SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCT* [2021] QCA 278
PARTIES:	**R** **v** **CCT** (appellant/applicant)
FILE NO/S:	CA No 313 of 2019 DC No 282 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 31 October 2019; Date of Sentence: 4 November 2019 (Clare SC DCJ)
DELIVERED ON:	14 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2020
JUDGES:	Sofronoff P and McMurdo JA and Applegarth J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DIMISSED – where the appellant was convicted by a jury of one count of maintaining a sexual relationship with his biological daughter and other offences against her – where the appellant relies on what are said to be inconsistencies in the complainant's evidence, a poor recollection by her of certain events and inconsistencies in the preliminary complaint witnesses' evidence – where there was a lengthy delay – whether the verdicts are unreasonable or cannot be supported having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant's first language is Thai – where an order was made in the District Court appointing an interpreter for the trial – where the appellant complains that the interpreter did not interpret for him, as required, throughout the trial – whether the interpretation provided to the appellant at trial allowed him to understand the proceeding and the nature of the evidence

against him so as to decide whether to give or call evidence and, if so, upon what matters evidence would be given

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where the appellant was convicted by a jury of one count of maintaining a sexual relationship with his biological daughter and other offences against her – where two preliminary complaint witnesses gave evidence that "it may have happened to other family members as well" and "she went to live with her dad so that she could try and protect her siblings" – where an application was made by defence counsel to discharge the jury because the preliminary complaint witnesses' answers were said to be inadmissible evidence that suggested the appellant had interfered with other family members – where the learned trial judge declined to discharge the jury – where the trial judge directed the jury, both after a preliminary complaint witness' evidence and in the summing up, to disregard the evidence – whether the preliminary complaint witnesses' comments were highly prejudicial and amounted to a miscarriage of justice which was not avoided by the directions given – whether the judge erred in not discharging the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced for the offence of maintaining a sexual relationship with his biological daughter and other offences against her – where the applicant was sentenced to 14 years for the maintaining offence, convicted and not further punished for the counts which constituted particulars of the maintaining offence, lesser concurrent terms for the other offences, and three years imprisonment for the offence of rape which occurred four years after the earlier offending – where at the time of sentencing, the applicant had served about six-and-a-half years of an eight year sentence imposed on him for the rape of another child 10 years after the offending against his daughter had ceased – where the offending was grave and perpetrated over a lengthy period – whether the sentencing judge failed to apply the totality principle so as to moderate the total period of imprisonment – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9(2)(l), s 9(6)

Ebatarinja v Deland (1998) 194 CLR 444; [1998] HCA 62, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Ozan v R [2021] NSWCCA 231, 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 Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177; [2014] QCA 206, cited
R v CAM [2009] QCA 44, cited
R v CBO [2016] QCA 24, cited
R v Cook [2021] QCA 209, cited
R v Dalton (2020) 3 QR 273; [2020] QCA 13, cited
R v Fox [1998] QCA 121, cited
R v Fraser [2001] QCA 187, cited
R v Knott (2007) 169 A Crim R 291; [2007] SASC 74, cited
R v Luke [1987] QSCCCA 9, cited
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, cited
R v Munday (1984) 14 A Crim R 456, cited
R v Oliver [2020] QCA 76, cited
R v Peter; R v Anau; R v Ingui; R v Banu (2020) 286 A Crim R 372; [2020] QCA 228, cited
R v Robinson [2007] QCA 99, cited
R v S [1993] QCA 367, cited
R v Smith; Ex parte Attorney-General (Qld) [1998] QCA 220, cited
R v WBK (2020) 4 QR 110; [2020] QCA 60, cited
Sayer v The Queen [2018] VSCA 177, cited
Warwick v R [2016] NSWCCA 183, cited

COUNSEL: J Crawford for the appellant/applicant
C M Cook for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Applegarth J and with the orders proposed by his Honour.

[2] **McMURDO JA:** I agree with Applegarth J.

[3] **APPLEGARTH J:** The appellant was convicted by a jury after a four-day trial of one count of maintaining a sexual relationship with his biological daughter and other sexual offences against her. He appeals against his conviction on three grounds and also seeks leave to appeal against his sentence.

[4] The three grounds of his conviction appeal are:

Ground 1 – the verdicts were unreasonable and cannot be supported having regard to the evidence.

Ground 2 – the trial was not conducted according to law because the court-ordered interpreter did not interpret for the applicant, as required, throughout the trial.

Ground 3 – the trial judge wrongly refused an application for the discharge of the jury during the course of the trial following receipt of inadmissible evidence from two complaint witnesses.

Ground 1 – Unreasonableness

Overview of the case presented at trial

[5] The offending was alleged to have occurred when the complainant was aged between 3 and 14 years old.

[6] Counts 1, 2 and 3 were not particulars of Count 4, the maintaining charge, but were said to show the appellant's sexual interest in his daughter from an early age. Counts 5 to 12 were particulars of the maintaining charge.

[7] Counts 1, 2, 3, 5, 6 and 7 were alleged to have been committed at the appellant's family home at Ashfield.[1] By that time, the complainant's mother had separated from the appellant. The complainant had been placed in the care of the appellant's mother and his stepfather.

[8] Counts 8 and 9 were alleged to have occurred after the appellant moved to his residence at Croydon. On that occasion, the appellant and the complainant had left a barbeque at a relative's nearby house and walked back to his home. He was alleged to have vaginally raped and then anally raped the complainant in his bedroom when no one else was present in that house.

[9] Counts 10, 11 and 12 were alleged to have occurred at the Port of Brisbane on occasions when the complainant would accompany her father on fishing trips.

[10] At different times the complainant made disclosures, including to her mother who lived in Sydney and who felt powerless to help. Soon after a disclosure to her mother which came to the attention of her stepfather, the complainant moved to Sydney to live with them. The complainant was aged about 10 but returned to Queensland when she was aged about 13 to live with her grandmother and two aunts. However, due to a lack of space in her grandmother's home she went to live in the same house as the appellant and her younger siblings at Richmond.

[11] Counts 13 and 14 relate to this period. Count 13 charged indecent treatment of the complainant who was still aged under 16. Count 14 was a charge of rape. The appellant was alleged to have ejaculated inside the complainant, after which he appeared afraid that she might become pregnant and gave her a pill to stop this.

[12] The complainant explained that the appellant's sexual offending towards her stopped after that and thereafter she spent little time at his house.

[13] The alleged offending therefore can be divided into three categories:

(a) Counts 1, 2 and 3 when the complainant was aged four or slightly older;

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1 Names of individuals and suburbs have been anonymised.

(b) Count 4, the maintaining charge, and Counts 5 to 12 which were particular occasions of sexual acts that the complainant could remember before she left Queensland; and

(c) Counts 13 and 14 which occurred when she was aged about 13.

[14] In 2013 the appellant was convicted of the rape of a five-year-old who was known to him. He lured her at night from the backyard of a house at which he was attending a barbeque. He took her behind a car and digitally penetrated her. He was imprisoned, initially for 10 years, but a sentence of eight years was imposed on appeal.

[15] In 2016, the complainant went to the police. By then she was aged 32.

[16] There was evidence at the appellant's trial in October 2019 from various witnesses that many years earlier she had told each of them of her father's sexual abuse of her. These witnesses included her mother. The complainant's mother gave evidence of having confronted the appellant when she first heard allegations from her three-year-old. The appellant denied the allegations. The complainant's mother explained that she did not go to the police because she felt powerless and was concerned for her daughter's safety if she did.

[17] The complainant's stepfather first heard of the complainant's allegations about a week before she went to live with him and his wife in Sydney. After the complainant returned to Queensland and reported that her father was again sexually abusing her, the complainant's mother and her partner asked the complainant if she wanted to go to the police, to which the complainant is said to have replied:

"No. Because my dad told me if I told anyone, I've got to kill you."

[18] The prosecution case depended on the credibility and reliability of the complainant's evidence about events that had occurred many years earlier.

[19] The appellant chose not to give or call evidence.

[20] The prosecution case at trial was that the complainant was a vulnerable child who was isolated in a household dominated by abusive men. Over the years she had struggled to deal with the things that had happened to her in her childhood, while confiding in some people. The specific offences charged were things she could not forget during a long period of regular sexual abuse and her accounts of those offences were consistent. Any confusion on some minor details was the product of the frailty of the memory of an honest witness, whose evidence was compelling, frank and true.

[21] Defence counsel's address to the jury pointed to delay which made it difficult for the appellant to defend himself. Counsel argued that the complainant's story was implausible in various respects. This included the improbability that the offences would occur in a household or in a public place (even in the dark) where the appellant might be detected. He argued it was implausible that, after going to Sydney, the complainant would return to Queensland and her alleged abuser. Counsel also contended there were various difficulties with the evidence of complaint witnesses. The mother's evidence was said to be implausible.

[22] Ultimately, defence counsel argued that, even if the jury concluded that something probably happened, different parts of the prosecution case would leave it with a reasonable doubt.

The relevant test for Ground 1

[23] The principles governing a case in which an appellant alleges that a verdict is unreasonable or cannot be supported are not in dispute. They have been recently summarised by this Court.[2] It is unnecessary to repeat all the principles.

[24] The appellate court must make an independent assessment of the whole of the evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused and must weigh the whole of the evidence.[3] The appellate court must not disregard the consideration that the jury has had the benefit of having seen and heard the witnesses.[4]

[25] If the trial record "contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court 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]

[26] An appeal court's assessment of the evidence proceeds on the basis that the jury is able to evaluate the "conflicts and imperfections" in the evidence at the trial.[6] In a case such as this, and even upon the assumption that the jury assessed the complainant's evidence as credible and reliable, the issue remains whether "compounding improbabilities" nonetheless required the jury, acting rationally, to have entertained a doubt as to the appellant's guilt.[7]

[27] The ultimate question for the appeal court is whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[8] Trial by the appellate court is not to be substituted for trial by jury.[9]

The essence of the appellant's case on Ground 1

[28] The appellant's essential argument is that there were inconsistencies in the complainant's evidence and a poor recollection by her of certain events. These should have raised many doubts for the jury and doubts about her evidence on one count should have been considered when reviewing the evidence for each of the other counts.

[29] These compounding doubts came against a lengthy delay. There was a lack of corroboration. Reliance is placed upon what is said to be inconsistencies in the complainant's evidence about the alleged acts and inconsistencies in the preliminary complaint witnesses' evidence.

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2 See, for example, *R v Dalton* [2020] QCA 13 at [173-[181] ("*Dalton*"); *R v Oliver* [2020] QCA 76 ("*Oliver*").
3 *Dalton* at [175].
4 *Dalton* at [177].
5 *Oliver* at [36] citing *M v The Queen* (1994) 181 CLR 487 at 494.
6 *MFA v The Queen* (2002) 213 CLR 606 at 634.
7 *Pell v The Queen* (2020) 268 CLR 123 at [39], [119].
8 *Dalton* at [178] citing *M v The Queen* (1994) 181 CLR 487 at 494-495.
9 *R v Baden-Clay* (2016) 258 CLR 308 at [66].

[30] The appellant's case is that these matters should have given rise to insurmountable doubts in the minds of the jurors, such that his convictions are unsafe.

The essence of the respondent's submissions on Ground 1

[31] The respondent argues that the criticisms of the complainant's evidence are misplaced, and that her credibility was bolstered by the evidence from several witnesses to whom she had disclosed, many years earlier, her father's sexual abuse.

[32] Upon analysis of the complainant's evidence and the evidence of the other witnesses, alleged inconsistencies and discrepancies could be explained. After an independent examination of the whole of the evidence, this Court should determine that it was open to the jury to be satisfied of the guilt of the appellant.

The background to Counts 1 to 7

[33] The complainant was born in 1984. Her mother had lived in a refugee camp in Thailand before she moved to Australia, aged 19. She met the appellant shortly after her arrival in Australia and married him soon afterwards.

[34] After her marriage, she moved into the house in which the appellant lived with his mother and stepfather. The complainant was born not long afterwards.

[35] The complainant's parents' relationship broke down after a few years. The complainant's mother moved out of the house at Ashfield and to a distant suburb. The complainant was three years old at the time. The complainant's mother explained that she was "allowed to see" her daughter once every fortnight. After the complainant's parents separated, the complainant's mother did not have any support from the appellant or his family. In July 1998, a formal order granted custody of the complainant to the appellant's mother and stepfather.

