 AB 376.
104 AB 376.
105 AB 377.
106 AB 378-379.
107 AB 380.
108 AB 381-382.
109 AB 382.

(i) his relationship with Y was described as:

> "And [Y] and I just seemed to, it was, I don't know if it was infatuation with her with me or me with her, whatever, and it just, it just got out of hand, and that's really what it was about, you know. And, and it was no malice, there was no, there was no intent to rape her or, you know … or stuff like that. It was just, it just got, she would sit on my lap every day in the kitchen … [s]he would just [indistinct] on the couch, she'd always want to, and, … [a]nd it just got to the point where it went, it went areas it shouldn't have gone … [a]nd that's it. But there was no sexual, I never raped her, I never had sex with her";[110]

(j) when questioned more closely about the occasions when Y would be sitting on his lap on the couch and he touched her on the vagina, the appellant described that as happening "a couple of times", then "two or three times", but "[i]t wasn't hundreds of times, and it wasn't every day";[111] the appellant said that Y would:

> "just come and sit on, you know, on my lap … [a]ll the time … [s]he would just always sit on my lap. We'd be eating meals she'd want to, you know, like that …";[112]

(k) the appellant went on to explain that not only were those occasions occurring at his house, there were also several occasions at Y's house;[113] and

(l) even though he admitted touching Y on her vagina, the appellant denied having sex with her; he also denied having sex with X, or touching her inappropriately;[114] and

(m) the appellant referred again to the frequency with which Y would sit on his lap, in the context of referring to the fact that Y's mother must have known something was going on:

> "But she must have known because for her daughter to sit on my lap whenever she wanted all the time, and hug me and, cry if I'd go home and stuff like this".[115]

Discussion

[33] It is true to say that both Y and X referred to the chocolate body painting incident[116] on 15 February 2005, in their first interviews. However, X's account on 15 February 2005[117] was different from that of Y. According to X each girl put the chocolate body paint on the other girl, at the request of the appellant, but the appellant was not involved in putting the chocolate body paint on at all. In fact, according to X the appellant was "outside doing something" at the time when it occurred. According

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110 AB 384-385.
111 AB 386.
112 AB 386-387.
113 AB 392.
114 AB 404-405.
115 AB 406.
116 Counts 6 and 7.
117 This was her only account as this topic was not mentioned by her on 16 February, 22 February or at the trial.

to X he told the girls to "[j]ust have a play with the chocolate", and then when he came inside "we went to have a bath".[118] Further, according to X both girls were wearing their swimsuits at the time and the chocolate body paint was only put on arms and legs, and in the case of Y, also on her stomach.[119]

[34] It is difficult to see how the jury could have concluded that the chocolate body paint incident constituted indecent treatment, if they acted on X's account alone. On that account the appellant was not involved, apart from providing the chocolate body paint, and in any event the paint was applied to arms and legs, and on Y's stomach. It is, in my view, fairly plain that the jury must have accepted Y's account of this incident, in order to convict upon it. The appellant does not challenge the correctness of the verdict on counts 6 and 7, which, of course, proceed on the basis that it was the appellant who was guilty of indecent treatment of each girl, by his application of chocolate body paint to their breasts and genitals. That was the way in which counts 6 and 7 were summarised to the jury by the trial judge,[120] and the appellant accepts that those two counts proceeded on that basis.[121]

[35] What follows from that is that on these counts, at least, the jury have plainly accepted Y's account of the circumstances. That account was first given on 15 February 2005, and then again at the trial.

[36] Counts 12 and 13 (naked in sexual poses), and the verdicts of guilty in respect of them, stand in much the same position. Both Y and X referred to this incident in their interviews on 22 February 2005. It was not referred to by either of them in the interviews on 15 February or 16 February 2005. Y and X said that, at the appellant's request, they each had to pose naked so he could sketch them, and then pose together for the same purpose.[122] However, there were differences between Y and X as to what occurred. According to Y it was the appellant who arranged the poses, whereas X said that it was she and Y who "just figured out some stuff".[123] Further, no aspect of the poses, on X's version, included having legs or arms in any particular way or being positioned other than in a normal sitting position, nor did it involve, as Y related it, X being required to sit with her fingers in her own vagina, and on the joint sitting, X being required to have her fingers in Y's vagina.[124]

