SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABF; R v MDK* [2021] QCA 240
PARTIES:	**In CA No 106 of 2019:** **R** **v** **ABF** (appellant/applicant) **In CA No 108 of 2019:** **R** **v** **MDK** (appellant)
FILE NO/S:	CA No 106 of 2019 CA No 108 of 2019 DC No 56 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 28 March 2019; Date of Sentence: 18 April 2019 (Long SC DCJ)
DELIVERED ON:	12 November 2021
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2021
JUDGES:	McMurdo and Mullins JJA and Bradley J
ORDERS:	**In CA No 106 of 2019:** **1. Appeal against conviction dismissed.** **2. Application for appeal against sentence granted.** **3. Appeal allowed.** **4. Substitute the following terms of imprisonment for those imposed by the sentencing judge on 18 April 2019:** **Count 19 — Ten years** **Count 23 — Three years** **Count 25 — Four years** **Count 26 — Eight years** **Count 27 — Eight years**

Count 28 Eight years

5. The orders otherwise made by the sentencing judge on 18 April 2019 are confirmed.

In CA No 108 of 2019:

1. Appeal against conviction dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the male appellant was tried before a jury and convicted of numerous sexual offences committed against three child complainants under 12 years and under his care – where the female appellant was tried on the same indictment and convicted of sexual offences in respect of which she was charged jointly with the male appellant that were committed against the third complainant under her care who was her daughter– where the male appellant was the father of the first and second complainants – where there was evidence the first and second complainants discussed the male appellant's sexual offending with their mother and each other – where the first complainant was interviewed for four s 93A statements – where the second complainant was interviewed for three s 93A statements – where each of the first and second complainants gave evidence of what she could remember of the incidents on which she was cross-examined – where the third complainant was around five years old when interviewed for her first and second s 93A statements – where the third complainant in both interviews gave graphic descriptions of sexual practices – where the third complainant conceded at the conclusion of her cross-examination that she could not remember anything that she had spoken about in her s 93A statements – where the verdicts of guilty on some counts relied upon evidence of a witness other than the relevant complainant who did not give evidence about the particular incident – whether multiple charges were brought by the prosecution due to inconsistencies in the evidence of the third complainant – whether the guilty verdicts were unreasonable or unsupported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL PERSONS – where the female appellant was tried and convicted before a jury of six sexual offences committed against her daughter who was under 12 years and under her care – where the female appellant was charged jointly with the male appellant – where the case against the female appellant had been opened for count 19 (the maintaining offence) and count 25 (indecent treatment

offence) on the basis her criminal liability was either as a principal offender or as a party to the male appellant's offending – where before final addresses the prosecution abandoned specifically seeking to prove the female appellant as a principal offender in respect of the maintaining offence – whether that abandonment extended to the female appellant's criminal liability for count 25 as a principal offender – where the trial judge in summing up directed the jury that the female appellant was charged with the offences as an aider or enabler – whether the trial judge erred in failing to direct the jury as to the distinction between the female appellant's liability as a principal offender on count 25 and her liability for the other counts where the male appellant was the principal offender

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the female appellant was tried and convicted before a jury for six sexual offences committed against her daughter who was under 12 years and under her care – where the complainant alleged that one of the incidents of sexual offending occurred after the complainant attended swimming lessons – where the last day that was particularised for the two counts arising out of that incident was one day prior to the day when the complainant was examined by a paediatrician – where the female appellant instructed her counsel to subpoena records from the aquatic centre the third complainant attended for her swimming lessons – where the female appellant's trial lawyers failed to subpoena the records from the aquatic centre – where the mother of the male appellant's two daughters who were also complainants on the same indictment in respect of offences committed by the male appellant was cross-examined on her motives for disclosing the allegations against the male appellant – where the mother stated that the domestic violence order (DVO) prevented the male appellant from going near the first and second complainants – where the female appellant believed that the first and second complainants were not listed on the DVO application – where the female appellant's trial counsel did not challenge the credibility of the mother by reference to the DVO application – whether there were forensic reasons for the conduct of counsel

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the male and female appellants were tried and convicted before a jury on the same indictment for numerous sexual offences which, in the case of the male appellant, were committed against three child complainants under 12 years and under his care and, in the case of the female appellant, were committed against the

third complainant who was also under her care – where the male appellant was convicted of 26 counts and acquitted of one count and the female appellant was convicted of the six counts with which she had been charged jointly with the male appellant – where the male appellant was sentenced to an effective head sentence of imprisonment of 16 years and 8 months and the female appellant was sentenced to an effective head sentence of imprisonment of 11 years and 3 months –where the trial judge selected the female appellant's sentence as a proportion of the sentence imposed on the male appellant – whether the sentences imposed on the female appellant were manifestly excessive on the basis of a justifiable sense of grievance in respect of her sentence compared to the sentence imposed on the male appellant

Criminal Code (Qld), s 7

Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, cited
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v BBM [2008] QCA 162, cited
R v HBT (2018) 274 A Crim R 569; [2018] QCA 227, cited
R v Leslie (a pseudonym) [2021] QCA 85, cited
R v MBG & MBH [2009] QCA 252, considered
R v OV [2021] QCA 228, considered

COUNSEL: In CA No 106 of 2019, P J Wilson for the appellant on one ground of appeal against conviction and the sentence leave application and the appellant appeared in person on the other grounds of appeal against conviction
In CA No 108 of 2019, the appellant appeared in person
G J Cummings for the respondent

SOLICITORS: In CA No 106 of 2019, KLM Solicitors for the appellant on one ground of appeal against conviction and the sentence leave application and the appellant appeared in person on the other grounds of appeal against conviction
In CA No 108 of 2019, the appellant appeared in person
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO JA:** I agree with Mullins JA.

[2] **MULLINS JA:** The appellants were tried before a jury on the same indictment for numerous sexual offences between 12 March and 28 March 2019. The male appellant was charged solely with counts 1-18, 20-22, 24 and 29 and charged conjointly with the female appellant on counts 19, 23 and 25-28. There were directed verdicts of acquittal on counts 5 and 6. The male appellant was acquitted by the jury of count 21 and found guilty of the other 26 counts. The female appellant was convicted of all six counts with which she had been charged. The male appellant was sentenced to an effective head sentence of 16 years and 8

months. The female appellant was sentenced to an effective head sentence of 11 years and 3 months.

[3] The appellants appeal their convictions. The male appellant is self-represented. The female appellant is represented for one ground of appeal, but represents herself for two grounds of appeal. During the hearing of the appeal the male appellant abandoned his application for leave to appeal against sentence. The female appellant is represented for her application for leave to appeal against sentence.

[4] Both appellants rely on the ground the verdicts of guilty are unreasonable and cannot be supported having regard to the evidence. In addition, the female appellant appeals on a ground of inadequate defence which is directed at failures of her trial counsel to act on her instructions. The ground of appeal for which the female appellant is represented relates to count 25 and alleges that the learned primary judge should have directed the jury that certain evidence was inadmissible in relation to that count, if the jury were considering whether the female appellant was guilty of that offence as a principal.

Summary of the relevant evidence for each count

[5] I will refer to the complainants in the order in which the counts relate to them respectively as A, B and C. A and B are the biological daughters of the male appellant and I will refer to their mother as "the mother". The male appellant and the mother lived under the same roof and their daughters joined the family unit, as each was born. A was born in September 2005 and B was born in February 2008. The relationship between the male appellant and the mother became open with each free to take other sexual partners. The female appellant together with her daughter C, who was born in October 2007, commenced living in the same household probably in late 2011, when the appellants were in a relationship by that stage, although the male appellant remained in a relationship with the mother. The mother ended her relationship with the male appellant and left the household, taking her daughters with her, about the middle of 2013.