[36] As a young child, the complainant's family was dominated by her grandmother's husband and by the appellant. The appellant's mother and her husband had two young children who were about the same age as the complainant. These aunts, Sarah and Mary, lived in the same house as the complainant. Sarah was two years older than the complainant and Mary was six months younger than her. The complainant's "grandfather" was said to be "very abusive" towards the three children. He would do things like hold a rifle to their face and make them look down the barrel, lock them out of the house in the middle of the night, or throw them down stairs. The children would explain their injuries by saying things like "we fell off a tree".

[37] The complainant had little recollection of her mother during the few years that they lived together with the appellant's family at Ashfield. She had little contact with her afterwards. She explained "I never knew who my mum was", but just wanted to be with her.

[38] The complainant's evidence was that when she was young, and after her mother moved to another suburb, the appellant used to come up to her and say, "how much do you love daddy?" at which time she "just froze". This was the precursor to sexual abuse. He would come up to her and say these things when she was in the backyard, watching television with her aunts or playing with them, or in other places in the house at Ashfield.

[39] The complainant thought she was two to three when the appellant's sexual abuse of her first occurred, but she could not recall how old she was.

[40] Early in her evidence-in-chief she was asked about "the very first event that sticks out in your mind". She recalled an occasion which will be discussed in connection with Count 5. By this time her father had remarried. A child named Scott was born in 1998, making him about four years younger than the complainant. The appellant's new wife was deported and the child Scott was left with the family in Ashfield.

Counts 1 and 2 – the backyard counts

[41] The complainant was asked to explain what she had said about things that would happen in the backyard. She then recounted a particular occasion at night when the appellant led her to the barbeque area which was "right at the backyard". She identified the location and recalled that the appellant started making her touch him, then put his finger inside her, and then made her put her mouth on his penis. She resisted but he kept holding her head down. The complainant recalled that she was crying and thought that she "must have passed out". She thought that she was four years old or possibly five at the time.

[42] The complainant's evidence was that she was struggling and she could not be sure whether during this episode they were both standing up or sitting down, or in different positions. Her answer was "Sitting down. He was either sitting down or laying down".

[43] The appellant submits that the "physical difficulties with the complainant's description of that event are self-evident and respectfully ought to have raised a doubt in the minds of the jury". The submission is unpersuasive. The complainant described with apparent fluency the sequence of events. There seems nothing inherently improbable in the sequence of the sexual assaults she described or her inability to recall the precise positions in which she and the appellant were during a time that she was being assaulted with force and almost passed out.

Count 3 – the window episode

[44] The complainant recalled occasions when her father would come into her bedroom through a window. The appellant would tell her to go up to her bedroom and when she did, she had to lock the door behind her. He would then come through the front of the window and check if the door was locked. He would then remove her clothing and rape her.

[45] The complainant recalled a particular occasion when this happened. She and her two aunts were watching television in the loungeroom. She thought it was a time when she was sharing a bedroom with Mary. She could not recall how old she was and said that "we were just young". The complainant said that she was in school by the time this incident happened. She gave evidence of penile penetration and the appellant refusing to stop despite her requests. She recalled:

> "When he just finished himself off, he then jumped out the window, told me to count to 10, go outside like nothing happened."

The complainant's recollection of this episode therefore included what the appellant said at its conclusion.

Count 5 – the alleged rape when a baby was nearby

[46] This was the event, earlier noted, which stuck out in the complainant's mind at the start of her evidence-in-chief. She gave further evidence about it later in her evidence. She recalled that she was downstairs in the house. The complainant was looking after Scott and trying to feed him. The appellant was watching television and drinking. As the complainant was trying to pat the infant child's back and hold a bottle for him, her father came up to her and said, "how much do you love daddy?". She instantly froze. He removed the bottom half of her clothes and had intercourse with her. The complainant recalled crying and asking him to stop, but he would not.

[47] She recalled that the baby was only little at the time, could not walk and was using a feeding bottle. After this sexual assault the appellant told the complainant to go and have a shower, go to her bedroom upstairs and "not to say anything".

[48] The complainant also recalled that the appellant had ejaculated on her leg on that occasion.

Counts 6 and 7 – the hide and seek episode

[49] The complainant recalled another occasion when she was playing hide and seek with her aunties, Sarah and Mary. Her father came up to her and led her to a downstairs area near the rumpus room where there was "a little hole where they were going to build the internal stairs". He led her into that small area and she recalled that there was a rubber mat there. He removed her pants and digitally penetrated her. He then took his pants off and penetrated her with his penis. He stopped when Mary stuck her head around the corner and said, "I found you". The appellant told her to go away and she did so.

[50] After Mary left, the appellant resumed sexual intercourse. After ejaculating he told the complainant to go. She complied and went to find Mary. When she did so Mary asked "what happened?" to which the complainant said "nothing". Mary then said "Okay. Let's go find [Sarah]".

[51] It is worth recalling at this point that the child Mary was six months younger than the complainant.

[52] The appellant submits that there is an inconsistency between the complainant's description of this event before a short mid-morning break in her evidence and her evidence after the break. Her evidence before the break was that Mary put her head around the corner and said, "I found you", whereupon the appellant told her to go away and "got scared". This is submitted to be inconsistent with her evidence after the break that after Mary left, he resumed sexual intercourse. This suggested inconsistency is said to be a matter that ought to have raised a doubt for the jury.

[53] Having reviewed the appellant's evidence, I am unable to detect any particular inconsistency. The appellant was surprised and possibly alarmed by the sudden arrival of Mary. He immediately told her to go away and she complied. This gave him the opportunity to briefly resume and conclude sexual intercourse.

[54] More generally, I do not find the appellant's evidence about this episode implausible. Mary was herself a young child. According to the evidence, she made

a fleeting observation of the appellant and the complainant who were in a confined space seemingly playing hide and seek. It is not obvious that Mary saw and understood what was transpiring between the appellant and the complainant. However, if she did or was suspicious, then she was assured shortly after by the complainant that nothing had happened and then encouraged to continue the game of hide and seek. If she was not assured, then the evidence of the dynamics of this unusual family makes it likely that Mary would keep her observations to herself and not accuse an adult male in the family of wrongdoing. It is unlikely she would take any such accusation to her own cruel father.

Alleged deficiencies in the evidence concerning Counts 1-7

[55] The appellant submits that there were a number of concerning deficiencies in the complainant's descriptions of the particularised events. One is said to be her evidence about her age at the time of the backyard incident and her age at the time of Count 5. The backyard incident was thought by the complainant to have occurred when she was four or five years old whereas Count 5 was alleged to have happened when the baby was aged between one and two. The latter would have been some time between September 1990 and September 1991, making the complainant aged six or seven at the time. However, she thought that it occurred when she was aged around seven to eight.

[56] The alleged discrepancies between her estimated age and the approximate date Count 5 occurred are not significant. This is especially so when it is recalled that the complainant was doing her best to recall how old she was when these particular events occurred, many decades ago, and how old the baby was.

[57] That the event charged as Count 5 (the rape which occurred in close proximity to the baby) stuck out in the complainant's mind and was mentioned by her in that regard early in her evidence-in-chief is unremarkable. She went on to clarify that this was not the first episode of sexual abuse.

[58] The appellant's submissions also point to the complainant's evidence that there were many occasions that she could not particularise. She said that the specific occasions that she remembered were because they were "painful and hurtful". The appellant submits that ejaculation on her leg should not have been accepted as painful or hurtful.

[59] With respect, this submission tends to miss the point. What was memorable about the rape charged as Count 5 was that the complainant was being raped in close proximity to a baby for whom she had been caring at the time. Having a recollection of that shocking episode, it is unsurprising that her recollection included how the episode ended, with ejaculant on her leg and the appellant's instruction to go upstairs and shower.

Counts 8 and 9 – the house at Croydon

[60] At some point the appellant moved out of the house at Ashfield and to a house at Croydon. The complainant thought that she was aged eight or nine and in grade 3 at the time. The appellant moved out with his wife, his son Scott and possibly a younger child Susan.

[61] The complainant remained at the Ashfield house with her "grandparents" who had "full custody" of her.

[62] After the appellant and his young children moved to Croydon, the appellant and her grandmother would visit there "pretty much nearly every weekend" because her grandmother wanted to see her other grandchildren. Typically it would be a day trip or sleeping a night or two on the weekend.

[63] The complainant gave evidence of an occasion when the appellant raped her in his bedroom at Croydon. She described it as "probably the worst".

[64] Her evidence was that the family was at an uncle's house. There were cousins and other kids at the family occasion. At one point that night the appellant said "I need to go check the house. [Complainant's name] come with me". They walked about five minutes to his house and went inside. He asked her to come into his bedroom, took off the bottom half of her clothing and started to rape her. She described the penile rape of her vagina and then being turned over, after which the appellant penetrated her anus with his penis. The complainant recalled screaming loudly and begging him to stop. However, he continued. He told her to be quiet. After this violent episode the appellant told her to take her shirt off, to stop crying and to wash herself. She washed herself and noticed blood. She recalls being in great pain and then going back to her uncle's house at which the appellant "just acted like nothing had happened. He was laughing".

[65] The complainant recalled another occasion at the Croydon house on a weekend. The appellant used to take her downstairs underneath the house. They were able to crawl under the house if they ducked their head. She said that the appellant would take off her pants and have intercourse with her. He would do so when he "got the chance, depending who was around". She explained that this depended on what family members were doing, who was drinking, and "how he could get away with it".

Counts 10, 11 and 12 – Fisherman's Island

[66] The complainant's evidence about being raped at this location should be viewed in the context of other evidence of the appellant's interest in fishing. She gave evidence of going with him to the Brisbane River near the Jindalee Bridge where he would take crab pots down to the water. On occasions she would be the only person with him. After he dealt with the crab pots he would come back to the car and rape her. On none of these or other occasions did the appellant use a condom.

[67] The appellant would go fishing more frequently at Fisherman's Island near the Port of Brisbane. The complainant recalled that they would go there every second week or maybe on weekends. She explained that the ethnic community to which they belonged liked to fish and her father did a lot of fishing.

[68] The complainant was asked whether these trips to Fisherman's Island started when her father was still living at the Ashfield house, and she said, "I think so". She said that they continued while he was living in Croydon and then Richmond. She went on some of these trips when he was living in Croydon and Richmond and recalled a particular occasion when he raped her in his car.

[69] The appellant submits that the complainant's response to the question of whether trips to Fisherman's Island occurred when her father was still living at the Ashfield house acknowledged that she did not have a clear memory of the events and this should have raised a doubt for the jury. I do not agree. The complainant was asked when her father's trips to Fisherman's Island started. She thought, but was not certain, that this was when he was still living at the Ashfield house. A more relevant issue is when the sexual offences charged as Counts 10, 11 and 12 occurred and, more importantly, the quality of the complainant's evidence about what happened on those occasions. Those counts particularised a date unknown between 1 January 1991 and 5 September 1994. This aligned with the period that the appellant was living in either Croydon or Richmond and when the complainant said she would go on trips with him to Fisherman's Island.

[70] The complainant's evidence descended to some detail about carparks and other physical features in the vicinity of the places at which the appellant would fish.

[71] Her evidence of the occasion that she was raped in the car was that she had gone with her father to Fisherman's Island, parked and taken fishing equipment down to the rocks. The appellant then cast his rods and started fishing. Subsequently, he told the complainant to go to the car. The complainant recalled the appellant removing the bottom half of her clothing and putting his penis inside her vagina. She remembered it hurting and telling him to stop. He had his hand over her mouth and after he finished he "just went away". She continued crying and then must have fallen asleep. She was woken up to him raping her again. She remembers him laughing and putting his hand over her mouth.

[72] This occurred at night time when it was "really dark". The appellant and the complainant spent all night at the fishing spot. She recalls that before they left he said that they would get McDonald's.

[73] During her cross-examination, the complainant was taken to part of her police statement in which she recalled that the appellant asked her to lay on her back on the dirty ground, put his hands under her shirt and pulled down her pants. The police statement reported that after he removed her underwear he started playing with her vagina. It did not allege a penile rape on the ground.

[74] After the complainant confirmed in cross-examination that she was raped in the car, defence counsel at trial suggested she had told police that the first rape happened on the dirt. The prosecutor pointed out that the complainant had told police about the appellant playing with her vagina on the ground and that her statement had gone on to say that she was raped in the car.