[37] On 15 February 2005 Y and X spoke to their guidance officer at the school. Some of that conversation was in the presence of the social worker. She noted that at first it was Y who spoke, and X was "quite ill at ease about the whole thing",[125] and "very reticent at first".[126] Her notes contained a precis of what she was told by the girls. In terms of the subject matter of counts 12 and 13[127] she recorded this:

> "He got us to pose naked so he could draw us. He made [X] sit with legs apart and finger in her vagina and then one other with her hand on her breast. [Y] had to sit with her legs spread so he could see everything. And with [Y] in the same pose. [X] had to put her finger in [Y]'s vagina and [Y] had to put her hand on [X]'s breast."[128]

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118 Page 12 of X's interview on 15 February 2005.
119 Page 11-12.
120 AB 264-265.
121 Appellant's outline, paragraph 3.
122 A's statement, page 7; X's statement, page 4.
123 Page 4.
124 A's statement, pages 7, 8 and 10.
125 AB 110.
126 AB 111.
127 Getting A and X to pose naked, and sketching them.
128 AB 112.

[38] Thus, whilst it is true that the first time these matters were mentioned in the s 93A statements was on 22 February 2005, the essential details had already been the subject of complaint by Y and X to their guidance officer.

[39] Counts 12 and 13 proceeded on the basis that they depended on the proof of the appellant's procuring indecent poses and actions by each of Y and X.[129] That is the way in which those counts were summarised to the jury by the trial judge,[130] who emphasised that they involved the appellant "getting them to sit in sexual poses, or be in sexual poses and then drawing them", and that the allegation for each count was "that he had them in sexual poses, touching themselves, inserting fingers into their vaginas, that sort of thing". The appellant does not challenge the jury's verdict that he was guilty of those offences.

[40] That being the case, it seems plain that the jury once again accepted the account of Y as to what took place. Having been told that they had to be satisfied that the appellant required both girls to sit or be in "sexual poses, touching themselves, inserting fingers into their vaginas …", that conclusion could only have been reached by accepting Y's evidence and not just X's.

[41] Mention should also be made at this juncture of several aspects of Y's evidence which were corroborated by items discovered during the police search, or by admissions. It was Y who gave precise details about the vibrators, including colour and shape. That was proved correct when the vibrators were discovered on the search. Further, her evidence, given in quite specific detail, about the pornographic videos was proved correct when a video with the name she nominated was discovered on the search. The same thing applies to her quite specific evidence about the lingerie and the pornographic magazines. In each case Y's evidence was far more specific than that of X, and proven correct by other evidence. The appellant's admission that he showed pornographic videos to the girls supported her evidence, even down to the specific name that she could recall for the video.[131]

[42] The foregoing demonstrates, in my opinion, that the jury's acquittal on all the rape charges did not mean that there was a wholesale rejection of Y's evidence. Clearly the jury were not satisfied beyond reasonable doubt that the rapes had occurred, and to that extent the jury might be said to have rejected Y's evidence. But they clearly did not reject her evidence on counts 6, 7, 12 and 13. No doubt they were fortified in that by their ability to be confident of her evidence otherwise because of its corroboration on a variety of facts.

Consideration of count 1 – verdict unsafe and unsatisfactory.

[43] That then leads to a consideration of the appellant's contention that there was no rational basis for the conviction of the appellant on count 1, when one has regard to the acquittals on count 2 and the rape charges.

[44] As the appellant correctly points out, the acquittals on the rape counts meant that count 1 relied upon proof of the appellant having committed more than one of the uncharged unlawful sexual acts of which Y had given evidence at trial. Those unlawful uncharged sexual acts were described, without objection, to the jury in this way:

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129 As the appellant accepts, paragraph 3 of the appellant's outline.