[6] For the purpose of the assistance of the jury during the trial the prosecution prepared a particulars of evidence document (MFI Q) which identified the allegations of evidence called in support of each count. That document divided the counts into 16 incidents. The prosecution prepared another document entitled "Abbreviated Particulars with Evidence Cross-references" (MFI X) which was used by the prosecutor during his address to the jury and was also referred to by the primary judge. There was no dispute at the trial that each complainant was under 12 and under care, A and B are lineal descendants of the male appellant, C is a lineal descendant of the female appellant, the conduct alleged was indecent and unlawful, and both appellants were adults. The issue at trial was whether any of the alleged conduct occurred and, more particularly, whether the prosecution could exclude the possibility that the evidence of each of the complainants had been tainted by communications from others. Neither appellant gave nor called evidence.

[7] Admissions were made at the trial as to the tenancy agreements entered into by various combinations of the mother and the male and female appellants and the mother was also able to give evidence of the timing of the household's moves from one residence to another that was of assistance in assessing some aspects of the evidence of the complainants. The male appellant, the mother, A and B lived at a

unit for 12 months between 25 June 2010 and 25 June 2011, when they moved to a house. It was at that house that the female appellant and C joined the household. The entire household then moved to another house on 26 May 2012. I will refer to these two houses where the entire household lived together as respectively the first residence and the second residence. The tenancy for the second residence ended on 2 June 2013 and while waiting the confirmation for a tenancy at another property, the mother was staying at her father's place and the mother then ended her relationship with the male appellant and moved away, taking her children with her. The appellants and C moved into the new rental house for which the tenancy commenced on 1 July 2013 which was the house at which C lived with the appellants only and from which she was taken into care on 16 October 2013. According to the female appellant's mother, C stayed at her grandparents' home around June or July 2013 for around five weeks. During that period neither appellant stayed at the grandparents' home with C. C commenced attending primary school in 2013 whilst the household was at the second residence and remained enrolled at that school throughout 2013.

[8] Counts 1-4 and 7-8 involved three incidents and the complainant for each was A. A was aged between three and four years during the period particularised in counts 1-4 and 7 of between 1 September 2008 and 30 June 2010. A did not give evidence of the events the subject of these counts which was no doubt due to her young age during the relevant period. There were two incidents involved in these counts and the evidence for them came from the mother.

[9] The first incident covered counts 1 and 2 which were particularised as occurring on dates unknown between 1 September 2008 and 30 June 2010. The mother's evidence was as follows. A was about three or three and one-half years. A came into the bed with the male appellant and the mother. The male appellant instructed the mother to move, so that A was between them and he placed his mouth in her genital region and proceeded to initiate oral sex. That was the subject of count 1 (indecent treatment). He then tried to penetrate A with his right pointer finger, but was unsuccessful, and used vaseline on his finger and attempted to penetrate A again. The mother did not recall how many times he attempted to penetrate her and did not see whether or not that was successful. The attempts were the subject of count 2 (attempted rape).

[10] The second incident occurred about two or three weeks after the first incident and covered counts 3-4 and 7 counts. The mother's evidence was as follows. The male appellant got the mother to bring A into the bedroom where he was masturbating his erect penis and the mother performed oral sex on the male appellant at the male appellant's request of her to show A how it was done. That was the subject of count 3 (indecent treatment). The mother asked A to do what she did, the male appellant then struck the mother across the face and A then grabbed his penis with her hand. That was the subject of count 4 (indecent treatment). A then put the male appellant's penis in her mouth, probably down to less than an inch, and then moved back almost immediately which constituted count 7 (rape).

[11] The third incident covered count 8 (indecent treatment) which was particularised as being committed between 1 June 2011 and 26 June 2013. A mentioned this incident briefly in her third s 93A statement recorded on 11 February 2015. She explained that when the mother was talking to B about "the yukie stuff", she started remembering what happened to her when she was little. She said that what she saw

happened between the male appellant and B (that was the ninth incident) also happened to her when she was about five or six years old. She said her father called her into his room, but she could not remember what happened to her, but thought that her mother could remember when it happened to her, because "she opened the door".

[12] The prosecution's case at trial for the third incident was based on A's evidence given in greater detail as follows in her fourth s 93A statement recorded on 15 June 2016. The male appellant approached A and asked her "do you wanna have sex" and pulled A into his bedroom. She was lying on the bed, when the male appellant who was naked laid on top of her and pushed against her. She screamed, and then nothing happened. A said the male appellant moved his body around when he was on top of her, but she only felt it on her chest, stomach and legs and not in her private places. After A screamed, the mother knocked on the door. The male appellant got dressed and went out to speak to the mother and A then snuck out of the room. When A first related what happened in this incident in the fourth s 93A statement, she said that after she screamed, she heard the door open and that the male appellant "would tell me to shut up so he … get out of the covers and then … go … running and hiding into the wardrobe and that Mum would say 'what's wrong' and so she saw me [in the male appellant's bed] and … no I don't think Mum was there to help me".

[13] A did not disclose anything about the third incident in either her first s 93A statement recorded on 15 October 2013 (when she was questioned at school by a male police officer and an officer from the Department of Child Safety (DoCS)) or her second s 93A statement which was recorded the next day again at the school with two female police officers.

[14] A's evidence for the trial was pre-recorded on 11 May 2018 and her evidence in cross-examination relevant to the third incident included the following. She did not tell the police in 2013 about what she told them in 2015, because as she got older she started developing "more memories of what happened … with … my family", in addition to watching the videos of her s 93A statements. She was too shy to say the things that her father had done to her, when she was interviewed in 2013, particularly as the interviews took place in the presence of her school principal. She has remembered most of the information that she said in her interviews. She explained that when the mother talked about events that happened in the household, A's memory was jogged about the events and the circumstances in which the sexual assault of her occurred. The mother asked her whether she remembered being sexually assaulted and A then explained to her how the sexual assault happened. Her mother was not there when it happened. She agreed with the proposition put to her that "your mum told you about things that happened to you but you don't really have a memory of them". It was then clarified that the cross-examiner was referring to sexual things between A and the male appellant and A agreed with the proposition that "you've told those … sexual things between you and your dad that's told to you by your mum to the police". A conceded that some of the information would have come from the mother "but not all of it". In re-examination A stated that all the interviews referred to things that she had seen and remembered.

[15] The complainant for each of counts 9-18 and 20 was B. Count 9 was the maintaining offence committed against B that was particularised as committed between 1 June 2011 and 26 June 2013. Apart from the conduct that was relied on

for each of counts 10-18 and 20, the prosecution relied on other sexual acts referred to in the course of B's third s 93A statement to prove the maintaining offence. Early in the third s 93A statement, B said that the male appellant told her that every time she did "the thing", she would get a big jar of lollies and that he did it to her, since she was three or four years old. She confirmed that if she did "S E X", the male appellant would give her the lolly container. She referred to it happening in the first house that they moved to (which I infer was the first residence) and that it also happened in the new house (which I infer was the second residence). B said "And every house we did the same thing over and over again. The same sexual habits over and over again". B also said that every time she "did sex" with the male appellant, she would go back to her room and stop thinking about sex and play with C.

[16] The fourth incident covered counts 10-12 which were particularised as being committed between 1 June 2011 and 26 May 2012. The fourth incident was based on the mother's evidence as follows. The male appellant ordered the mother to bring B into their bed when B would have been two or three years old. The mother did so and placed B on the bed. The male appellant instructed the mother to remove B's underpants which she did and the male appellant proceeded to perform oral sex on B. This constituted count 10 (indecent treatment). The mother could see the male appellant's mouth making contact with B's genitals. The male appellant then told the mother to do the same that he was doing and she covered B's genitals and put her mouth around B's genital area, but did not actually perform an act of oral sex. This constituted count 11 (indecent treatment by touching) which was particularised on the basis that the male appellant caused the mother to simulate oral sex on B in his presence while he was masturbating with his left hand. The male appellant then moved the mother and proceeded to perform oral sex again on B in the same manner as he had when the incident commenced. This constituted count 12 (indecent treatment).