[75] The matter was further clarified in re-examination. The complainant confirmed that her police statement was correct about what happened when she was on the dirt and also confirmed her evidence about being twice raped in the car.

[76] In summary, the complainant's evidence about the night she was sexually abused and then twice raped at Fisherman's Island did not disclose inconsistencies or discrepancies.

Evidence of threats and disclosures

[77] During her evidence-in-chief and in respect of the events that the complainant recalled happening at the houses at Ashfield and Croydon, on drives and while fishing, the complainant was asked whether the appellant ever said anything to her about talking to others. She responded:

> "He told me not to tell anyone and that if I had told someone, I wouldn't see him again. I'd get him in trouble. And if I really loved him, I wouldn't say a word. He would then say to me 'if you say anything, you'll just go away like your mum'."

[78] The complainant's recollection is that he said this a few times to remind her to not say a word and to keep quiet. He would say these things "straight after he raped me" or it could be half an hour afterwards or if he saw the complainant upset. He would just say "Don't say anything. If you love me, you won't."

[79] Despite this, the complainant made disclosures to her mother, to her stepfather and to others.

[80] When she was very young she told her mother about the appellant putting his penis in her vagina, without using those words. The complainant's mother thought that the complainant was three years old when she described this, using certain names to describe those parts of her father's body and her own. The complainant's mother was living in another Brisbane suburb at the time. Her mother confronted the appellant with the allegation, to which he responded:

> "Don't be silly. Don't be stupid. I'm her father. I'm not going to do that".

[81] The complainant's mother explained that after the appellant's denial she did not speak to the police because she could not speak English.

[82] Later, and after her mother had moved to Sydney, the complainant would speak to her by telephone and cry on the phone because she wanted to be with her. The complainant told her mother that the appellant had been molesting her. Her mother remained concerned but said in her evidence "but I can't do anything". She also explained that she had no power to stop her daughter moving back to Brisbane to live with her grandmother. When further cross-examined about why she never went to the police during the time her daughter was telling her things, when the complainant was aged between six to about ten and before she moved to Sydney, the complainant's mother stated:

> "I can't go to the police because my English not very good and I feel useless because I can't do anything for my daughter.
>
> ….And my husband, [name of appellant], threatening her if she do anything. He going to kill her."

[83] The complainant's mother says that she was told this when her daughter was about six or seven. She confirmed to the judge that the reason she did not go to the police was that she was worried about her daughter's safety. Her daughter did not say anything further after she came to live in Sydney.

[84] In re-examination she reiterated that when the complainant was six or seven, the complainant reported to her that the appellant had told her that he would kill her if

she said anything. The complainant's mother rejected the suggestion that she was just saying that now as an excuse for not going to the police and confirmed that these matters had been included in the statement she gave to police in 2017.

[85] The complainant's evidence under cross-examination is that the rapes at Fisherman's Island occurred when she was probably in grade 2 or 3 at school. Again, she did not tell anybody about those episodes when she got home or when she went to school. She explained that her school had a Catholic priest rather than a school counsellor. She was told at school that if she wanted to talk to somebody to head up to the church. However, she did not disclose the abuse to the priest because she was "scared to talk to anyone".

The complainant's return to Brisbane

[86] It seems that the complainant returned to Brisbane when she was aged about 13 for more than one reason. Her mother thought that the complainant wanted to move back to Queensland because she did not like the strict rules that applied when she lived in Sydney.

[87] The complainant said her reason for leaving Sydney and returning to Queensland was that she missed Sarah and Mary and also that she "wasn't really being a good kid down there" and was "playing up". When she came back to Queensland she moved in with her grandmother. By that time, her grandmother had separated and divorced from the "grandfather" who had been cruel to the complainant as a young child. Her grandmother was living at Northam, while her father, his wife and two children were living in Richmond.

[88] Her "aunts", Sarah and Mary, were living with her grandmother at Northam when the complainant returned from Sydney. The complainant did not have her own room at Northam. She used the sunroom as her bedroom. This was unsatisfactory because there was no bed, she had to sleep on something that "looked like a nest" and people were always coming in and out of the room. She hated it. She stayed with her grandmother for some months and then moved to the house at Richmond which accommodated the appellant, his wife and their two children. She shared a room with the boy who was about four years younger than her. At some stage the appellant arranged for a little room downstairs to become the complainant's own room.

Counts 13 and 14 - the final alleged offences

[89] By 1997 to 1998, the complainant was a young teenager and in high school.

[90] She gave evidence of an occasion when she was living at the Richmond house. No one else was home apart from the appellant and the complainant. They were on the couch in the lounge room watching television. The appellant had been drinking alcohol. He came towards her on the couch, lifted up her shirt and began sucking her nipples. The complainant jumped up and told him to stop. However, he started to rape her. The complainant's evidence was that he removed the bottom half of her clothing and penetrated her vagina with his penis. The complainant gave evidence of how the appellant ejaculated inside her and then appeared scared. He then told her to go for a shower and to wash herself. He gave her a tablet and said, "take this and you won't have a baby".

[91] After this incident, the appellant did not sexually assault the complainant again. She thought this was because she was getting older. The impression given by her evidence is that he did not want to get her pregnant.

[92] The complainant was not cross-examined to any great extent about the details of her alleged indecent treatment and rape at Richmond (Counts 13 and 14). She was asked about whether people would come and go from the house and whether the alleged incident happened on a weekend. Defence counsel put to her that these things simply did not happen.

[93] Evidence and submissions at the trial explored the alleged implausibility of the complainant returning to Queensland and to her abuser. This is an issue about which this Court is required to make its own independent assessment.

[94] So far as the complainant's return to Queensland is concerned, she gave plausible reasons for this. She did not return to live with the appellant. She returned to live with her grandmother and two other young family members of about her age who she missed. Her decision to return to live with those women does not provide a reason to question her credibility or reliability. That domestic situation became untenable after a number of months.

[95] Her conduct in moving to the house in which the appellant and his family resided at Richmond warrants additional consideration. She was going to live in the house of an adult male who, if she was to be believed, had abused her for many years until she went to Sydney. It was open to the jury and is open to this Court to conclude that her actions in moving into the house at Richmond were those of a vulnerable and abused child who needed a place to stay. Her father offered her shelter and, later, a room of her own, something she did not have at Northam. The complainant was still a child. She was in grade 8 at the time. I conclude that her actions in moving into the appellant's house do not discredit her or give me a reasonable doubt about the offences that are alleged to have occurred there, or the earlier offences.

[96] Other aspects of the complainant's ongoing relationship with her father were relied upon in defence arguments about the credibility and reliability of her evidence. They call for independent consideration by this Court.

[97] The last offence was alleged to have occurred between 1 January 1997 and 5 September 1998. After that, the complainant maintained contact with her father. That ongoing relationship was a matter which required an explanation. However, the complainant satisfactorily explained it in her re-examination. When asked why she had stayed in contact with her father she answered:

> "After what he had done, I – like, he's my dad, and I wanted to have a dad. Like, when I was older, we were doing fun things like drinking, like, at, like, the Thai and Laos community, going to parties and he was like more of a mate, you know, and it was nice. Like, that's all I wanted. I wanted him to be like the fun – you know, fun dad, and we'd like do stuff together and, like, with our other siblings as well."

[98] Having regard to the whole of the evidence about the dysfunctional family in which the complainant grew up as a child and the nature of her relationship with her father, it was open to the jury to accept the complainant's evidence about why she continued to have contact with him, despite the things he had done to her as a child.

The jury had the advantage of listening to all her evidence, including the evidence which I have just quoted. I conclude that her evidence about social contact with the appellant in the years after he ceased to sexually assault her is credible. It does not raise a reasonable doubt in my mind about his guilt.

Complaint witnesses

[99] The complainant's mother gave evidence. I have already summarised her evidence about the complaints which were made to her from when the complainant was very young. It was open to the jury to accept the mother's evidence about the making of those complaints and her reasons for not reporting them to the police.

[100] The complainant's stepfather gave evidence which explained that the complainant came to live in Sydney when she was about 10 years of age. Shortly before this he was told for the first time by his wife about allegations concerning the appellant. He then phoned the complainant's guardians in Brisbane (her grandmother and her then husband). After that phone call, arrangements were made for the complainant to travel to Sydney to live with her mother and stepfather. These arrangements were made within a week.

[101] The complainant's stepfather also recalled a visit to Brisbane when the complainant was 15 years of age, during which there was a conversation about what had happened to her in the past. Her stepfather and her mother encouraged her to "step up and report what had happened" and assured the complainant that they would stand beside her every step of the way.

[102] Another complaint witness, Ms Findlay, had been a very good friend of the complainant between around 2006 and 2008 when they lived together. During this time the complainant confided in Ms Findlay. On one occasion Ms Findlay noticed the complainant was quite upset and asked her what was wrong. The complainant then disclosed that her father had abused her throughout her childhood and that she could remember that this occurred as early as two to three years of age. In later conversations, the complainant disclosed how her father had touched her inappropriately, made her perform acts of a sexual nature and forced himself upon her in a sexual manner. The complainant also disclosed to Ms Findlay how the complainant's father would hit her with palm fronds as a form of discipline. Ms Findlay's evidence was that she was told the sexual abuse happened until the complainant was probably a young teenager and that it happened in their family home.

[103] Under cross-examination, Ms Findlay explained why her evidence-in-chief had more detail than appeared in her police statement. She explained that after signing her police statement she went home and thought about matters for probably over six weeks. The additional information that she recalled was written down in a diary.

[104] There was no suggestion of collusion between Ms Findlay and the complainant. Ms Findlay explained that the last time she had spoken to the complainant was about three to four years earlier.

[105] The next complaint witness, Ms Vongsamphanh, first met the complainant in late 2003 or early 2004. Thereafter they maintained a friendship despite the witness moving to Canberra in 2006. The witness recalled a phone call in 2014 in which the complainant said that her father had molested and raped her. This witness was not cross-examined.

[106] The final complaint witness, Ms Hickman, met the complainant in a professional capacity around 2015 when the complainant was studying. Initially the complainant told Ms Hickman that things had happened to her as a child "that no adult should do to another". The two women stayed in contact and one night during a telephone call the complainant reported that she had been molested as a child by her father. The complainant said that it had happened repeatedly during her childhood. The complainant gave some detail about the events, including that the appellant would always make her take a shower afterwards.

Other evidence or its absence

[107] After the complainant went to police in 2016 contact with her father's family ceased. The investigating police officer gave evidence about her investigations, including the fact that the complainant's grandmother, her aunts Sarah and Mary and her stepmother did not wish to provide a statement to police.

[108] Evidence adduced on the appeal indicated that the appellant's trial solicitors obtained a statement from Mary. The prosecution seemingly was not asked to call Mary as a witness and there is no criticism of the prosecution for that.

[109] As noted, the appellant exercised his right to neither give nor call evidence.

Application of relevant principles

[110] The fact that many of the arguments advanced by the appellant on this ground of appeal were advanced on his behalf at the trial and highlighted by the trial judge does not relieve this Court of its obligation to perform an independent examination of the whole of the evidence and to consider those and other arguments.

[111] In discussing the evidence of the particularised offences, I have considered contentions raised in the appellant's submissions about alleged deficiencies in parts of the complainant's evidence. These observations need not be repeated. It is, however, necessary to consider the accumulated criticisms of her evidence to decide whether, on the assumption that the jury found the complainant's evidence to be credible and reliable, it should nevertheless have entertained a reasonable doubt about the appellant's guilt, so that this Court should conclude that there is a significant possibility that an innocent person has been convicted.

[112] My independent assessment of the whole of the evidence should take account of the lengthy delay in the complainant taking her allegations to the police and the consequences of delay on the appellant's ability to defend himself.[10]

[113] Insofar as the appellant points to imprecision in the complainant's evidence about her age at the time of certain events, this imprecision is understandable. Her evidence about the location of each particularised offence is submitted, along with other matters, by the appellant to make his convictions unsafe. However, in my view, her evidence about those locations accords with other evidence about the state of houses and other places, including who resided there at particular times.

[114] As previously discussed, I do not accept the appellant's submission about the improbability of the alleged physical acts. The complainant's evidence about them was not inherently improbable.

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10 *Longman v The Queen* (1989) 168 CLR 79.