130 AB 266.

131 AB 403.

> "… the prosecution relies upon sexual acts about which [Y] was not specific as to times or circumstances under which the acts occurred. **Those sexual acts described by [Y] included putting his fingers into her vagina when she was sitting on his lap**; inserting the vibrator into her vagina; after the girls found a vibrator in a drawer and were playing with it [the appellant] forced the vibrator inside her; after crawling in the hallway [the appellant] dragged her onto the bed and raped her vaginally; she was raped vaginally, orally and anally when the girls were tied up under the house; she was raped from behind at the kitchen sink; after making a mess in the abandoned house next to the studio, she was raped as "punishment"; she was raped in the pool; she was anally raped on the back stairs; she was raped on [X]'s bed when [the appellant] collected her from school early for [X]'s birthday party."[132]

[45] The jury were also instructed by the trial judge how to approach their conclusion on count 1 in the event that they were not satisfied of one of the rape charges:

> "If you have a doubt about the specific offences in counts 8, 9, 14, 15, 16 & 17 with respect to [Y], then you should only convict [the appellant] on the basis of the evidence of the other alleged acts if after carefully scrutinising [Y]'s evidence you are satisfied beyond reasonable doubt that [the appellant] did these acts during the period alleged in the indictment between 31st December 2003 and 16th February 2005."[133]

[46] For present purposes it is sufficient to focus on the allegations by Y that the appellant had put his fingers inside her vagina when she was sitting on her lap. Acceptance of her evidence of those acts would be sufficient to sustain the jury's verdict on count 1, as Y's evidence was that form of penetrative act occurred on more than one occasion in the relevant period.

[47] In her first interview on 15 February 2005 Y gave evidence of having been touched by the appellant. She said "… he touches us and stuff like that".[134] Later in the interview, after having dealt with separate specific incidents[135] Y was asked again about her statement that the appellant had touched them. She said that in the context of playing a game "… then he started touching me and stuff …",[136] which she then clarified by saying "he touches me and X up near the, um, breasts … and down near the vagina and on the behind".[137] It was made plain that this happened on more than one occasion, saying it was "every time we play that game",[138] and "he mostly touched the same spots every day".[139] She referred to the occasion when the appellant touched her on the last time the game was played, and described the appellant having "grabbed X on the rear end … and on the boob and he grabbed me on the rear end and the vagina".[140] She then described that he used his fingers to massage her vagina, over her clothes.[141]

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132 AB 413. Emphasis added.
133 AB 413.
134 AB 306.
135 Such as the vibrators, the pornographic videos and the chocolate body paint.
136 AB 329.
137 AB 329.
138 AB 329.
139 AB 331.
140 AB 330.
141 AB 330.

[48] By the time Y and X were interviewed by the police on 15 February 2005 they had already spoken to their guidance officer and a social worker at the school. The guidance officer's evidence, recorded in note form, was a summary of what was said by both girls, in combination. The account included that: "X said he touched them with his hands and fingers and in parenthesis "down there"."[142] Her account was that usually Y initiated what was said, and often X would add something, but X became more vocal as time went on.[143] The guidance officer's evidence also included the fact that later on that first day the girls returned to speak to her, "[a]nd they said we – we didn't' tell you that [the appellant] had had sex with both of us".[144]

[49] The social worker's evidence was that she saw both girls on 15 February 2005, subsequently making notes of what they said. The social worker called in the guidance officer, and together they spoke to Y and X. Included in that account was this note: "Y talked about being touched by [the appellant] too."[145] The notes ended with a record that X "said that [the appellant] doesn't want her telling anyone".[146]

[50] The interviews on 16 February 2005 were concerned principally with specific matters such as the vibrators, the lingerie and the pornographic videos. In other words, they focussed on the items that had been discovered during the police search. The interviews on 22 February 2005 were prompted by the girls having spoken to the guidance officer and having given more information. The interviewer spoke to Y first and specifically asked to speak about those things that Y had not already told the first interviewers on 15 February and 16 February 2005.[147] The same thing occurred with X.[148] For that reason those statements focussed on the topics of the mugs which had been given to Y and X, the appellant walking in on them while they were in the bath, the posing incident and an occasion when the appellant washed their backs while they were in the bath.