[17] Each of counts 13-18 was particularised as having been committed between 1 June 2011 and 26 June 2013.

[18] The fifth incident covered count 13 (rape) and count 14 (indecent treatment by touching) which was based on B's evidence as follows from her third s 93A statement recorded on 15 June 2016 when she was about eight years and four months old. There was an occasion when the male appellant told B to go to his room. B was lying on her stomach on the bed and the male appellant put his penis in her mouth (count 13). He then lay on top of her and she felt his testicles or penis leaning on her vulva (which she described as the part of her body between her legs) and he "sexed" her (which she described as moving in a sexual way with their private parts leaning close) (count 14). She explained that he was doing "sexual habits". When B was asked for another name for her private part, she said vulva or vagina. It was also apparent from her explanation of testicles that she used testicle to describe the penis.

[19] B's first s 93A statement was recorded on 15 October 2013 (when she was questioned at school by a police officer and an officer from DoCS) when she was about five years and eight months old. B did not disclose anything relevant to any of the incidents the subject of the trial in her first interview. B was interviewed again on 16 October 2013 at the school by two female police officers in the presence of the officer from DoCS and again did not disclose anything of relevance

to the incidents, apart from a very general statement that the appellants and A had "sex" without her being able to explain in the interview what she meant by "sex".

[20] B's evidence for the trial was pre-recorded on 11 May 2018. Her cross-examination included the following. Two days before she did her third s 93A interview, B started having "flashbacks" about what happened. She told her mother what she remembered and that is what she told the police in her third s 93A interview. The first time the male appellant had sex with her was when C told her to go to her father's room which she did and he touched her body parts which she described as "he started having sex with me". The bodily parts involved were the vulva and the testicle. The female appellant was in the room trying to convince her to have sex with the male appellant for a jar of jelly bears. His testicle went inside her vulva. At one point in this interview, B said she could remember four times that the male appellant had sex with her.

[21] After B was cross-examined by the male appellant's counsel, she was cross-examined by the female appellant's counsel. She confirmed that she did remember what she had told the male appellant's counsel and commented that she did not remember the date of the incidents with her father, but a few days after it all happened her mother and her siblings left together and flew to another part of Queensland. This cross-examination also included the following. Her mother had told her that C had said something about the male and female appellants, but they denied it, and that it was important for someone to stand up for C. It was around the same time that B had the flashbacks. A was also present when B was talking to their mother about C. A couple of days before B went to see the police on 15 June 2016 was the first time she remembered anything her father had done to her or anything to do with A and C being touched by her father. On the first occasion the female appellant sat on the bed and persuaded B to have sex with the male appellant by saying that she would give B the lolly jar, if she had sex with him. When asked to explain what actually happened when B had sex with the male appellant, she did not want to answer the question. She said that she was face down on her belly with her face to the side. He tried to have sex with her whole body, but did not succeed. His testicle was touching her vulva and her bottom. He then told her to go in the cupboard. B then went back to her room. She had not mentioned in her third s 93A statement that the female appellant was present for this occasion that her father had sex with her, but she explained that she thought that the police were asking her about herself and the male appellant. In re-examination, B said that what the mother told her before they went to the police was that the mother would report it to the police and arrange an interview, so that B could talk about it to the police. The mother did not tell B about anything that actually happened to B that B told the police about, before they went to the police.

[22] The sixth incident (referred to as "the cupboard incident") covered counts 15 and 16 which was based on B's evidence from her third s 93A statement as follows. The cupboard incident happened on the same day, but after, the fifth incident. There was a cupboard in the male appellant's bedroom with a curtain on the outside. B was in the cupboard and the male appellant came into the cupboard, took off his clothes and then stuck a green penis shaped sex toy up her bottom. This constituted count 15 (rape). The male appellant then put the sex toy in the middle of a wooden chair and told B to sit on it. B was leaning against the wall in the cupboard and the male appellant then wrapped his leg around her leg and was rubbing his body against hers which constituted count 16 (indecent treatment by touching). B

elaborated that she physically felt "a warm testicle" on her vulva. B's cross-examination on this incident included the following. After the male appellant had sex with her on the bed when the female appellant was in the bedroom, the male appellant told B to go into the cupboard where he stuck the green testicle-like thing up her bottom while she was sitting down. The male appellant then put his testicle up her bottom. In re-examination, B was able to recall that the female appellant was sitting up on the bed, when B went into the cupboard, and she was laying down on the bed, when B came out of the cupboard and left the room.

[23] The seventh incident (referred to as "the dinner time incident") resulted in count 17 (rape) which was also based on B's evidence from her third s 93A statement as follows. B was on the sofa with the male appellant before dinner. Both had their clothes off and the male appellant was then on top of B who was laying on her back and there was a blanket over them. B stated "he did sex with me". She described his "testicle" was leaning on her vulva and it went a little inside her vulva. In cross-examination B confirmed that the dinner time incident occurred on the same day as the fifth and sixth incidents.

[24] The eighth incident (referred to as "the bedtime incident") resulted in count 18 (rape) and was based on B's evidence from her third s 93A statement as follows. B was rushing to her bedroom, when the male appellant grabbed her and took her into his bedroom. He told B to take off her clothes. He took his clothes off, lay on top of her on the bed and then "he did sex" with her by putting his penis inside her vagina. B then went to her room. In cross-examination, B said that this incident also happened on the same day as the other three incidents, but after dinner. She could not remember where this incident took place.

[25] The ninth incident covered count 20 (indecent treatment) which was particularised as having been committed between 1 May 2012 and 26 June 2013 and was based on evidence primarily from A and to a much lesser extent from B. According to A's third s 93A statement, she had not told the other police (in the first and second s 93A interviews) about what happened to B, as she could not remember at the time, but she started remembering things when she talked to the mother "about the story". Her evidence in her third s 93A statement about the ninth incident included the following. A was in the kitchen on a stool waiting for the female appellant to get the gingerbread house and she saw the male appellant get B to go into the corner, but A could not hear what was said. The male appellant and B went into the male appellant's room. A followed them in. She could see the male appellant taking his pants off and he was in his bed with B. The male appellant told A to leave which she did. The female appellant was in the family room. A then returned to spy on the male appellant and B. The male appellant was lying on his back and B was on top of him and the doona cover was over them. B had shorts and a shirt on. B's chest was on the male appellant's body and her legs were on his legs. In her cross-examination, A stated that B was underneath the male appellant. When asked whether B could have been on top, A responded that "no, she couldn't have because I saw her underneath". It was not clear from B's third s 93A statement which incident she was speaking about, when she said that A peeked into the male appellant's room and asked "what are you doing" when B was on the bed under his body and the male appellant responded to A by swearing at her to leave which A did.

[26] Counts 19 and 22-29 were committed against C. Count 19 was the maintaining offence where the male and female appellants were charged jointly. The period particularised in count 19 was between 1 June 2011 and 16 October 2013.

[27] Counts 22-24 were particularised as occurring between 1 May 2012 and 26 June 2013. Count 22 (indecent treatment) involved the 11th incident which was based on A's evidence in her fourth s 93A statement as follows. There was one occasion when A was outside the male appellant's bedroom after he had called C into his room. The door was slightly open and A saw the male appellant lying on top of C. The male appellant was moving his body back and forth and from side to side. C was trying to say "stop", but the male appellant continued. They were under the covers. After the male appellant got up, A saw that C had no clothes on. A's cross-examination included the following. A never said anything in her third s 93A statement about C being assaulted, as she did not think she had to look after C until she heard from the mother that the appellants were saying that they did not touch C in a sexual way. A went to the police to make her fourth s 93A interview after the mother had told her that C was making some allegations. A, B and the mother also spoke about the sexual abuse that the male appellant committed against A before A went to the police station for the fourth interview. A spoke to B and the mother about what happened to her and what she could remember, B spoke about what had happened to her and what she could remember, and the mother spoke about what she could remember happening to the two of them. That was when the mother first told her about C.