[115] The appellant's submissions also point to a lack of corroboration from any person other than the complainant and the lack of any supporting objective evidence, such as medical records. However, these matters do not, in my view, lead to the conclusion that it was not open to the jury to be satisfied of the guilt of the appellant. The lack of evidence in medical records is explained by the fact that the child complainant was never taken to a doctor or hospital at the relevant time. The absence of such evidence, the lack of corroboration, and the delay in the charges being brought is a relevant consideration. These matters require her evidence to be carefully scrutinised. However, having done so I find the complainant's evidence concerning the elements of each of the offences for which the appellant was convicted credible and reliable.

[116] The appellant raises alleged inconsistencies in the complainant's evidence about the alleged acts. However, having read the record and considered the arguments advanced by the appellant at trial and on appeal, I am unable to conclude that her evidence is flawed by any significant inconsistencies. Matters which, upon a superficial analysis, might appear to amount to inconsistencies or discrepancies, such as the sequence of offences, particularly which occurred first, are adequately explained. I have given particular consideration to the sequence of the earlier counts and Count 5 and why the complainant referred to Count 5 as the event that stuck out in her mind. Having regard to the whole of her evidence the sequence of events was reasonably clear and consistent.

[117] Any minor discrepancies in her evidence are consistent with the frailty of memory and do not reflect on the complainant's honesty or her reliability on matters of substance.

[118] The appellant also contends that there are inconsistencies in the preliminary complaint witnesses' evidence. In my view, the evidence of the different complaint witnesses was satisfactory. Each reported essentially the same account of prolonged sexual abuse of the complainant from an early age.

[119] There was no significant inconsistency between the complainant's evidence and what the complaint witnesses say they were told at different times. The complainant's credibility was bolstered by the evidence of the preliminary complaint witnesses.

[120] The evidence at trial does not, in my view, contain discrepancies, inadequacies or otherwise lack probative force so as to lead me to conclude that, even making full allowance for the advantages endured by the jury, there is a significant possibility that an innocent person has been convicted. The evidence of the complainant satisfactorily addressed questions about how the offences came to occur, where and when they occurred, why she did not take her complaints to the police soon after the offences occurred and why she maintained a social relationship with the appellant after his sexual abuse of her ceased, despite all that he had done to her as a child.

[121] I conclude that it was open, upon whole the evidence, for the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences charged.

[122] Ground 1 of the appeal is not made out.

Ground 3 – Did certain evidence result in a miscarriage of justice?

[123] It is convenient to next address Ground 3. It relates to the reception of certain, brief evidence from two complaint witnesses, the trial judge's directions about it, and the refusal of an application to discharge the jury.

The evidence

[124] The evidence of one of the preliminary complaint witnesses, Ms Findlay, has recently been discussed. At the end of her evidence-in-chief, there was the following question and answer:

> "Any other things she told you about things happening with her father with her that you can recall?---That it – the only other thing that I can recall is that it may have happened to other family members as well. Yep."

[125] As can be seen, the answer was not directly responsive, and possibly not responsive at all, to a question about things happening between the appellant and the complainant. After cross-examination, which lasted five minutes and did not mention this answer, the witness was excused. Immediately thereafter and before the next witness came into the courtroom, the trial judge gave this direction:

> "… ladies and gentlemen, that last witness said something like, "it may have happened to other family members." Now, that is not evidence of anything and it's not something that you could place any weight on. It is, at best – at most, it is some kind of speculation, but there is no basis for it and even truthful people make assumptions sometimes or leap to the wrong conclusions, and the complainant has given no evidence of that and it isn't anything about which that last witness could comment on. So disregard it. I can't tell you that in strong enough terms, because it is worthless."

[126] Later that morning, on the third day of the trial, another complaint witness, Ms Hickman, gave the evidence which I have summarised. After reporting what the complainant had said about events in her childhood, she was asked and answered the following question:

> "And did she say anything more to you about the – a last time anything happened?---She said when she was – she went to live with her dad so that she could try and protect her siblings."

[127] Ms Hickman was then asked about what the complainant had told the witness "about what happened while she was living there". The witness responded that the appellant tried something with the complainant, she just said, "he did what he did" and then he told her to "go and shower" and then it did not happen again.

[128] To place matters in context, the witness' report in that regard was consistent with the complainant's evidence about the incidents charged as counts 13 and 14, being the final sexual assaults upon her. Ms Hickman's evidence-in-chief concluded at that point and there was no cross-examination. She was excused at 11.54 am. There was a police witness and then matters connected with admissions and amending some of the dates on the indictment. At 12.33 pm counsel for the appellant indicated that he needed more time to finalise instructions about giving evidence and to get instructions on admissions and whether to make an application, given some of the things that were said by witnesses.

[129] When the court resumed at 2.16 pm, defence counsel indicated that he had instructions to make an application for a mistrial based on the evidence of Ms Findlay and Ms Hickman which I have just quoted. The two answers which they had given about other family members were submitted to be inadmissible evidence that suggested that the appellant had interfered with other members of his immediate family and this was the reason the complainant went back to live with him, so as to protect her siblings. The evidence was said to be highly prejudicial and incapable of being cured by the trial judge.

[130] In response, the Crown prosecutor adopted observations made by the trial judge during the course of argument that the evidence did not go so far as to make an assertion that another child was hurt and that, if the jury accepted that those things were said by the complainant, they may indicate a fear or a suspicion by the complainant, and that it would not be unusual for a victim of childhood sexual abuse to be concerned that other children in the family were at risk of being abused by the same offender. The Crown prosecutor further submitted that the response by Ms Hickman served to lessen the impact that might have stemmed from Ms Findlay's answer, so as to suggest the complainant was concerned about what might happen to her younger siblings.

[131] Accordingly, the jury would not draw an adverse inference that these sorts of things had in fact been done to other children. The fact that the trial judge very clearly raised the matter also meant that potential for prejudice had been cured and the jury should not be discharged in the circumstances.

[132] The trial judge declined to discharge the jury. Because this is not an appeal from her decision on that matter, it is unnecessary to detail her reasons. In summary, the trial judge noted that defence counsel had fairly conceded that the complainant would have been entitled to give evidence that the reason for returning to the appellant's home was a concern to protect her siblings and if such evidence had been given, it would not amount to an accusation that he in fact had done so. It would simply make her decision to return more plausible. The trial judge referred to the direction which she had given that evidence about the other children had no probative value and that the jury's "energetic endorsement" of that direction (presumably a reference to nodding, or some other form of body language) reassured the trial judge that it clearly understood and accepted the direction. The judge also indicated that the direction could be further reinforced. The judge declined to find improper prejudice that required the jury to be discharged.

[133] The trial judge then inquired whether defence counsel wanted her to give a "very pointed direction" about the evidence or a more general direction. Defence counsel indicated that he preferred the judge to give a specific direction about the evidence.

[134] In her summing up, the trial judge gave conventional directions about the appropriate use of preliminary complaint evidence and also gave the following direction about the two answers given by Ms Findlay and Ms Hickman respectively:

> "Yesterday, I directed you to disregard Ms Finlay's [sic] reference to the possibility of other family members, and by your reaction, it seemed that you were already aware that that was not something you could use against the accused. I see you agree with me now. After I spoke to you about that, the next witness also recalled the

> complainant saying that she went back home – saying something to the effect that she had gone back home to protect other children. The statements about other family members cannot be used as complaint evidence. They do not concern any particular charge, and they have no logical relevance to the issues in the trial. You must disregard them, and perhaps to labour the point and state the obvious, what you have heard in that regard about the possibility of other children amounted to no more than an expression of concern that it may have happened, or it could happen, to other children. It was expressed as a concern premised upon the allegation that it had happened to **[ ]**, and therefore, the reasoning was: if her, it could also happen to others. That part of what Ms Finlay [sic] and Ms Hickman said did not purport to be an account of something that anyone had observed or experienced. **[ ]** did not claim to have seen anything sexual against other children. So, of course, that part of the evidence is not evidence that the accused did abuse any other child, and it is not evidence that the accused sexually abused **[ ]**. It has no probative value whatsoever. It does not add to the prosecution case. But it is the kind of thing that could cause unfair prejudice. That is why I have stepped you through it again – to guarantee that you do not fall into that error."

The relevant test

[135] Counsel for the appellant accepts that for the purpose of Ground 3 the appellant must show that the trial judge erred in failing to discharge the jury because of the receipt of the quoted inadmissible evidence and that the error resulted in a miscarriage of justice.

[136] Section 60(3) of the *Jury Act 1995* provides that a decision of a judge under that section is not subject to appeal. This appeal is not an appeal against the exercise of the judge's discretion to discharge the jury. Instead, the appellate court decides whether, on consideration of the whole of the evidence, there has been a substantial miscarriage of justice.[11]

[137] The relevant test was discussed by this Court in *R v Peter; R v Anau; R v Ingui; R v Banu*.[12] A trial judge's discretion to discharge a jury is to be exercised when it is necessary to ensure a fair trial.[13] It is a decision to be made having regard to the circumstances of the trial and the likelihood of any material prejudice to the accused.

[138] In *R v Fox*,[14] the court held that in determining whether a trial miscarried as a result of the failure to discharge the jury, the relevant time for that question to be considered was the conclusion, not the beginning, of the trial. The relevant issue is not the refusal to discharge the jury per se, but whether the refusal resulted in the accused being denied a fair trial, amounting to a miscarriage of justice.

Submissions on Ground 3

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11 *R v Fraser* [2001] QCA 187.
12 [2020] QCA 228, particularly at [64]-[65].
13 *R v Munday* (1984) 14 A Crim R 456.
14 [1998] QCA 121.

[139] The appellant submits that the admission of "inadmissible, irrelevant and highly prejudicial evidence" constituted a miscarriage of justice, despite the fact that the trial judge directed the jury to disregard it. The jury could not "unhear" what they should not have heard and the refusal to discharge the jury denied the accused a fair trial, amounting to a miscarriage of justice.

[140] The respondent submits that the evidence in this case did not necessitate the jury's discharge and that the appropriate remedy was the directions which were given by the trial judge. They are said to have adequately counteracted any potential prejudice that the non-responsive answers could have caused to the appellant.

Did the decision to not discharge the jury result in a miscarriage of justice?

[141] I am not persuaded that the trial judge erred in deciding to not discharge the jury. The evidence, while inadmissible and having the potential to prejudice the appellant, did not necessitate the discharge of the jury to ensure a fair trial.

[142] As the appellant submits, the jury could not "unhear" what they should not have heard. However, the relevant inquiry is not whether the evidence was inadmissible, but whether its admission was potentially or actually prejudicial and whether discharging the jury was necessary to address that prejudice and to ensure a fair trial.

[143] The potential prejudice of the evidence falls to be assessed against the whole of the evidence, including the complainant's evidence about her reasons for going to live with the appellant's family some months after she had returned to Brisbane from Sydney. Her evidence did not suggest that she did so out of a concern to protect her siblings with whom the appellant was living at the time.

[144] The brief and unresponsive answers of Ms Findlay and Ms Hickman suggested otherwise. Even if their evidence had gone without further comment by the trial judge, the jury might have concluded that they were not giving a reliable report of the complainant's reasons for going to live with the appellant or a reliable report of any accusation that she actually made about the safety of other family members. Ms Findlay's answers raised the possibility that something similar may have happened to other family members. That speculation had a potential to prejudice, but was not as prejudicial as a purported report of the complainant saying that such things had actually happened to another family member. Ms Hickman's answer was less prejudicial, being about the reason she understood the complainant went to live with her father. It was a concern to try to protect her siblings, rather than an assertion of actual wrongdoing by the appellant towards those siblings.

[145] If the two witnesses' answers had been left without comment or emphatic directions from the trial judge, then they had the potential to prejudice, despite their brevity, by encouraging the jury to speculate about the reasons the complainant moved in with her father (a reason which the complainant did not proffer) and to speculate that her siblings needed protection from their father. However, the brief and unprompted evidence of Ms Findlay and Ms Hickman was the subject of comment by the trial judge and suitable, emphatic directions.

[146] The trial judge's directions, both shortly after Ms Findlay was excused and in her summing up, were clear. No complaint was made at the trial or on appeal about

their terms. In my view, the trial judge's clear and emphatic directions were apt to counteract the potential prejudice to a fair trial of the appellant arising from the two unresponsive and inadmissible answers.

[147] The appellant has not shown that the giving of those answers resulted in a miscarriage of justice. Ground 3 of the appeal is not made out.