[51] At trial Y gave evidence as to how the appellant would put his hand under her underwear and play with her vagina, putting his fingers inside her.[149] In cross-examination Y was asked how many times it occurred, and her answer was "[m]any times. I don't have a number".[150] She referred to the event again, when referring to her complaints to the appellant, and that it was about "he was putting his fingers up my skirt inside me and sexually molesting me".[151] In cross-examination it was put to Y that the appellant did, in fact, put his hand in her underwear and play with her vagina, but that at no stage did he insert any fingers in her vagina.[152] She rejected that saying: "He definitely did put his fingers inside my vagina." Further, in cross-examination it was put to her that "the touching of your vagina by [the appellant] occurred about six times".[153] Her response was that she did not know the dates or "how many times he touched me, but he did touch me, yes". Finally, in cross-examination it was put to Y that the appellant "did touch you [sic] vagina", to which she agreed.[154]

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142 AB 111.
143 AB 112.
144 AB 113.
145 AB 120.
146 AB 120.
147 A's statement, page 3.
148 X's statement, page 2.
149 AB 88-89.
150 AB 156.
151 AB 158.
152 AB 196.
153 AB 200.
154 AB 205.

[52] Y also gave evidence in cross-examination as to why, in 2013, different matters were revealed from those which had been revealed in 2005. She said she was scared and did not want to talk to the police in 2005. Further, she explained that it was "because I was scared of them and him. I was 12 years old."[155] She reiterated that the events were quite concerning, and:

> "Well, it was my body that stuff was being done to, so yes, I was quite concerned. More afraid. I wasn't sure what was going on. … Yes, I was scared."[156]

She said the same thing about not telling her mother or anyone else at the school.[157] In re-examination she referred to the threats made against her and X by the appellant and that they were playing on her mind at the time she spoke to the police in 2005. She said she was "a lot scared of the police".[158] She said that she was still scared, because of the appellant's threats, at the time she spoke to the police in 2005.[159] She was then asked about the time when she heard from the police in 2005 that the appellant had fled, and whether that played on her mind. Her answer was:

> "I couldn't sleep. I couldn't think. I hated going anywhere. I didn't know where he was. I didn't know what he'd do. I didn't know if he'd show up."[160]

Then, when she was asked again about why things had been said in 2013 and not 2005, and to explain her feelings before she had been told that the appellant had been recaptured, her answer was:

> "Scared, worried. I was almost in hiding as best I could. I didn't use social media. I didn't give out my phone number. I didn't go out often. I was very much a hermit. I just didn't feel safe."[161]

She explained that her ability to tell the police about all the other things, once the appellant had been recaptured, was because:

> "I felt more safer. I was a lot more older and mature. I could word things better and different. But definitely I felt safe. I felt [X] was safe – mostly [X]."[162]

[53] The jury may well have found it easier to accept those explanations for the non-disclosure of some matters in 2005, when they had regard to the fact that Y had mentioned something similar from the outset in 2005. In the context of responding to questions about the appellant's giving them the vibrators, Y said in her first s 93A statement that when she refused to use the vibrator the appellant "laid off me" but then he "laid into X and X was too scared to say no because she thinks that he'll … hit her. So, she had to use it and I felt really bad and I didn't really want to say anything because – well, if I went home, he could have laid it out on X – taken it out on X. So I didn't say anything about that."[163]

[54] In their consideration of this particular area the jury also had the benefit of hearing the appellant's interview on 16 August 2013. That included the admissions which

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155 AB 153.
156 AB 157.
157 AB 157.
158 AB 218.
159 AB 219.
160 AB 218-219.
161 AB 219.
162 AB 219.
163 AB 317-318.

he made about the sexual touching of Y whilst she sat, naked, on his lap. On his own account that occurred on multiple occasions. When he first referred to it, without any prompting, it was in these terms:

> "Oh well, I know I **touched her in the areas** that I shouldn't have touched her …
>
> … I inappropriately touched her **in her private parts**.
>
> …
>
> Um, I placed my hand on her vagina."[164]

Was it open to accept Y's evidence as to touching inside her vagina?