[28] The 12th incident covered count 23 (indecent treatment) and was based on B's evidence in her third s 93A statements as follows. The male appellant told B to convince C to have sex with him. The female appellant was holding a jar of lollies. B told C she would get the whole jar while she was "doing sex" with the male appellant. B was on the bed with the female appellant next to her with her arm around her and the male appellant was on top of C. C was not wearing clothes, the male appellant was wearing a shirt, and he was rubbing against C.

[29] The 13th incident covered count 24 (indecent treatment) which also was based on B's evidence in her third s 93A statement as follows. B could recall the last time she saw the male appellant doing something to C and it was when he gave C lolly snakes. B was holding the jar this time. B saw the male appellant rubbing his body against C "as usual" in his bedroom. In cross-examination, B said that they could not remember any occasion on which she saw C having sex with the male appellant.

[30] The 14th incident covered count 25 (indecent treatment) and count 26 (anal rape) which was based on C's evidence. This was referred to at the trial as "the first stacking incident". The date of the offences was particularised as a date unknown between 1 June and 16 October 2013. The prosecution's case on the timing of this incident was that it occurred at the place where C lived only with the appellants. The incident was described in C's first s 93A statement recorded on 16 October 2013 when C was almost six years old. (The use of the description "the first stacking incident" was due to it being revealed in the first s 93A statement and was not intended by the prosecution to suggest this was the stacking incident that was the first in time to occur.). C's evidence in that statement included the following. The appellants were the two people taking care of her. The male appellant did to C what he did to her mother. C "hopped on my Mum … and then he does it to my Mum and then he does it on top of Mum … he does it to me". C explained that her

mother lay down and she lay down and then the male appellant "does it to us", putting "his private stuff on our private stuff". When asked to identify the last time that happened, C responded that he had only done it "one time" that was on Tuesday after swimming. (The first s 93A interview was on Wednesday 16 October 2013 and early in the interview C said she had been swimming yesterday on Tuesday and went swimming "every single Tuesday".) When asked which Tuesday, C responded "That was tomorrow. That was next day after, after camp … . My Mum picked me up and they just started that". Her mother had put her on the bed and the male appellant told her to take her pants off. She did not want to, but her mother took them off. Her mother lay down and the male appellant put C on top of her mother "and then he put the thing into where we poo". C told him to stop, but the male appellant told her not to talk and she stopped talking. He put a red bandana on her mouth and C did not talk. When he put his "sucker" into her bottom, it hurt. It is called "sexing". He did it to her for one minute and he then did it to her mother for 10 minutes. It happened in her mother's bedroom and it only happened one time. It happened on a holiday and not a school day. It was when she was at the school that she was still attending. She did not know which holidays it was. It happened ages ago. C said it "stinged". In response to the question whether it had happened to her any other time, she said "nah". C's grandmother gave evidence for the purpose of enabling the jury to understand what C meant by the term "sucker". In 2014, she had a conversation with C who pointed to the penis of the grandmother's dog and used the word "sucker".

[31] The 15th incident covered count 27 (anal rape) and count 28 (penile rape) which was based on C's evidence. The date of the offences was particularised as a date unknown between 25 May 2012 and 16 October 2013. They were alleged to have been committed at the second residence. This incident was referred to at the trial as "the second stacking incident" and was based on C's evidence in her second s 93A statement recorded on 22 November 2013. At the commencement of this interview, the officer from DoCS reminded C that she had used the word "sucker" in the last interview and asked her to tell everything she knew about that word. Her response was that the male appellant "use it all the time" and "Like in my Mum's bottom or in my Mum's fanny or in my one on my fanny on my bottom". Her second s 93A statement also included the following. The male appellant put his penis in her Mum's fanny or in C's fanny or in her Mum's bottom or in her bottom. When the male appellant put his "sucker" in her bottom, he pushed it "very very very very deep", he takes it out and then he pops it in "my Mum's fanny". It happened "a long long long time ago" - "a hundred and ninety nine million years". It happened one day at the "old house". The last time he put his sucker in her fanny was at the middle house (which was not the last house she lived in with the appellants only). Slime came out of their bottoms and their fannies. This incident was also based on C's third s 93A statement recorded on 13 June 2016 when she was almost eight years and ten months old which included the following. Once the male appellant asked her to stack on top of her mother. C was stacked on her mother's back. The male appellant was standing behind them and would put his penis into her mother's bottom, then her bottom and do that repeatedly. The stacking incident only happened once. It did not happen at the last place the appellants and C lived together. It happened after the mother had left with her children.

[32] C's cross-examination was pre-recorded on 10 May 2018 when she was about 10 years and six months old. She had watched her s 93A video interviews the day before the cross-examination and conceded that she only remembered two incidents

of sex. One was when her mother was on the bed with her hands and feet on the ground and the male appellant told C to hop on her back the same way and he had sex with her in her bottom. She did not count out how many times he had sex with her bottom. That was the stacking incident and the only time it occurred. C did not remember whether the male appellant put his penis in her bottom on another occasion when her mother was present. C conceded that when she watched the videos of her interviews she did not remember anything.

[33] C described the 16th incident as occurring between the male appellant and her alone and that constituted count 29 (rape). It was particularised as occurring between 1 June and 16 October 2013. C described the incident in her third s 93A statement which included the following. The male appellant did it once with just C in her bedroom. The male appellant was lying on her bed with his head at the bottom of the bed, she climbed on top of him and "He would have sex with me in the front part". It was after the mother left, and C was not then six years old. In her cross-examination, the other incident that C remembered (apart from one stacking incident) was being in her bedroom when the male appellant told her to hop on her bed with him and he had sex with her in both her bottom and her front part. He then smacked her and told her not to tell anyone. Her mother was not there when that incident happened.

Other evidence

[34] Apart from giving evidence relating to the specific counts, the mother gave evidence of the circumstances in which the allegations against the appellant were reported to the police which was after family law proceedings had commenced between the male appellant and her and he had been given unsupervised access to the children to which she had objected. She was cross-examined extensively on her motivations for making these reports and the discussions she had with the complainants about the allegations against the appellants. The mother denied telling A and B what she said their father had done to them.

[35] The mother conceded that she participated in sexual activity with the male and female appellants and on occasions had participated where she would be on top of the female appellant and the male appellant would place his penis in her vagina and then in the female appellant's vagina. The mother conceded that, even though she took precautions to prevent the children seeing this activity, any of A, B or C potentially may have witnessed that activity.

[36] Paediatrician Dr Cruickshanks examined C's genital and anal region on 17 October 2013. The examination was within the realms of normal limits which was not unexpected in a child of her age. An acute examination is one within 72 hours or less of the incident, otherwise it is treated as an historical allegation. The introitus, hymen and anal region were normal. Where there is a time lapse between the abuse and the examination, it is unlikely any physical evidence will be found. The reason for this is that the genital area is very elastic and vascular and therefore heals very quickly. There are sometimes non-specific findings of notches and bumps along the hymen that could have been a healed cut or tear, but that cannot be diagnosed, unless the cut or tear had been seen. (In fact, Dr Cruickshanks' evidence was treated at the trial as being neutral with the trial judge explaining to the jury in the summing up that there was nothing in it that was capable of either confirming or refuting the allegations in respect of C.)

[37] During her cross-examination, C said that she had never talked to A, B or the mother after they left the home where C was living with the appellants.

[38] The principal of the school which C attended in 2013 gave evidence that C was in the prep year in 2013 and the prep year did swimming lessons on a Tuesday in term 4 which commenced on 8 October 2013.