Ground 2 – Interpretation at the trial

Background

[148] Despite some facility with English after living in Australia for about 30 years, the appellant's command of English was not thought sufficient for his pending trial. On 12 July 2019 the District Court ordered that a Thai interpreter be available to him at the trial. His lawyers at the time withdrew around this date and Black & Co Lawyers became involved on his behalf.

[149] The appellant's new solicitor, Mr Black, convened two separate video-link conferences with the appellant to obtain a statement and instructions from him leading up to the adjourned trial.

[150] The first occurred on 23 August 2019. The only participants were the appellant and Mr Black. That conference lasted about thirty minutes and Mr Black was able to obtain certain instructions from him.

[151] The next videoconference was on 23 October 2019. It initially was attended by the appellant (who was in custody), Mr Black and counsel briefed for the trial, Mr Braithwaite. They spoke in English to the appellant for about 20 minutes until the arrival of a Thai interpreter. The interpreter engaged for the conference was not the same interpreter who appeared at the trial.

[152] Both conferences were audio recorded by Mr Black to assist in preparing a statement. For the purposes of this appeal, legal professional privilege was waived by the appellant in relation to those recordings. Mr Black and Mr Braithwaite had access to them to refresh their memories of the appellant's facility with English and to provide affidavits and oral evidence in this Court. Neither party sought for copies of these audio recordings or the notes taken by Mr Black to be tendered.

[153] I will need to refer in some detail to the course of events at the trial, as disclosed in the record of the trial, and as described in the affidavit and oral evidence of the appellant, Mr Black, and Mr Braithwaite.

[154] By way of preview, the court-appointed interpreter was qualified. She had, and it became apparent to Mr Black that she had, been the appellant's interpreter at his prior rape trial. According to Mr Black, the appellant was comfortable with Mrs Hood as the interpreter, having previously dealt with her. Mr Black's evidence is that the appellant did not express any misgivings to him about the interpreter's performance at the previous trial nor during the trial in October 2019. He observed them interacting while the appellant was in the dock. Mr Black's evidence is that he was comfortable that Mrs Hood was a competent and appropriately qualified court interpreter proficient in Thai. Mr Black says that at no time did the appellant say to him during the trial or during any break in the trial that he could not understand what was being said in court.

[155] Mr Black's oral evidence was that he spoke to the appellant after the verdict. The appellant thought that the verdicts were "unjust". However, no issue about interpretation at the trial was raised by the appellant at that point.

[156] Mr Black's firm filed a notice of appeal on 26 November 2019. No ground of appeal related to the issue of interpretation.

[157] That issue arose at some later date upon a review of the matter by new lawyers. Legal Aid Queensland, on the appellant's behalf, filed an amended Notice of Appeal on 11 February 2021 which raised a new ground of appeal. It reads:

> "The trial was not conducted according to law because the court ordered interpreter did not interpret for the applicant, as required, throughout the trial".

[158] An affidavit sworn by the appellant on 5 February 2021 (which was read to the appellant with the assistance of an interpreter) stated that:

(a) he did not speak to the court-appointed interpreter before the trial started;

(b) he understood approximately 25 per cent of what was being said at the trial;

(c) he did not discuss how often the interpreter was going to interpret;

(d) the interpreter was only interpreting "7 out of 10 words because she couldn't talk loud enough" and in the time she could interpret, she would; and

(e) the interpreter was the same interpreter that he used seven or eight years ago, that the interpreter was "okay interpreting the last time I was on trial because the interpreter didn't get in trouble".

[159] As to the last matter, the appellant says that he remembers the interpreter was "getting in trouble" and that when she "got in trouble and she stopped interpreting everything and then I didn't understand again". The reference to "getting in trouble" seemingly is a reference to getting into trouble with the judge.

[160] The appellant's affidavit also says that he told his lawyers at the trial "that some things I could understand but others I couldn't, because in court, the interpreter couldn't explain everything".

[161] A number of these recollections are in conflict with Mr Black's and Mr Braithwaite's evidence, including their oral evidence given to this Court.

[162] As to the appellant's evidence that he only understood approximately 25 per cent of what was being said at the trial and that he told his lawyers that he could not understand some things because the interpreter could not explain everything, Mr Braithwaite of counsel says that at no stage did the appellant raise with him, or with Mr Black in his presence, that he was having any difficulty with the interpreter or understanding the court process. Mr Braithwaite says he regularly spoke with the appellant throughout the proceedings, including during court breaks, and nothing of the kind was mentioned. Neither was anything of the kind mentioned to Mr Braithwaite by Mr Black in that regard.

[163] Mr Braithwaite also says that, had he formed the view that the appellant was not adequately following proceedings, he would have brought that matter to the

attention of the trial judge. He did not do so based on his previous experience during the 23 October 2019 conference, no issue being raised with him throughout the trial by the appellant, either directly or through the interpreter, and the things that were said by the interpreter in exchanges with the trial judge.

[164] Before turning to the resolution of the conflicts in the evidence between the appellant and his former lawyers, the governing principle that applies to this ground of appeal should be stated.

The governing principle

[165] In *Ebatarinja v Deland*,[15] the High Court stated:

> "On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In *Kunnath v The State*, the Judicial Committee of the Privy Council said:
>
> > "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him."
>
> If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. In *R v Willie*, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them."

[166] It is not necessary at this point to address the most appropriate practical course for the court, lawyers or the court-appointed interpreter to adopt where an accused has some command of English and is able to understand parts of the proceeding without the assistance of an interpreter. The governing principle is the same in such a case as one in which the accused speaks no English at all. The accused should be able to understand the proceedings and the nature of the evidence against him or her. The accused should be able to understand the proceedings and decide what witnesses should be called, whether to give evidence and, if so, upon what matters relevant to the prosecution case against the accused.

The relevant issue

[167] The issue on this appeal is not whether the appellant did not need an interpreter because he was sufficiently proficient in English. The trial court proceeded on the basis that the appellant required an interpreter. An order was made. On the second

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15 (1998) 194 CLR 444 at 454 [26]-[27] (footnotes omitted).

day of the trial, the judge raised the question of whether the appellant in fact required an interpreter. The exchanges that followed are set out below. The interpreter remained, for good reason.

[168] The issue is whether the interpretation provided to him at the trial allowed him to sufficiently understand the proceeding and the nature of the evidence against him so as to decide whether to give or call evidence and, if so, upon what matters evidence would be given.

The course of the trial as disclosed in the appeal record and by uncontested evidence

[169] The trial commenced on Monday 28 October 2019. Some preliminary matters were addressed before the jury panel arrived, including arrangements about the court-appointed interpreter. At that stage the interpreter was sitting beside the appellant in the dock and Mr Braithwaite of counsel told the judge:

> "His English is quite poor, so unfortunately it might mean that things take a little longer than usual."

[170] The matter was stood down at 10.19 am to await the arrival of the jury panel. It appears that the appellant and the interpreter remained in the dock during this period. The matter resumed at 10.52 am with the arrival of the jury panel at which point the indictment was presented and the interpreter was affirmed. Formalities at the start of the trial followed. Because the trial judge was in another trial and had to return to it, the jury retired at 11.38 am and the matter was adjourned to the next day.

[171] The complainant gave evidence for most of Tuesday 29 October 2019 and was the only witness called that day.

[172] After the jury retired at 12.58 pm for lunch, the trial judge asked defence counsel whether the interpreter was required. There followed exchanges between defence counsel and the judge, the judge and the interpreter and the judge and the appellant. They are significant and it is appropriate that they be quoted at some length:

> "HER HONOUR: Is the interpreter required, Mr Braithwaite?
>
> MR BRAITHWAITE: Is the interpreter required?
>
> HER HONOUR: Yes.
>
> MR BRAITHWAITE: That was my experience when I tried to have a conference with my client last week.
>
> HER HONOUR: Because there didn't seem to be any interpreting going on during the evidence just given.
>
> MR BRAITHWAITE: Right.
>
> HER HONOUR: And your client seemed to be paying careful attention to what was being said, so I inferred from that that he could understand.
>
> MR BRAITHWAITE: My experience with him is he can understand some broken English – or can – there's a very rudimentary understanding, if I can put it that way. But from conference last week

I was under no misapprehension that there'd be an interpreter required.

HER HONOUR: All right. Well, if that's the case, the interpreter will remain. I just – sometimes people require the court to provide an interpreter and, really, it is an unnecessary expenditure for no apparent reason.

MR BRAITHWAITE: I well appreciate your Honour's observations.

HER HONOUR: And I just raise it because I would hope that the interpreter is doing her job.

MR BRAITHWAITE: Yes. I'll have some discussions after the adjournment.

HER HONOUR: And presumably – I'll just ask – perhaps I can ask Mrs Hood.

MR BRAITHWAITE: Sure. If it please.

HER HONOUR: Mrs Hood.

INTERPRETER: Yes.

HER HONOUR: I know initially you started to take notes. You seemed to be writing a - - -

INTERPRETER: Yes.

HER HONOUR: - - - translation during the opening, but during the evidence were you not required to translate?

INTERPRETER: He's understood what's going on. And, besides, there's no time for me to interpret the whole time. It goes on and on and on and on.

HER HONOUR: All right. Well - - -

INTERPRETER: Yes. And he understood now what my role is he's cross-examination – maybe cross-examining or something like that, he can't follow all the terminology or something like that.

HER HONOUR: All right. Well, your role is to make sure that he – to ensure that he understands - - -

MR BRAITHWAITE: Yes.

HER HONOUR: - - - that Mr [last name of appellant] – Ms [last name of complainant] – it's important that you understand what's going on. And so - - -

INTERPRETER: He understood [indistinct]

HER HONOUR: I – all right.

INTERPRETER: Yeah.

HER HONOUR: I just wanted to make sure of that, because I didn't want to progress with the trial beyond a point where it would become unsafe because, Mr [last name of appellant], you didn't understand.

INTERPRETER: It's [indistinct]

HER HONOUR: Just – sorry. Yes.

INTERPRETER: It's actually - - -

HER HONOUR: No. No. Sorry. Mr [last name of appellant].

DEFENDANT: Some word I don't understand. I [indistinct]

HER HONOUR: All right. So you refer to Mrs Hood when you need to? Is that - - -

DEFENDANT: Yes.

HER HONOUR: All right. All right. And so so far everything is all right from your perspective?

DEFENDANT: I don't understand everything [indistinct] I don't been to school.

HER HONOUR: Well, that – yes. That's all right.

DEFENDANT: I can't write. I can't read.

HER HONOUR: Okay.

DEFENDANT: I understand [indistinct] some word I don't understand. I [indistinct] her [indistinct]

HER HONOUR: All right. Well, it sounds, Mr Braithwaite, like your client has been following as it appeared the evidence, so that there is no need to replay the complainant's evidence to him.

MR BRAITHWAITE: I wouldn't ask for it to be done.

HER HONOUR: I beg your pardon?

MR BRAITHWAITE: I wouldn't ask for that to be done.

HER HONOUR: Well, I would do that if I was – if I believed that he hadn't - - -

MR BRAITHWAITE: Of course. Yes.

HER HONOUR: - - - been able to follow what was going on, but it seems clear that he has.

MR BRAITHWAITE: Yes.

HER HONOUR: All right. And, Mrs Hood - - -

INTERPRETER: Yes, your Honour.

HER HONOUR: - - - if you need – if there is a point at which the court is going too fast and you need time to interpret or to translate for Mr [last name of appellant], you just need to tell me. And I will

> make people go more slowly. If you need a break, we'll have a break.
>
> INTERPRETER: It depends on – you want me to translate every question and answer, then there have to have a pause.
>
> HER HONOUR: All right.
>
> INTERPRETER: But he seemed to be able to follow.
>
> HER HONOUR: I only need you to interpret as Mr [last name of appellant] requires you to do.
>
> INTERPRETER: Yes. That's all right.
>
> HER HONOUR: But if at any point he hasn't understood something and you don't have the time to translate it or you want the question to be repeated or the answer to be repeated, all you have to do is let me know.
>
> INTERPRETER: Yes, your Honour.
>
> HER HONOUR: And I will stop and make sure, because it is important that you understand, Mr [last name of appellant]. All right?
>
> INTERPRETER: Yes, your Honour.
>
> HER HONOUR: Thank you."

[173] The trial resumed at 2.30 pm.