[55] In my opinion it was open to the jury to accept Y's evidence that on a number of occasions the appellant had touched her in a way which involved the insertion of his fingers in her vagina. In her initial interview she said that the appellant "touches us and stuff like that". That interview then focussed on specific aspects which included the pornographic movies, pornographic books, vibrators, the chocolate body paint, and the lingerie and dancing. However, when the subject of "touching" was reached, Y's evidence was that it was "down near the vagina" and that he massaged her vagina on one occasion, with his fingers, albeit over her clothes. X gave early complaint that the appellant "touched them with his hands and fingers", indicating "down there". Y also made early complaint to the guidance officer and social worker about "being touched" by the appellant.

[56] More importantly, the jury had the opportunity to assess that evidence against the admissions made by the appellant that: on many occasions she had sat on his lap; on a number of occasions she had sat on his lap naked, at which time he had touched her "in the areas that I shouldn't have touched her", and "in her private parts"; he had then referred to that touching as being "on her vagina"; some of those occasions had been when he was sitting on the couch and Y was sitting on his lap; that during that period he was addicted to pornography, and spent most of his day watching pornography; he could not tell if it was Y's infatuation with him, or his infatuation with her, but "it just got out of hand" and that was the context in which he would touch her on the vagina while she was sitting on his lap on the couch.

[57] The jury would have also been aware of the appellant's evidence in his interview[165] as to his state of mind at the time of the offences, and his explanation for why they occurred:

(a) "I was … addicted to pornography at the time";[166]

(b) "I was taking Trammel[167] and drinking a lot….. so I was spending most of my day watching porn; …. the porn … was just stuff that I would never be into";[168]

(c) He was taking Trammel in quantities such that he was having weird dreams, and "the more I took, the more I took … [a]nd then with the alcohol and the porn all day"[169], he was "thinking things that I like, just things that would just, you know like, inside, you know it's sort of, it's wrong … [y]ou know that you shouldn't be going there";[170] then in

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164 AB 375. Emphasis added.
165 Exhibit 16.
166 AB 380.
167 Which he identified as a powerful painkiller.
168 AB 380.
169 AB 396-397.
170 AB 397-398.

November 2004 a doctor gave him a lot of Trammel, and "That's when things just … got silly";[171] "the Trammel stopped me from saying well, hang on, …[w]hat you're doing is wrong, stop it";[172] his "moral compass wasn't there";[173]

(d) He stopped sleeping with his wife; "I just didn't want to, you know … pornography became my way of ..";[174] he would get "lots and numerous" porn from the video shop, and "it was the darkest time of my life";[175]

(e) "she just would come and sit on … my lap …[a]ll the time. …She would just always sit on my lap";[176] on occasions Y was naked when she did this;[177]

(f) "I don't know if it was infatuation with her with me or me with her, … and …. it just got out of hand, and that's really what it was about, you know. And, and it was no malice, there was no, there was no intent to rape";[178]

(g) "I didn't force my daughter … [o]r Y to do anything they didn't want to do";[179]

(h) When she was touched in the vagina, "she didn't run, try to run away from the house …[o]r scream or rant and rave..."[180]; "she didn't jump off, she didn't run away … she would have had ample opportunity to tell her mother";[181] her mother "knew stuff was going on"; she "must have known because for her daughter to sit on my lap whenever she wanted all the time, and hug me and, and cry if I'd go home and stuff like this".[182]

[58] The jury may well have thought that signified a person who, at the relevant time, had little ability to control his conduct.

[59] The jury were also able to assess Y's evidence in light of the appellant's case as put to Y in cross-examination, which included: that the appellant did put his hand in her underwear and play with her vagina,[183] but did not insert any fingers; that he did show her pornographic movies and magazines;[184] that he did purchase the vibrators for them, and discussed with her how to use one;[185] that he did buy her the body chocolate paint and the lingerie;[186] that he did rub massage oil on her back;[187] and that he did touch her vagina about six times.[188]

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171 AB 398-399.
172 AB 399.
173 AB 387.
174 AB 383. The jury could well have understood this to mean that the appellant was inferring that pornography was his form of sexual release.
175 AB 383.
176 AB 386-387.
177 AB 377.
178 AB 384.
179 AB 381.
180 AB 376.
181 AB 388.
182 AB 406.
183 AB 195-196, 205.
184 AB 205.
185 AB 193, 199.
186 AB 205.
187 AB 200.
188 AB 200.