Were the verdicts unreasonable in respect of the male appellant?

[39] The function of this court in determining the ground of appeal that the verdicts of the jury are unreasonable or cannot be supported having regard to the evidence is to examine independently the whole of the evidence to determine whether it was open to the jury to be satisfied of the relevant appellant's guilt, but having regard to the pre-eminent position of the jury which means proceeding on the assumption that the relevant complainant was assessed by the jury to be credible and reliable: *Pell v The Queen* (2020) 268 CLR 123 at [39].

[40] The male appellant's case at trial was that the events the subject of the counts did not occur and that the evidence of the complainants was the product of contamination, suggestion, concoction or collusion (to which I will refer in a shorthand way as "contamination").

[41] The male appellant's written submissions for the appeal listed aspects of the evidence at the trial and then, in relation to each aspect, set out references to other evidence that was relied on by the male appellant to show an inconsistency or a discrepancy or otherwise to support the allegation of contamination. The male appellant's approach to the appeal was based on arguments addressed to the jury by counsel for the appellants.

[42] The male appellant relies on the fact that the only offence in respect of which A alleged any sexual abuse of herself was count 8. He relies on the cross-examination of A where A agreed with the proposition put to her that the mother had told A about sexual things between the male appellant and A and A then told the police the sexual things between her and the male appellant that had been told to her by the mother. The male appellant submits the jury should have inferred that meant that the mother told A the details that A related in respect of count 8. That specific evidence of A had to be considered, however, with other evidence from A that she remembered the events of which she gave evidence. To the extent the prosecution relied on the detailed account of count 8 given by A in her fourth s 93A statement, the male appellant relies on the inconsistent aspect of the same incident given by A in her third s 93A statement that the mother opened the door on the male appellant and A which she also repeated in her fourth s 93A statement before confirming that the incident occurred with the door to the bedroom locked. This inconsistency and the possibility of the contamination of A's evidence in respect of count 8 were raised at the trial. The jury was not limited to those parts of A's evidence on which the male appellant relies to make his submissions that A's evidence was unreliable. Even accepting that A may have discussed her evidence with the mother and B to some extent and that she said her memory was "jogged" by the discussions about non-sexual events in the household that assisted her in remembering the context of sexual incidents, A was firm in her evidence that her mother did not provide information to her about the sexual assault of her that constituted count 8, when her mother was not there. I am satisfied on an assessment of all A's evidence relevant

to count 8 that it was open to the jury to be satisfied that offence had been proved beyond reasonable doubt.

[43] The male appellant characterises parts of B's evidence as honest and reliable based on his interpretation of it. He then places reliance on B's saying she was the only one who knew about what the appellant had done to her, as undermining A's evidence in respect of count 20. The obvious response to that submission is that A's evidence was to the effect that she was spying on the male appellant and B during the ninth incident. That is not necessarily inconsistent with B's saying that she was the only one who knew about the abuse and therefore it does not follow that B's evidence undermined A's evidence in respect of count 20. Another argument advanced by the male appellant in relation to count 20 was that the fifth and the ninth incidents were the same incident, having regard to the evidence. Although B had mentioned in her evidence that there were four times the male appellant had sex with her, B did give evidence of other sexual contact with her father. The distinguishing feature of B's evidence about the fifth incident was that she had the female appellant present. When A was spying on the male appellant and B during the ninth incident, she said the female appellant was in the family room. There was therefore evidence open to the jury to accept that count 20 was committed at a separate time to counts 13 and 14.

[44] The male appellant relies on the numerous concessions made by B in her evidence that at certain stages she could not remember being abused by the male appellant and that she only had dreams or nightmares about incidents of sexual abuse and that the first time she remembered anything about the male appellant touching A, C or her was a few days before she went to the police on 15 June 2016. The male appellant therefore emphasises the contamination of B's evidence. This was at the forefront of the issues at trial for the jury's consideration in assessing B's evidence.

[45] The essence of the male appellant's submissions on contamination was that there was evidence of some discussion between the mother with A and B about sexual offending by the male appellant that influenced the statements that A and B made to the police and on the basis of that possibility the jury should have had a reasonable doubt about the male appellant's guilt of those offences. Each of A and B ultimately said she gave evidence of what she could remember of the incidents on which they were questioned. There were some similarities in the mode of operation each attributed to the male appellant of procuring a complainant to come into his bedroom and closing the door, but there are aspects of the recollections of each of A and B of what she experienced or observed that are markedly different to the recollection of the other that supports the conclusion that each complainant was relating her own recollection. The only reference in A's evidence to the offering of lollies for sexual activity is in A's third s 93A statement where she said that B told her something about being given lollies to do "the yukie stuff". A did not herself experience or observe the offering of lollies for sexual activity, but that was experienced or observed by B. To the extent that the possibility of some contamination was raised on the evidence, it was not to a degree that the evidence given by A and B suggested that each of them was not giving evidence by reference to her memory. I am therefore satisfied that any contamination inferred from the evidence of the mother, A and B did not have the significance that was placed on it by the male appellant in his submissions on this appeal in precluding the jury being satisfied of the male appellant's guilt of the relevant counts beyond reasonable doubt where they were based on either A's evidence or B's evidence.

[46] The male appellant focuses on the concession made by C at the conclusion of her cross-examination that when she watched the videos of her s 93A statements that she could not then remember anything that she had spoken about in those interviews. C did qualify slightly both that answer and her agreement to the proposition that she could not say whether what she had said in the interviews was true or not, by saying "I do remember some of it because I was there" and "I never heard anything else from them". The latter statement was a reference to the police officers, counsellors and officers from DoCS to whom C had spoken over the years. This submission is conveniently dealt with at the same time as another submission made by the male appellant (which also reflects the argument put to the jury at the trial) that counts 25-28 relate to one incident and not two incidents and that either the verdicts for counts 25 and 26 or counts 27 and 28 cannot be supported having regard to the evidence. This was a live issue at the trial, particularly as by the time that C was cross-examined, she remembered only one stacking incident, and that was therefore the focus of the addresses of counsel.

[47] C was very young when she participated in the interviews for the first and second s 93A statements. She disclosed the details of the first stacking incident in the first interview, as if that were part of normal activities. It is apparent from these interviews that C was unable to identify the timing of events about which she spoke with any precision. In the first stacking incident C said she was placed on top of her mother by the male appellant and it is the only incident about which C spoke in her evidence during which the male appellant tied the red bandana over her mouth to stop her making a noise. According to C, it was limited to penile penetration and the penetration of C's anus was for a shorter period than the penetration of her mother's anus. When the second interview commenced, the only part of the first interview to which C was referred by the officer from DoCS was her use of the word "sucker" and she was asked to tell everything she knew about the word. That question prompted the disclosure about the second stacking incident where she said she was told by the male appellant to hop on top of her mother and the male appellant repeatedly penetrated the anus of each of C and her mother and then the genitalia of each of them. Again, the disclosure of the second stacking incident was related by C, as if it were a normal part of what happened at home.

[48] It was apparent from C's evidence that, even as a five year old, she could discriminate between penetration of her anus and her vagina. It was also apparent that C answered questions in the first and second s 93A statements in a very literal way. In both these interviews, C gave graphic descriptions of sexual practices. The assessment of her evidence must have regard to her age and experiences at the time of these interviews. The disclosure of the 14th incident was detailed and was a significant disclosure of serious offending made on the first occasion that C was interviewed which was at school and not in the presence or vicinity of the appellants. That C could only remember one stacking incident by the time she was cross-examined did not preclude the jury being satisfied that there were two stacking incidents that were described respectively in her first and second s 93A interviews. There was significant differentiation by C in timing, location and the description of the male appellant's conduct between the 14th and 15th incidents for it to be open to the jury to be satisfied beyond reasonable doubt that she was describing what happened to her on two separate occasions. To the extent the male appellant relies on C's evidence in the first interview that the stacking incident she described happened one time, that is easily explicable by the focus of C on the detail

of what happened which differentiated that incident from the one she discussed in her second s 93A interview.