[174] During the course of the complainant's evidence that day there were rest breaks taken at the complainant's request and a lunch break of about an hour and a half. There is no dispute that the appellant spoke to Mr Black and Mr Braithwaite during these breaks and also after the court adjourned that afternoon at 4.50 pm.

[175] The third day of the trial, being the second day of evidence, consisted of preliminary complaint witnesses and an investigating police officer. The first witness was the complainant's mother, followed by her step-father. The morning break was then taken at 11.05 am. At 11.24 am Ms Findlay commenced her evidence-in-chief. A few minutes thereafter the trial judge asked the jury to retire and the following exchanges occurred between the trial judge, the interpreter and defence counsel. Again, it is necessary to quote a substantial part of the transcript. I have highlighted, however, an important passage in which defence counsel explained how the interpretation had proceeded the previous day and the interpreter's statement that she had been translating.

[176] The trigger for the trial judge's intervention was that the interpreter's words could be heard quite loudly. In the result, the microphone near the interpreter was muted:

> HER HONOUR: I'm sorry, but, Ms Hood, whilst you didn't appear to say anything during the evidence-in-chief of the complainant, you've been talking quite loudly through these witnesses, and it's actually distracting the jury. It - - -
>
> INTERPRETER: What did I do, your Honour?

HER HONOUR: You can stand up when I talk to you. If Mr [last name of appellant] needs an interpretation, you are, of course, there to give it, but I'm just a bit confused about how you're approaching this, because when the complainant, who is the most important witness, was giving her evidence, until she had almost finished her evidence-in-chief from the prosecutor, you hadn't - - -

INTERPRETER: I have. **I have translated.**

HER HONOUR: I could not – sorry, I could not hear you talking at all to Mr [last name of appellant], but, since then, you've been talking quite loudly, and I don't want to interfere with your ability to do your job, but I just wonder if there is some way that we can approach this so that it is not as distracting for the jury.

INTERPRETER: I don't understand what you're talking about, because **I'm trying my best to explain to him about this, translated whatever I could hear, and I don't know what I have done wrong.**

MR BRAITHWAITE: Can I perhaps intervene to assist the court. What – I think **the difference between yesterday and today is that, yesterday, Mr [last name of appellant], if he didn't understand something, would make a note in Thai, and then Ms Hood would translate that for him as the evidence went along. Now, I just note that he doesn't have any note paper there this morning, so I think we might give him some note paper and perhaps revert to that practice, if that might assist the court.**

HER HONOUR: Well, as I said, I don't want to – if that works satisfactorily, and if it's effective, that would be great. I - - -

MR BRAITHWAITE: Well, if it worked for the complainant's evidence, then - - -

HER HONOUR: Yes, well, that – one would - - -

MR BRAITHWAITE: For preliminary complaint evidence, I'm entirely happy for it to be for preliminary complaint evidence.

HER HONOUR: I just repeat that I don't want to compromise Mr [last name of appellant]'s ability to participate and understand.

MR BRAITHWAITE: I - - -

HER HONOUR: But it is – it is a little - - -

MR BRAITHWAITE: Yes.

HER HONOUR: - - - strange that, at this point - - -

MR BRAITHWAITE: Yes.

HER HONOUR: - - - we're confronted by this, when it was not required - - -

MR BRAITHWAITE: Yeah.

> HER HONOUR: - - - earlier on.
>
> MR BRAITHWAITE: Yeah. I appreciate what your Honour's saying, and it's preliminary complaint evidence. It's probably not matters for which he can comment upon anyway, so I might suggest that that approach that was going on yesterday, unbeknownst to me, I might say, during the complainant's evidence – I was focused on that – we'll revert to that to – for the benefit of the jury.
>
> HER HONOUR: Well, if it works – so Mrs Hood, you're here to make sure that Mr [last name of appellant] understands what's going on.
>
> INTERPRETER: Yes, and trying to respond to him - - -
>
> HER HONOUR: Yes.
>
> INTERPRETER: - - - what's going on.
>
> HER HONOUR: All right. Well, it's quite loud because I can hear it from here.
>
> INTERPRETER: I didn't know it was loud, because if – if I speak too quietly, he might not be able to hear what's going on.
>
> HER HONOUR: Yes. Well - - -
>
> INTERPRETER: Or understand - - -
>
> HER HONOUR: - - - we'll take the microphone away. That's right. And – all right. All right. All right. And the microphone will be muted. Okay. All right. Well, if everybody's happy, we'll try again.

[177] Shortly thereafter the jury returned and the judge explained to them the importance of the appellant understanding what was going on and that was why he had an interpreter. The judge explained that she was "just a little concerned that the level of noise was distracting for you, and the bailiff has now muted the microphone from that part of the courtroom, so hopefully we will be better". Ms Findlay then resumed her evidence.

[178] The next matter of relevance is that after the conclusion of the evidence there was a need to stand the matter down to enable defence counsel to obtain instructions. At 12.35 pm the jury returned to the courtroom with two questions which the trial judge answered before allowing them to go to lunch. One question was:

> "Why didn't the accused have the translator speaking to him during [first name of complainant's] evidence? It appeared that he wasn't getting her evidence translated to him?"

[179] The trial judge responded that the appellant "is entitled to be assisted to the extent that he requires it from his interpreter. That does not mean that she has to interpret everything if he doesn't need it, and I have already satisfied myself from counsel and Mrs Hood that she has been giving him all of the assistance that he requires".

[180] In summary, the trial record indicates there was limited talking between the interpreter and the accused by way of interpretation of the complainant's evidence.

More was seemingly said by way of interpretation the following day when the preliminary complaint witnesses gave evidence. The limited verbal exchanges between the interpreter and the appellant during the complainant's evidence prompted two separate inquiries, one by the trial judge and the other by the jury.

[181] The jury's question may have been prompted by a belief that the interpreter's job was to translate every word. That understanding (or misunderstanding) of the interpreter's role was not informed by an appreciation of the need or otherwise for every word of the complainant's evidence to be translated. The jury's question is understandable in circumstances in which the interpreter was sworn in their presence and they knew little about the appellant's understanding of English.

[182] Defence counsel's explanation to the judge on the third day of the trial about the differences between the conduct of interpretation on the second and third days is illuminating. It indicates that the process adopted during the complainant's evidence was that if the appellant did not understand something, then a note would be made of that in Thai and the interpreter would address that matter. Possibly because of the absence of notepaper on the third day, or possibly because the preliminary complaint witnesses' evidence was not as familiar to him as the complainant's evidence, verbal exchanges between the interpreter and the appellant increased on the morning of the third day of trial.

[183] The trial record suggests that the appellant understood a substantial part of the oral evidence given by the complainant. Other things said on that day were addressed principally by notes being taken with subsequent interpretation.

The appellant's oral evidence before this Court

[184] When asked in cross-examination if Mr Braithwaite and Mr Black regularly spoke to him during the trial, the appellant responded:

> "Yes. They were in front of me about one metre away from me, and I was sitting at the back here, like this, with the interpreter."

[185] The appellant was then asked if Mr Braithwaite and Mr Black would speak to him during court breaks, to which he responded:

> "There was one time that the interpreter asked me whether or not I understood everything, and I told her yes, I did. Okay. Those two people, Mr Black and Mr Braithwaite, asked the interpreter to ask me whether or not I understood everything, and I said, "Yes"."

[186] When asked whether Mr Braithwaite and Mr Black spoke to him in English, the appellant replied:

> "He – they spoke to me through the interpreter. Sometimes I understood; sometimes I didn't. But when I didn't understand, I would ask."

[187] The appellant agreed that the interpreter was of great assistance to him on the second day of the trial (being the first day of evidence), when the complainant gave her evidence. He said: "I heard my daughter's evidence, and then the – Mrs Hood would interpret – interpret it for me."

[188] The appellant later stated that "the first and second days I did understand". This further exchange occurred:

> "MR COOK: At no stage did you raise with Mr Braithwaite that you were having difficulties understanding what was happening at your trial
>
> INTERPRETER: I – on the third and the fourth day, I did raise concern to Mrs Hood. It was very bad, because sometimes she would interpret and sometimes she wouldn't. Because – because the judge – because the judge was always stopping – telling Mrs Hood not to speak too loudly all the time, and then she got angry, Mrs Hood got upset."

[189] The exchanges quoted above, together with the appellant's affidavit, suggest his concerns about the standard of interpretation started on the third day after what he perceived as the interpreter "getting in trouble".

[190] In his oral evidence, the appellant complains that on the third day of the trial, he was not told about, and the interpreter did not interpret discussions about, the application to discharge the jury. The appellant stated that "She didn't tell me. The interpreter didn't tell me".

[191] The appellant confirmed in cross-examination that there were no issues around the interpretation of the discussions between Mr Braithwaite and himself about whether he should give evidence. The appellant confirmed that he "understood that day".

[192] Finally, the appellant clarified that he did not raise any issues about the interpretation or understanding the trial with Mr Braithwaite and Mr Black directly. He said that he told the interpreter to tell them. The following evidence was given by him:

> "MR COOK: Okay. So the question was, at no stage did you raise with Mr Braithwaite any issues with understanding the trial.
>
> INTERPRETER: I didn't tell him directly, but I told my interpreter, Mrs Hood.
>
> MR COOK: At no stage did you raise any issues (sic) understanding with Mr Black during your trial.
>
> INTERPRETER: After the jury delivered the verdict and then everyone was gone or the jury was gone, then I told him that I didn't understand.
>
> MR COOK: Told Peter Black at that stage.
>
> INTERPRETER: I told the interpreter to tell Mr Black. Whether or not she told him, I don't know."

Assessment of the affidavit and oral evidence in this Court

[193] Neither the trial record nor the evidence of Mr Black and Mr Braithwaite supports the appellant's assertion in his affidavit that he understood about 25 per cent of what was said at the trial.

[194] I am not persuaded that the appellant's affidavit or oral evidence on this appeal is reliable. He has a poor recollection of detail, for example in saying that he was not able to speak to the interpreter before the trial started. He did not recall that he sat beside her for 30 minutes awaiting the arrival of the jury panel.

[195] On more important matters, the evidence of Mr Black and Mr Braithwaite that the appellant did not complain to either of them about the conduct of the interpreter commands acceptance. So does their evidence that the appellant did not say to either of them during the trial, or during any break in the trial, that he could not understand what was being said in court.

[196] The evidence-in-chief of the complainant largely followed the contents of her police statement, about which the appellant had given instructions prior to the trial. He was familiar with what she was expected to say. It seems likely that he understood a substantial part of her evidence without requiring interpretation.

[197] The record suggests that there were some parts of the complainant's evidence or things said by the judge or the lawyers on that day that the appellant did not understand. However, the record also indicates that if he did not understand something, then the interpreter would interpret that for him as the evidence went along. This would be done by the taking of notes. The oral evidence of the appellant in this Court was that the interpreter was of great assistance on the first day of evidence and that he heard his daughter's evidence and the interpreter interpreted for him.

[198] I do not accept the appellant's evidence that he told his lawyers that there were things that he could not understand because the interpreter could not explain everything. It seems more probable that he said to them that there were some things that he could not understand and the lawyers explained these things to him during breaks and adjournments. This is consistent with the need to have an interpreter in the first place and the evidence of Mr Black and Mr Braithwaite to the effect that, while the appellant had a basic understanding of English, he required assistance with complex matters and important decisions such as whether to give or call evidence.

[199] The appellant has a recollection of the interpreter "getting into trouble". He says in his affidavit that sometimes when she was interpreting "the judges and lawyers would get upset" and that he does not recall her not interpreting before that. This recollection of trouble seems to relate to the intervention by the judge on the trial's third day when the judge told the interpreter that she had been talking "quite loudly through these witnesses" and that it was distracting the jury. Those remarks might have been perceived by the appellant as a criticism of the interpreter and that the interpreter was "getting in trouble" with the judge. In any case, he does not recall her "not interpreting" before then.

The appellant's submissions

[200] The appellant's counsel submits that the transcript reflects that the appellant "did not receive a complete translation of the evidence-in-chief of the complainant". The further submission is made that the trial judge accepted the opinion of the court-ordered interpreter that the appellant could understand the evidence of the complainant sufficiently, despite the fact that during the trial judge's conversation directly with the appellant, it appeared that he did not.

Did the appellant sufficiently understand the proceedings and the evidence?

[201] As to the first part of the submission, a complete translation of the evidence was not required in the circumstances.