[60] In addition, the jury were able to assess the acceptance or otherwise of Y's evidence on the question of being touched, in light of the other objective evidence corroborating what she had said. By that I refer to the police search revealing the vibrators, lingerie, pornographic magazines and pornographic movies that Y had referred to, in great detail.

[61] This Court was invited to view at least one of Y's s 93A statements, namely that on 22 February 2005. I have listened to and viewed all of the s 93 statements. There is little doubt that they permit an additional appreciation beyond the mere transcript. However, they cannot replace the advantage which the jury had of seeing and hearing both Y and X at trial. The same applies to seeing and hearing the evidence of the guidance officer and social worker. That advantage cannot easily be put aside, and in this case should not be. Critical to the jury's resolution of each count was their assessment of Y's evidence, and in the case of count 1, that evidence was largely given at trial. That evidence, as well as the matters to which I have referred above, does not lead me to the conclusion that there are such discrepancies or inadequacies, or a lack of probative force, as to create a doubt as to the jury's conclusion on count 1.

[62] In my view, given that the appellant himself had admitted to multiple occasions when Y was sitting naked on his lap, and when he touched her on the vagina, it was a relatively small step for the jury to believe Y's account that the touching involved the insertion of his fingers in her vagina. Insofar as the acquittals on all the counts of rape were concerned, none of them involved digital rape; all of them involved vaginal, anal or oral rape with a penis or vibrator. Insofar as an acquittal on those counts might reflect a rejection of Y's evidence, that does not necessarily flow to her account of having been touched in a way that was very close to that which the appellant admitted. Indeed, the appellant's first description of that touching was, in his own words and unprompted, consistent with what Y said. He initially used the description that he had touched her "in the areas that I shouldn't have", and that he touched her "in her private parts". Notwithstanding that he later used the phrase "on her vagina", the jury were entitled to have regard to that evidence in their assessment of whether they should accept Y's account.

[63] On the whole of the evidence relevant to that count, it was, in my view, open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

Ground 2 - was a finding of guilty on count 1 inconsistent with the acquittals on the rape counts and count 2?

[64] In my view there was no rational inconsistency. Touching of the kind referred to above had been the subject of complaint at the earliest time, and was supported by the appellant's admissions as to his own conduct. There was nothing similar in respect of count 2, which related to maintaining a sexual relationship with X. Except for a reference in the early complaint evidence, X gave no evidence of having been touched in that way, and there were no supporting admissions from the appellant.

[65] As to the counts that involved rape, I have referred above to the fact that none of them involved digital rape. Further, the appellant is correct to point out that none of those counts were the subject of any mention in 2005. For the reasons given above, the contrary is the case for count 1. Further, insofar as the acquittals on the rape counts signified a rejection of Y's evidence, that was clearly not a wholesale rejection, as the guilty verdicts on counts 6, 7, 12 and 13 reveal.

[66] In my view the jury could quite likely come to the view that, accepting the appellant's admissions that there were multiple occasions when Y was sitting naked on his lap and when he was touching her on her vagina, that the touching was as

Y described it. The jury may well have found it difficult to believe that the appellant, who on his own account[189] was: taking painkilling drugs and alcohol to the point that it prevented him from stopping what he knew was wrong, and let things get out of hand; addicted to pornography; disposed to buy vibrators and inappropriate lingerie for Y and X; disposed to permit Y and X to watch pornographic movies and magazines; acting as a result of some sort of infatuation with Y, or by her with him; and permitting a 12 to 13 year old to sit naked on his lap while he touched her on the vagina; would have maintained some self restraint by touching her only **on the vagina**, and not **in the vagina,** when presented with numerous such opportunities.

[67] In my opinion there is no affront to logic in the way the jury went about their task in respect of count 1.

Conclusion

[68] I would dismiss the appeal.

[69] **ALAN WILSON J:** I agree with Morrison JA's reasons, and with the order his Honour proposes.

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189 See paragraphs [57] to [60] above.