[49] The male appellant relies on the disclosure by C in her third s 93A statement that she had been told by "Jaycee" who was part of her "team" that the male appellant had sex with the mother and A and B. That was the extent of C's disclosure in her evidence of information provided to her by Jaycee. The submission loses its significance in the context that C does not give evidence in respect of any of the incidents involving A or B.

[50] An argument addressed to the jury at the trial on behalf of the appellants was that one interpretation of the second s 93A interview of C was that when she was talking about the stacking incident occurring at the middle house, she was in fact referring to the grandmother's house where it was established on the grandmother's evidence the male appellant never stayed. C jumped from topic to topic during the first and second interviews which was not surprising, having regard to her age. C did refer to "tasting the flavour on the sucker" at her grandmother's house, but also said that it happened at the "old house" which I infer is a reference to the first residence and consistent with the other evidence that C gave about the presence of the mother, A and B. It was argued by the female appellant's counsel at the trial C's statement in the second interview that the last time the male appellant put his penis in her vagina was at the middle house could have been a reference to the grandmother's house, but the male appellant had never stayed there. The prosecution case was that the middle house was a reference to the second residence (which was in between the first residence and the last house where C lived with the appellants only). C's descriptions in her second s 93A statement of the sexual activities were detailed. It was a matter for the jury to interpret her evidence as to the location of the various activities and assess whether any discrepancies affected their acceptance of her evidence. In view of the conclusion from the guilty verdicts that the jury accepted that C was credible and reliable, I am satisfied that this perceived discrepancy based on the male appellant's interpretation of C's evidence did not preclude the jury's being satisfied beyond reasonable doubt of the offences based on this evidence.

[51] The male appellant disputes the verdicts of guilty in respect of those counts where the evidence depended on that given by a witness other than the relevant complainant who did not give evidence about the incident. As those counts (counts 1-4, 7, 10-12 and 22-24) relate to offending that occurred when the respective complainants were very young, it is not unusual that the complainant for the offence did not give evidence of the specific incident. The question is whether it was open to the jury on the evidence that was given by the witnesses relied on to support each of these counts to be satisfied of proof of the relevant offence beyond reasonable doubt. This involved the evidence of the mother for counts 1-4, 7 and 10-12. The mother's credibility and reliability were in issue at the trial and she was cross-examined on her motivation for first going to the police in October 2013. It was also a relevant consideration in assessing her evidence against the male appellant for each of these counts that it did not reflect well on her in respect of her participation in the first, second and fourth incidents. As shown by the summary of her evidence relating to these incidents set out above, her evidence was not implausible so as to preclude acceptance by the jury, if otherwise satisfied of her credibility and reliability. The mother's evidence was therefore capable of supporting the verdicts of guilty on these counts.

[52] Count 22 was based only on A's evidence of what she saw the male appellant do to C, when the door to his bedroom was slightly open. It was a matter for the jury to assess whether this evidence was credible and reliable, when it had not been disclosed by A in her interviews prior to her fourth s 93A statement. A provided an explanation as to why she had not described this incident at any earlier time and that she was relating what she had seen and not what she was told by her mother. This was a quintessential jury question of whether A's evidence on count 22 should be accepted, despite the late disclosure by A of this incident. In view of the jury's acceptance of A as a credible and reliable witness, it was open to the jury to be satisfied beyond reasonable doubt of the male appellant's guilt of count 22.

[53] Counts 23 and 24 were based only on B's evidence of seeing the male appellant rubbing his body against C on two occasions. The hallmark of the 12th and 13th incidents is that B had a role to play in each of them in convincing C to have sex with the male appellant in the presence of the female appellant for count 23 and that B was holding the jar of lolly snakes which the male appellant gave to C at the time of committing count 24. There was therefore sufficient evidence from B to support the verdicts of guilty on counts 23 and 24.

[54] The focus of the male appellant's submissions was on the evidence of the respective incidents. It follows from the guilty verdicts in respect of the separate counts based on these incidents that there could be no issue about the unreasonableness of the respective verdicts of guilty to the two maintaining offences of counts 9 and 19.

[55] Despite the extensive submissions made by the male appellant both in writing and orally for the purpose of the appeal, each of the issues depended on the jury's interpretation of the evidence. Taken separately or together, I am satisfied that no submission made by the male appellant on this appeal precluded the jury being satisfied the male appellant was guilty of the offences beyond reasonable doubt of which they convicted him. The male appellant's appeal against conviction must be dismissed.

The female appellant's ground of appeal in respect of count 25

[56] The prosecution case at trial was that the female appellant was a party to counts 23 and 26-28 on the basis that she aided the male appellant to commit them and the proof of each of those counts against the female appellant involved as an element the proof that the male appellant committed the relevant offence. The prosecution case in relation to count 19 had been put on the basis it was open for the jury to find that the female appellant was either a principal or a party to the male appellant's offending. It had been particularised in paragraph 77 of MFI Q that the prosecution relied on all or any of those acts attributed to the female appellant in relation to C by herself and in conjunction with the male appellant as unlawful acts of a sexual nature occurring on one or more occasions and constituting a relationship of a sexual nature with C and her maintenance of that relationship with C. Before the addresses of counsel, the prosecutor abandoned reliance on paragraph 77.

[57] Count 25 was opened to the jury by the prosecution and particularised in paragraph 135 of MFI Q on the basis the female appellant was said to be a principal offender:

> "… each of them participated in moving [C] into the room and on top of [the female appellant] whilst [the male appellant] had some

> form of sexual intercourse with [the female appellant]. The prosecution case is that by touching, that is moving and placing [C] in that position in these circumstances each was indecently dealing with her when she was a child under the age of 16".

[58] The gist of the ground of appeal in relation to count 25 was that the trial judge did not address in the summing up the distinction between the criminal liability of the female appellant as principal in relation to count 25 and her liability for each of counts 23 and 26-28 on the basis that the male appellant was the principal offender. The trial judge gave the jury a direction in relation to the use which they could make of the male appellant's sexual interest and similar fact evidence in considering each separate charge. That direction was relevant in respect of the proof against the female appellant of the commission of the principal offence by the male appellant in respect of each of counts 23 and 26-28, but did not apply to the proof of count 25 against the female appellant as a principal offender. It is therefore argued by Mr P J Wilson of counsel on behalf of the female appellant that the trial judge should have directed the jury that the evidence which fell into the categories of the male appellant's sexual interest in the children and the similar fact evidence was inadmissible against the female appellant in relation to consideration of her criminal liability in respect of count 25 as a principal offender.

[59] Mr Cummings of counsel who appears on behalf of the respondent, but was also the prosecutor at the trial, submitted that when he indicated to the trial judge that the prosecution was no longer reliant on paragraph 77 of MFI Q in relation to count 19 that was an abandonment by the prosecution of seeking to prove the female appellant liable as a principal in respect of any of the offences.

[60] That was how the trial judge must have understood the abandonment of paragraph 77, as when the trial judge summed up to the jury, his Honour expressly instructed the jury that the basis on which the female appellant was charged with the offences was as an aider or enabler, as the trial judge explained the handout which was MFI DD which set out the direction for aiding or enabling based on s 7(1)(b) and (c) of the *Criminal Code* (Qld).

[61] The female appellant's concern that the jury may have been confused as a result of the basis on which the case was opened against her as a principal in respect of count 25 was displaced by the directions on the law that were given to the jury in the summing up supplemented by the written handout MFI DD which made it clear that the only basis for which the prosecution was seeking to prove the female appellant liable for the counts with which she was charged as a party to the male appellant's offending.