[202] As noted, the evidence is that the appellant understood a substantial part of the complainant's evidence such that the interpreter was not required to translate all that was said. Those parts of the complainant's evidence that he did not understand were noted and the subject of interpretation through the process which counsel explained to the trial judge.

[203] The appellant's oral evidence was that the interpreter was of good assistance the first day of evidence and he heard, and received an interpretation of, the complainant's evidence.

[204] The appellant did not complain to his lawyers at the trial, despite many opportunities to do so directly to them, that the process of interpretation did not allow him to sufficiently understand the evidence of the complainant.

[205] The trial record indicates that the interpreter interpreted the evidence of the complainant and of the other witnesses at the trial to the extent required to enable the appellant to sufficiently understand it. This conclusion is reinforced by the evidence given to this court by Mr Black and Mr Braithwaite.

[206] Matters proceeded differently, but satisfactorily, on the second day of evidence. If the appellant perceived that the interpreter "got in trouble" on the third day and stopped interpreting as a result, then he did not complain about those matters at the time. The appellant's recollection of events at the trial seems poor, and there is no support for his assertion that the interpreter stopped interpreting towards the end of the evidence after the trial judge raised an issue about the level of noise that could be heard. The trial record indicates that interpretation continued, as required, and that if little needed to be interpreted in the evidence of the final few witnesses, this is because the appellant understood what they were saying.

[207] As to the appellant's second submission, the trial judge was entitled to have regard to and to accept the opinion of the interpreter that the appellant sufficiently understood the evidence of the complainant. The fact that the appellant said that there were some words that he did not understand does not call for a different conclusion. The words he did not understand were noted and were the subject of interpretation.

[208] The appellant has not established that the interpretation provided to him at the trial did not allow him to sufficiently understand the proceeding and the nature of the evidence against him so as to decide whether to give or call evidence and, if so, upon what matters evidence would be given.

[209] Ground 2 of his appeal against conviction fails. In the result, his appeal against conviction should be dismissed.

Leave to appeal against sentence

[210] The appellant seeks leave to appeal against the sentences imposed upon him on 4 November 2019 on the grounds that the sentences totalling 17 years were manifestly excessive.

[211] The appellant was sentenced to 14 years for the maintaining offence (Count 4). He was convicted and not further punished on Counts 5 to 9 which constituted particulars of the maintaining offence. He was sentenced to concurrent terms of imprisonment on Counts 1, 2, 3 and 13 of three, five, eight and three years respectively. On the final count (Count 14) which was the rape committed at Richmond when the complainant was aged about 13, he was sentenced to three years imprisonment, to be served cumulatively on the sentence of 14 years. The 14 year sentence started from the date of sentence, rather than being required to be served cumulatively upon the eight year sentence that the appellant was serving for his offending in 2010 against a different complainant.

[212] By the time the appellant was sentenced in November 2019, he had served about six-and-a-half years of the eight year sentence that had been imposed by the Court of Appeal in 2014. As a result, the overall term of imprisonment for all his offending was about 23-and-a-half years. He was given a parole eligibility date of 9 August 2025.

[213] The appellant acknowledges that the sentencing judge was conscious of the need to moderate the overall sentence to take account of the substantial period that he had already spent in custody for his 2010 offending. The appellant contends that the sentencing judge identified the relevant principle but then failed to apply it so as to moderate the total period of imprisonment. The appellant submits that had his entire offending been dealt with at the same time it is likely he would have been sentenced to a period of imprisonment of around 20 years and that "the additional effect of 15½ years imprisonment" to which he was sentenced was manifestly excessive.

[214] The respondent submits that the sentences imposed took appropriate account of the appellant's overall criminality.

The relevant principle

[215] Sentencing requires a judge to ensure that the aggregation of sentences is appropriate for each offence and is a just and appropriate measure of the total criminality involved.[16] As Chesterman J (as his Honour then was) wrote in *R v Smith; Ex parte Attorney-General (Qld)*:[17]

> "The overriding principle is … that the aggregate sentence should fairly and justly reflect the total criminality of the offender's conduct."

This principle may be referred to as the "totality principle".

[216] In a case such as this, where the offender is already serving a term of imprisonment at the time he comes to be sentenced, regard must be had to that sentence. This principle is reflected in s 9(2)(l) of the *Penalties and Sentences Act 1992* which requires a court in sentencing an offender to have regard to "sentences already imposed on the offender that have not been served".

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16 See, for example, *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308 per McHugh J.

17 [1998] QCA 220.

[217] In *R v MAK* the New South Wales Court of Criminal Appeal stated:[18]

> "… where a judge is sentencing for offences in a situation where another judge has already sentenced the offender for other offences, the second judge must regard the first sentence as an appropriate exercise of the first judge's discretion and not seek to reduce or increase it by the sentences the second judge imposes."

The Court went on to note:

> "… the difficulty that confronts the second judge in trying to determine what the overall sentence would have been had a single judge been sentencing the offender for all offences for which he is, and has been, punished. That is in effect part of what an application of the principle of totality requires."

[218] The statement that the second judge must regard the first sentence as an appropriate exercise of the first judge's discretion is well-settled. The second judge's task is not to re-open the first sentence and to re-sentence for offences that already have been imposed in the light of facts not known to the first sentencing court. The second judge's task is to sentence for offences that are before that judge. In doing so, the judge must ensure that the aggregate sentence reflects the total criminality of the offender's conduct. This does not mean that the first sentence is re-opened and adjusted.

[219] Some authorities suggest that the second judge must not only regard the first sentence as an appropriate exercise of the first judge's discretion, "but must also seek to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences". Such a proposition appears in the following passage from the decision of the New South Wales Court of Criminal Appeal in *Warwick v R*:[19]

> "Where, as in the present case, a sentencing judge imposes a sentence on an offender who has already been sentenced by another judge, the second judge must not only regard the first sentence as an appropriate exercise of the first judge's discretion, but must also seek to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences: *R v MAK; R v MSK* [2006] NSWCCA 381; 167 A Crim R 159 at [99] (Spigelman CJ, Whealy and Howie JJ). The difficulty of this task imposes an additional obligation on counsel to provide assistance as to how the principles of totality ought operate in the particular case.
>
> The correct application of the principle of totality serves to remove from consideration arbitrary matters, such as whether the same judge sentenced the offender for all offences; or whether the offender was sentenced later for an offence committed earlier than one for which he has already been sentenced. The totality principle has the effect that, if all other things were equal, the total sentence imposed on the applicant for the August 2010 and the September 2010 offences would be the same irrespective of the time at which the offender was sentenced or the order in which he was sentenced for these offences."

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18 (2006) 167 A Crim R 159 at 183 [99]; [2006] NSWCCA 381 at [99] ("*R v MAK*").

19 [2016] NSWCCA 183 at [31]-[32] ("*Warwick*").

[220] In a case like this, the offender stands to be sentenced for a group of offences committed first in time, having already been sentenced for a second offence or group of offences. The sentence already imposed for the second offence or group of offences may have been made on the basis of assumptions that are falsified in the light of information that is available to the second judge. For example, in this case the appellant was sentenced by this Court in 2014 for offending against a different complainant in 2011 on the basis that he had no criminal history and was supportive of his children.

[221] The authorities do not permit the sentencing judge in such a case to proceed on the basis that, in the light of new information, the first court's sentencing discretion miscarried. They do, however, require the court to have regard to the defendant's total criminality. Account must be taken of the existing sentence so that the total period to be spent in custody adequately and fairly represents the total criminality involved in all of the offences to which the total period is attributable.[20]

[222] The authorities are somewhat unsettled about the necessity, permissibility or utility of attempting to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences.

[223] Such a course was approved by the High Court in *Mill v The Queen*[21] in a case in which offences were committed within a short space of time but in different jurisdictions. In that context, the High Court stated:[22]

> "In our opinion, the proper approach which his Honour should have taken was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time."

[224] In *Mill* the "intervention of State boundaries" constituted "a legal obstacle to the offender being sentenced on a single occasion".[23] The totality principle was applied to an offender who committed a number of offences within a short space of time but in more than one State.

[225] The deferment of sentence for the first group of offences in a case such as this is for a different reason to that which applied in *Mill*. The appellant was not apprehended in respect of his offending against his daughter until he had begun to serve his sentence for offences he committed against a different victim. Those offences were committed some 10 years after he desisted from further offending against his daughter and some 20 years after his offences against her began.

[226] As noted, some decisions following *R v MAK* and which extend the principle in *Mill* beyond its facts suggest that the second court must seek to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences.[24] Other courts faced with the situation in which the offender is

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20 *R v Beattie; Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 177 at 181 [19]; [2014] QCA 206 at [19] ("*Beattie*") citing authority including *Postiglione v The Queen* (1997) 189 CLR 295 at 308.

21 (1988) 166 CLR 59 ("*Mill*").

22 At 66.

23 *R v Sayer* [2018] VSCA 177 at [76] ("*Sayer*").

24 For a recent example see *Ozan v R* [2021] NSWCCA 231 at [65].

serving or has served a sentence for similar conduct have questioned whether it is appropriate to determine a notional sentence as though the offender were being sentenced for the whole offending at one time and then make adjustments to that sentence. In *R v Knott*, Gray J (with whom Doyle CJ and David J agreed) stated:[25]

> "The sentencing Judge erred in the application of sentencing principle. The respondent was to be sentenced as at November 2006 with respect to the present offending. It was relevant for the Judge to have regard to events that had occurred since the offending. Those events included the sentence imposed for the 1999 offending. In particular rehabilitation following release on parole was a relevant matter. The approach taken by the Judge involved the fixing of a notional sentence as though the respondent was being sentenced in 1999 and then making adjustments to that notional sentence. As earlier observed that approach was in error."

[227] In *R v Sayer* the Victorian Court of Appeal (Whelan and McLeish JJA) observed that *Knott* shows that to the extent that it can be said the totality principle applies to cases such as the present and which differ from *Mill*, it does so "in a very distinct manner":[26]

> "Its application does not proceed by seeking to identify what total sentence would have been imposed had all the offending been before the court at the time when the person was first sentenced and then making adjustments to that sentence. On the other hand, the fact of the sentence and its effects are apt to be highly relevant sentencing considerations."

[228] The court in *Sayer* referred to the passage which I have quoted above from *Warwick* which spoke of "the need to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences". The Court noted, however, that *Warwick*:

> "confirmed that the sentence previously imposed and served was a matter that the sentencing judge was required to take into account as part of the instinctive synthesis. Consistently with *Knott* and *Bruce*, that did not require the sentencing court to start by working out what sentence would have been imposed had all the offences been tried together and then making adjustments to that sentence."[27]

The Victorian Court of Appeal observed that the application of the totality principle in such circumstances differs from that undertaken in *Mill*.

[229] This Court has recognised that the totality principle extends beyond a case where an offender commits a number of offences within a short space of time but in more than one State. *Beattie* suggests that in a case that does not involve offences of a like nature which occurred at or about the same time as the offending for which the offender has been previously sentenced, it will be an error to apply the totality principle in the way it would be applied to a case like *Mill*.

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25 (2007) 169 A Crim R 291 at 299-300 [35].
26 *Sayer* at [71].
27 *Sayer* at [74] (footnotes omitted).

[230] The issue of whether a sentencing judge is required to ask or is precluded from asking what the hypothetical sentence would have been if the offender had been sentenced for all of the offences at the same time was discussed in *R v Cook*.[28] Mullins JA (with whom Holmes CJ and McMurdo JA agreed) noted that the statement in *Beattie* at [21] "did not purport to lay down that a sentencing judge could never consider what a hypothetical sentence would have been in an appropriate case for the application for (sic) totality principle, if the sentencing for all offences had proceeded at the one time, rather than on separate occasions".[29]

[231] The sentencing judge in this case did not undertake the difficult exercise of asking what the overall sentence would have been had the appellant been sentenced at the one time for all of his offences. The appellant does not argue that the sentencing judge was required to undertake that exercise. Therefore it is unnecessary to consider the complexities of that exercise or its appropriateness in a case such as this.

[232] This is not a case in which the sentence being served and the sentence being imposed were for offences that were committed at about the same time. It is, however, a case in which s 9(2)(l) of the Act was engaged and the totality principle required the judge to take into account the existing sentence so that the total period to be spent in custody adequately and fairly represented the totality of criminality involved in all of the offences to which that total period was attributable.