[62] As count 25 was one of the particulars relied on to prove count 19 against the male appellant, it made sense that an abandonment of a case of principal liability on the part of the female appellant for count 19 was intended to abandon that basis of liability for count 25 and that was consistent with how the trial judge summed up the basis for the female appellant's liability for any of the offences with which she was charged.

[63] The female appellant cannot succeed on the ground that count 25 was left to the jury on the basis that the female appellant was either a party or a principal, as that was

not the basis on which the prosecution case against the female appellant was left to the jury.

Were the verdicts unreasonable in respect of the female appellant?

[64] There was evidence adduced at the trial from the mother and Dr Rosser that related only to the case against the female appellant. The mother gave evidence to the effect that about six months after the female appellant and C started living in the household, the female appellant spoke to the mother about how the male appellant would initiate sexual activity between himself and C after the mother had taken A and B to school. Another conversation took place between them after the male appellant had contracted chlamydia from another female. The female appellant stated to the mother that she and the male appellant needed to get chlamydia medication and she was given three tablets and the third tablet was for C.

[65] The general medical practitioner who was consulted on 14 March 2013 about chlamydia by the male appellant gave evidence that the chlamydia was confirmed by a test and on 19 March 2013 the doctor prescribed for him an antibiotic which was taken as a single dose of two tablets. The female appellant then attended on the same general practitioner on 27 March 2013 and tested positive for chlamydia. She was prescribed a single dose of two tablets on 2 April 2013. She then returned 10 days later and told the general practitioner that she had thrown up the tablets, asked for another prescription, and was given another single dose of two tablets. The doctor recalled that on 2 April 2013 she gave another prescription to the male appellant for the antibiotic, because he notified reception that he had lost his prescription. According to the practice records, another doctor gave the female appellant a prescription for the treatment for chlamydia on 19 July 2013. In cross-examination, the doctor agreed that nausea, stomach upset and vomiting can be a side effect of the antibiotic, but added that was not common.

[66] It was a jury question whether they accepted the evidence of the mother about the two conversations she claimed that the female appellant had with her. It was relevant to the assessment of the conversation about the chlamydia medication that some support for the appellants' obtaining additional medication was found in the evidence of the doctor who prescribed additional medication for the male appellant who said he had lost the first prescription and for the female appellant who said she had thrown up the tablets.

[67] The female appellant argues that multiple charges were brought by the prosecution to cover up inconsistencies in C's evidence and that was particularly so in relation to the allegation there were two stacking incidents reflected by counts 25 and 26 for one incident and counts 27 and 28 for the second incident. The female appellant submits the inconsistencies were so prominent that it led the prosecutor to believe that C was talking about completely separate incidents. I have dealt with a similar submission made by the male appellant to the effect that there was only one stacking incident. The same reasoning applies to reject the argument advanced by the female appellant.

[68] The female appellant also relies on the issue of contamination of B's evidence in respect of count 23 which must be rejected for the same reasons that the male appellant has failed on this issue.

[69] The female appellant advances similar submissions to the male appellant on the contamination of the evidence of C, in addition to the contamination of the evidence of A and B where relevant to the counts against the female appellant. For the same reasons that the male appellant does not succeed on his appeal based on the issue of contamination of the complainants' evidence, the female appellant also does not succeed on this issue.

Inadequate defence

[70] There were two matters on which the female appellant relies to submit that a miscarriage of justice was caused by her trial counsel's failure to act on her instructions.

[71] Because the last day that was particularised for counts 25-28 was 16 October 2013 and C was examined by Dr Cruickshanks on 17 October 2013, the female appellant instructed her counsel to subpoena records from the aquatic centre where C started her swimming lessons, because if the incident had occurred within 48 hours of the examination of C, there should have been physical evidence of the alleged sexual abuse, as it then would have been a complaint of current rather than historical abuse. The first matter relates to the failure of the female appellant's trial lawyers to subpoena the records from the aquatic centre. It was the prosecution case ultimately at trial that the stacking incident covered by counts 25 and 26 occurred much later than the stacking incident covered by counts 27 and 28. The anal penetration that was the subject of count 26 was particularised as committed on a date unknown in the period of some four and one-half months ending on 16 October 2013. It was a possibility that the offence occurred as late as 15 October 2013, but it was unclear on C's evidence that was so, as C suggested that the incident happened on a Tuesday after swimming (which may have been a reference to school swimming) and also suggested that it did not happen during the school term, but when she was on holidays. If the female appellant had given instructions in the terms set out in her written submissions, there were obvious forensic reasons for a decision not to follow those instructions. One of the reasons was that the principal of C's school gave evidence from which it could be inferred that C went swimming with the school on 8 and 15 October 2013. Obtaining the records from the aquatic centre may have excluded the possibility that the incident occurred as late as 15 October 2013 or added nothing to the principal's evidence. Her trial counsel addressed the jury (consistent with the principal's evidence) on the basis it was a possibility that C went swimming on 15 October 2013. In those circumstances, the female appellant was bound by that decision: *Nudd v The Queen* (2006) 80 ALJR 614 at [9].

[72] The second matter related to an issue that concerned the mother's credibility. When the mother was being cross-examined on her motives for making disclosures to the police about the allegations against the male appellant, the mother stated that "the DVO actually stopped him from going anywhere near my children and my whole family". The female appellant believed that the mother's children were not listed on her DVO application and provided her lawyers with that document for the purpose of showing the mother lied about the DVO, but alleges the mother's credibility was not challenged by her counsel by reference to the original DVO application. The mother's response to the cross-examination was given in relation to the domestic violence order which may not necessarily have reflected the original application for the DVO. The cross-examination was successful in eliciting a motive of the mother in making the allegations to the police. There were obvious forensic reasons why

counsel did not seek to pursue the accuracy of the mother's belief about the content of the DVO in relation to the children and the female appellant is again bound by that decision.

[73] There is no substance to the ground of appeal based on trial counsel's failure to act on the female appellant's instructions.

[74] The female appellant's appeal against conviction must be dismissed.

Sentence application

[75] The ground relied on by the female appellant for applying for leave to appeal against her sentence is that it is manifestly excessive in all the circumstances. A difficulty for the application is that at first instance her counsel submitted that a sentence of imprisonment between 10 and 12 years was appropriate. Notwithstanding that submission, Mr P J Wilson of counsel submits the female appellant has a "justifiable sense of grievance" (as that expression is used in *Postiglione v The Queen* (1997) 189 CLR 295 at 304, 314, 323 and 338) in respect of her sentence compared to the sentence imposed on the male appellant, when she offended against C only and the male appellant offended against three complainants over a much longer period.

[76] The female appellant was aged between 22 and 25 years during the period particularised for the offending. She had a criminal history with two entries for minor dishonesty in 2010 and 2011 for which no convictions were recorded and small fines were imposed and a breach of bail condition (for late reporting) committed on 27 November 2017 for which no conviction was recorded and she was discharged absolutely.

[77] At the sentencing hearing, a victim impact statement in relation to C was tendered. It was prepared by the foster mother who had been caring for C for five years. It was graphic in its description of the severe trauma-related behaviours of C. She exhibited sexualised behaviour, experienced significant developmental delays, required speech therapy and attended therapy for victims of sexual abuse and treatment with a clinical neuro psychotherapist. She had difficulty relating to other children and other persons generally and had been diagnosed with attachment disorder. She had recurrent nightmares.

[78] The female appellant had two children with the male appellant who were taken into care at birth and are cared for by the same foster family who cares for C. When the sentencing submissions were made after verdict, the female appellant had been engaged to the male appellant for two years. The female appellant had little or no contact with any of her children from 16 October 2013 and she was also unable to have contact with her mother who was a prosecution witness in the trial until her mother's evidence was completed.

[79] There was no submission before the trial judge suggesting that the female appellant was acting under the influence or out of fear of the male appellant. No such submission was sought to be made on the sentence leave application.

[80] During the course of sentencing the male appellant, the trial judge referred to relevant authorities that were then also relied on in sentencing the female appellant, including *R v HBT* (2018) 274 A Crim R 569 at [96] and *R v BBM* [2008] QCA 162

at [26] where reference was made to Jerrard JA's judgment in *R v SAG* (2004) 147 A Crim R 301 at [18] that listed many decisions in this court in which offenders who had maintained an unlawful sexual relationship with one child for a lengthy period were sentenced for periods between 10 and 15 years which sentences were imposed or upheld on appeal. The trial judge noted specifically the reference in *R v MBG & MBH* [2009] QCA 252 at [22] to the aggravation of the offending when parental figures were jointly involved in the offending.

[81] The male appellant was 29 years old when sentenced and was aged between 19 and 24 years at the time of the offending. He also had a minor criminal history. Towards the end of the offending period he committed a serious assault against a person aged over 60 years. He was dealt with in the Magistrates Court on 19 December 2013 when no conviction was recorded and he was placed on probation for a period of two years. The trial judge selected the sentence for the male appellant on each maintaining count of 16 years and eight months (or 200 months) with shorter concurrent terms imposed for each of the other offences of which he was convicted. Each of the offences was declared to be a serious violent offence.

[82] The trial judge selected the sentence for the female appellant for count 19 (which was the most serious offence committed by her) as a proportion of the male appellant's sentence, explaining that the sentence was to maintain "an appropriate sense of parity and relativity with the sentences to be imposed" on the male appellant. The trial judge made an express finding in relation to the female appellant:

> "Whilst noting the relatively less extensive nature of your offending and the circumstances of it, like the position with [the male appellant] there can be no doubt that an effective sentence that will attract the requirement that you serve 80 per cent of the period, before any release on parole may be considered, is appropriate."

[83] The trial judge then selected the sentence to be imposed on the maintaining count for the female appellant as 11 years and three months which his Honour said was 130 months, but which is 135 months and 67.5 per cent of the sentence imposed on the male appellant for each maintaining count committed by him. Concurrent terms of imprisonment were imposed for the other offences of four years for count 23, five years for count 25 and 10 years for each of counts 26 – 28 which were identical to those imposed on the male appellant for the same offences. Each of the offences of which the female appellant was convicted was declared to be a serious violent offence. A declaration was made in respect of the 21 days in pre-sentence custody between 28 March and 17 April 2019.

[84] The following submissions are made on behalf of the female appellant in support of her application before this court. There are serious aggravating factors which demanded a substantial period of imprisonment: there was a grave breach of the relationship of trust, a complete failure of parental responsibility and the offending against her own child was heinous. Consideration must be given, however, to her role in the offending against C which was limited to three incidents. The male appellant alone committed the offences against C that were the subject of counts 22, 24 and 29, although the opportunity for the male appellant to commit those offences was facilitated by the female appellant's remaining in the male appellant's household, when she knew of the male appellant's sexual interest in C. The persistent nature of the male appellant's offending called for a sentence to act as a

powerful personal deterrent, as well as protecting the community against a dangerous sexual offender. The female appellant's offending did not call for such a strong personal deterrent aspect and she does not necessarily present as a significant danger to the community. If the court were satisfied the sentence on imposed the female appellant was manifestly excessive for the maintaining offence, she should be re-sentenced to a term of imprisonment for nine years with a parole eligibility date being set after she had served one-half of the sentence.

[85] It is apparent by the manner in which the trial judge fixed the female appellant's sentence as a proportion of the male appellant's sentence that the trial judge was endeavouring to apply the parity principle. For the reasons that follow, I consider the resulting sentences for the female appellant were manifestly excessive.

[86] The seriousness of the female appellant's offending against C who was then aged between three and five years in gross breach of the trust expected of a parent required condign punishment. The purposes of sentencing that had particular relevance to the sentencing of the female appellant were both general and specific deterrence and denunciation of the female appellant's conduct. Because the appellants were co-offenders, there should be some relativity in the sentences imposed on them for the same offences, but the respective sentences also had to take into account the differences in the offending conduct committed by each of them for which they are being sentenced at the same time. The male appellant's conduct that was the subject of counts 19, 23 and 25-28 was more egregious than the female appellant's involvement in the same offences. The sexual acts relied on to prove count 19 against the female appellant as an aider or enabler were limited to the specific offences of which she was convicted against C, as a result of her aiding or doing acts for the purpose of aiding the male appellant in committing count 19. The conduct relied on to prove count 19 against the male appellant extended to counts 22, 24 and 29 and many uncharged acts committed against C in respect of which the evidence did not show that the female appellant was actively present when these other counts and the uncharged acts were committed by the male appellant which had to be balanced against the female appellant's constant passive presence that the prosecution relied on as encouraging the male appellant to commit these acts by her remaining in the household in circumstances where the male appellant could maintain the sexual relationship with C.

[87] In view of the more extensive offending by the male appellant against C and that the male appellant was also convicted of offences against A and B, including the maintaining offence against B, the female appellant has shown that she has a justifiable sense of grievance in the sentence of 11 years and three months imposed for count 19 (and to reflect the overall criminality of her offending) compared to the sentence of 16 years and eight months imposed on the male appellant for the same offence (and to reflect the overall criminality of his offending). That justifiable sense of grievance must extend to the concurrent sentences imposed for the other offences the appellants had in common where the male appellant's offending conduct was more extensive than the female appellant's conduct.

[88] In re-sentencing the female appellant, it is a relevant consideration that the female appellant was found guilty after trial. A female partner who was a party to the offending of her male partner in maintaining an unlawful sexual relationship with their children under 16 for an extended period and pleaded guilty was sentenced to

imprisonment for nine years in *R v Leslie (a pseudonym)* [2021] QCA 85. In that case, the female offender applied for leave unsuccessfully against her sentence of imprisonment for nine years with parole eligibility fixed after serving four years of the sentence, where the observation was made at [17] that a sentence attracting a serious violent offence declaration or one attracting an order delaying eligibility for parole may have been difficult to upset on appeal. That is consistent with the sentences imposed on the husband and wife in *MBG & MBH* who pleaded guilty to maintaining an unlawful sexual relationship with their seven to eight year old daughter and other sexual offences, including against two friends of their daughter, and were each sentenced to 10 and one-half years' imprisonment on the maintaining count with a serious violent offence declaration. In *R v OV* [2021] QCA 228, the offending of the female partner against her two daughters as a party to her male partner's sexual offending against them was even more egregious than the female appellant's offending against C, but it was committed over a shorter period of about seven months. The offender in *OV* pleaded guilty and was unsuccessful in her application for leave to appeal against a sentence of concurrent terms of ten years' imprisonment on each of the maintaining counts.

[89] The sentence imposed on the female appellant for count 19 must reflect the seriousness of her offending and appropriate relativity to the sentence imposed on the male appellant, taking into account all the relevant circumstances. I would therefore reduce the sentence for count 19 to imprisonment for 10 years and make concomitant reductions in the sentences imposed for each of counts 23 and 25-28, but otherwise confirm the declaration made by the sentencing judge that each of the offences of which the female appellant was convicted was a serious violent offence.

Orders

[90] I propose the following orders:

In CA No 106 of 2019:

1. Appeal against conviction dismissed.
2. Application for appeal against sentence granted.
3. Appeal allowed.
4. Substitute the following terms of imprisonment for those imposed by the sentencing judge on 18 April 2019:

   Count 19 Ten years

   Count 23 Three years

   Count 25 Four years

   Count 26 Eight years

   Count 27 Eight years

   Count 28 Eight years.
5. The orders otherwise made by the sentencing judge on 18 April 2019 are confirmed.

In CA No 108 of 2019:

1. Appeal against conviction dismissed.

[91] **BRADLEY J:** I agree with the orders proposed by Mullins JA and with her Honour's reasons.