[233] As for s 9(2)(l), Fraser JA (with whom Lyons SJA and Boddice J agreed) in *R v WBK* stated:[30]

> "Section 9(2)(l) may be treated as empowering sentencing judges to apply the totality principle in appropriate circumstances to moderate a custodial sentence that overlaps with or commences immediately upon the end of the non-custodial part of a previous sentence."

Fraser JA then observed:[31]

> "Importantly for present purposes, and consistently both with the statutory text ("have regard to") and the High Court decisions, no aspect of the totality principle mandates moderation of a custodial sentence merely because a custodial (or other) sentence overlaps with or follows immediately upon a pre-existing sentence. A decision whether the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences is an aspect of the wide discretion reposed in sentencing judges to impose a sentence that is just and appropriate in the circumstances of the case.
>
> If all other things are equal, any moderation of a sentence under the totality principle is likely to be required to a greater extent where (as in *Mill v The Queen*) the existing sentence and the sentence being imposed are for offences of the same nature and committed at about the same time, than in a case of the present kind where both factors are absent."

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28 [2021] QCA 209.
29 At [29].
30 (2020) 4 QR 110 at 117 [13]; [2020] QCA 60 at [13].
31 At [14]-[15] (footnotes omitted).

Application of the relevant principle

[234] The following propositions of relevance to the present case emerge from the authorities. The appellant was not being sentenced for all of his offending as might be the case if his 2014 sentence was being re-opened and re-sentenced. He was being sentenced for offences against his daughter, not for the offences he committed against a different victim in 2011. In sentencing the appellant, the judge was required by s 9(2)(l) to have regard to the sentence already imposed on the appellant that had not been served.

[235] This was not a case in which the totality principle fell to be applied to like offending of the same nature committed at about the same time. Any moderation of sentence under the totality principle was less than would be required in such a case. In a case in which sentences are accumulated for offences of the same nature committed at about the same time, the offender loses what may be described as "the benefit of concurrence". This was not such a case.

[236] The sentencing judge nevertheless was required by the totality principle to take into account the existing sentence so that the total period to be spent in custody under aggregated sentences adequately and fairly represented the total criminality of the appellant's conduct involved in all of the offences to which that total period was attributable.

The appellant's offending

[237] The appellant was a mature-aged, prior convicted child rapist. His offending was grave and was perpetrated over a lengthy period. The total sentence of 17 years imprisonment was made to run concurrently with the balance of the appellant's earlier rape sentence, giving the appellant the benefit of this overlapping period of about 18 months.

[238] References to comparable cases amply supported a sentence in excess of the 14 years imposed for the maintaining offence. It was appropriate to impose a cumulative sentence for the final rape of his daughter which occurred many years after the maintaining offence.

[239] The appellant's counsel at sentence advocated initially for a sentence in the order of between 16 and 17 years as a head sentence before taking into account that the appellant had been in custody for six years. Ultimately, defence counsel at sentence advocated for a 15 year sentence, with a parole eligibility date at "about the 2024-2025 mark".

[240] Before turning to the comparable cases, I will note six features of the offences for which the appellant was convicted in 2019 which warranted a very substantial head sentence and a total sentence of at least 15 years.

[241] First, there is the extreme vulnerability of the victim. She was a very young child when she was initially raped by her father. This is not to minimise the seriousness of offending in other cases where the child victim is older. It simply recognises that a child aged four or five is even more vulnerable.

[242] The vulnerability of the victim was compounded by her isolation from her mother throughout the period of five years when the appellant maintained a sexual relationship with his young daughter and regularly raped her.

[243] Second, the appellant was the victim's biological father and his offending against her amounted to a gross violation of trust.

[244] Third, the sexual abuse of his child did not consist of a few isolated episodes over a relatively short period. The sexual relationship was maintained for several years, a longer period than in some other cases. As the sentencing judge observed "The sexual violence was a course of conduct".

[245] Fourth, the victim was violated by various forms of penetration. This led to physical hurt, bleeding, and enduring psychological injury.

[246] The complainant's victim impact statement recounted the "huge amounts of pain" her father inflicted on her tiny body as he raped her, ignoring her pleading to stop and her resistance. The psychological injury inflicted on the complainant has extended into her adult life. She has always had trouble sleeping and experiences nightmares. She struggles with depression, anxiety, and post-traumatic stress disorder. Her condition and the medications that she has taken to ease her burden have affected her relationships. Memories plague her. She says that she has thought about suicide a lot throughout her life. After she was brave enough to take her complaint to the police and the appellant was charged, his side of her family completely cut her off and she has felt abandoned by them.

[247] Fifth, the victim's reluctance to complain to teachers and the police during the lengthy period of the offending was induced by the appellant's threats.

[248] Sixth, there are no substantial matters in mitigation. The appellant's work history and the absence of a relevant criminal history prior to his offending against his daughter had limited claim on the sentencing discretion. He did not self-rehabilitate after offending against his daughter. He was not entitled to any mitigation on account of a plea or cooperation. He showed no remorse.

Comparable cases

[249] It is not necessary to repeat the extensive analysis of comparable cases relating to the rape of children[32] or the offence of maintaining.[33]

[250] The six features just noted place the appellant's offending against his daughter in a category which is more serious than many comparable cases. Certain points of distinction must be made with some of the cases cited to the sentencing judge and to this Court. In some other cases broadly similar offending has been subject to a serious violent offence declaration. Some cases have involved pleas of guilt, which would imply a sentence after trial of a substantially longer duration.[34] In some cases the head sentence for maintaining did not reflect the circumstance of aggravation that, in the course of the relationship, the offender committed an offence of a sexual nature for which he was liable to imprisonment for 14 years or more.[35] In this case such a circumstance of aggravation was charged and proven because in the course of a relationship the appellant raped his daughter.

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32 See for example *R v WBK* (2020) 4 QR 110; [2020] QCA 60 at [20]–[22], [47]–[50].
33 See for example *R v CBO* [2016] QCA 24 ("*CBO*") at [25]–[37].
34 See for example *R v CAM* [2009] QCA 44, discussed in *CBO* at [26].
35 See for example *CBO* at [15].

[251] Reference was made to *R v CBO*. However, that case was less serious than this. There was no suggestion of any subsequent offending. The maintaining offence did not involve "aggravating factors such as violence additional to that inherently involved in the offence" or serious threats.[36] The applicant in that case received an effective sentence of 13 years imprisonment in circumstances in which the respondent did not advocate for a lengthier aggregate term.[37]

[252] *R v S*[38] concerned an applicant who was 37 years of age with no prior criminal history. He carried on a sexual relationship with his daughter over a four year period commencing when she was four years old. His offending included rape. However, he made full admissions and entered an early plea of guilty. His sentence of 20 years imprisonment was reduced to 15 years by this Court.

[253] The respondent relies upon *R v Robinson*[39] which was a conviction after trial. The offender was aged in his early 50s, with no relevant criminal history.[40] He was a friend of the complainant's parents and spent time with her, both while they were with her family and when they were alone together. He would take the complainant for drives in his car and she slept over at his house. The appellant maintained a sexual relationship with the complainant for a period of about two years from when she was five years old. The Crown also proved that he raped the complainant in his motor vehicle at the end of the offending period. The appellant in that case was sentenced after trial to life imprisonment in respect of each offence: maintaining a sexual relationship with a child under 16 years of age and two counts of rape. He was granted leave to appeal and the sentences of life imprisonment were set aside. Instead he was sentenced to 18 years imprisonment in respect of each offence to be served concurrently.

[254] Keane JA, with whom Williams JA and Muir J agreed, referred to the fact that penile penetration of such a young victim and the maintenance of a sexual relationship with her over many months were serious aggravating features in the case.[41] After reviewing comparable cases, Keane JA concluded that the decisions "would tend to support a sentence of imprisonment in a case of this kind of offending, where the offender has a benefit of a plea of guilty, of up to 18 years".[42] They did not, however, support a life sentence. Reference to another case involving a "one-off" brutal rape of a six-year-old[43] was said to suggest that a sentence of 18 years imprisonment would have been appropriate in *R v Robinson* if the appellant in that case had been entitled to the benefit of a plea of guilty. However, the court imposed a sentence of 18 years imprisonment to avoid an anomaly that would have arisen if a sentence of 20 years imprisonment rather than a life sentence had been imposed.[44]

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36 At [36].
37 At [39].
38 [1993] QCA 367, discussed in *CBO* at [31].
39 [2007] QCA 99.
40 At [31]–[32].
41 At [33].
42 At [40].
43 *R v Luke* [1987] QSCCCA 9.
44 At [41].

[255] I would regard the appellant's offending against his daughter as more serious than the offending and betrayal of trust in *R v Robinson*, which was over a much shorter period.

Structure of the sentences imposed on 4 November 2019

[256] The head sentence of 14 years imprisonment imposed on the maintaining count (Count 4) took account of the serious sexual offending which occurred during that five year period as well as the offending which preceded it. As noted, concurrent sentences were imposed for those separate offences and also for Count 13.

[257] Count 14 occurred about four years after the offending that occurred at Ashfield and Croydon. It involved the forced rape of the complainant and unprotected sexual intercourse when she was aged about 13.

[258] If Count 14 had been the only offence for which the appellant was convicted, then the sentence for that rape would have been in excess of the three years actually imposed. It is unnecessary to refer to the comparable cases in that regard. The sentencing judge clearly applied the totality principle in moderating what otherwise would have been the sentence on Count 14.

The relevance of the appellant's 2010 offending against a different complainant

[259] The appellant's rape of a five-year-old in November 2010 heightened the need for a sentence to protect the community, particularly the need to protect children from the appellant.[45]

[260] The totality principle, as reflected in s 9(2)(l) of the *Penalties and Sentences Act*, fell to be applied. However, this was not a case in which moderation of a sentence under the totality principle arose in circumstances where the existing sentence and the sentence being imposed were for offences of the same nature committed at about the same time. The appellant's offending in 2010 occurred about 20 years after the appellant commenced offending against his daughter and more than a decade after his last offending against her.

[261] The appellant's submissions pose the question of what an appropriate sentence would have been had his entire offending been dealt with at the same time. This involves the hypothesis that the offending against his daughter and the offending against a different complainant in 2010 would have gone to separate trials and resulted in convictions after which he would have come to be sentenced.

[262] Such a hypothetical exercise would not involve the commission of offences of the same nature and committed at about the same time or offences that presumptively would attract concurrent sentences. It would involve offences committed many years apart against different complainants. Such a difficult hypothetical exercise was not one that the sentencing judge was required to undertake, and then make adjustments. It is not an exercise that this court is required to undertake.

[263] If such an exercise had been undertaken, then one thing is clear. The appellant would have been treated as a child rapist whose offences against more than one victim spanned a very long period.

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45 *Penalties and Sentences Act 1992* (Qld) s 9(6). See also *R v Robinson* [2007] QCA 99 at [35]-[36].

[264] The appellant's sentence of eight years imprisonment without a serious violent offence declaration had been fixed and could not be reopened. The sentences imposed by the sentencing judge were not accumulated upon that eight year sentence. This involved a further recognition of the totality principle.

Was the overall term of imprisonment manifestly excessive?

[265] Consideration must first be given to the component parts of the total term of imprisonment of 17 years to which the appellant was sentenced on 4 November 2019. When regard is had to the comparable cases and the many aggravating circumstances which I have identified a sentence of 17 years was open in respect of all the offending charged on the indictment. The sentences were appropriately structured by imposing a head sentence on the maintaining count and an additional sentence for Count 14.

[266] The total sentence of 17 years came to be served after the appellant had served approximately six-and-a-half years for a very serious offence of rape. It would have been open to the sentencing judge to accumulate the sentences to be imposed for the appellant's offending against his daughter upon the eight year sentence that he was still serving in 2019 and then adjust a notional sentence of 17 years or more on account of the totality principle.

[267] When regard is had to the serious sexual offending for which the appellant stood to be sentenced, the serious sexual offending for which he had already been sentenced, the duration of his offending and the fact that he raped more than one child, I am not persuaded that the component parts of the sentences imposed were manifestly excessive. The appellant has not shown that the sentencing judge failed to moderate the sentences imposed and to structure the sentences so as to apply the totality principle.

[268] The overriding principle is that the aggregate sentence should fairly and justly reflect the total criminality of the offender's conduct. In my view and contrary to the appellant's submissions, "the additional effect of 15-and-a-half years imprisonment" to which he was sentenced is not manifestly excessive having regard to the component parts of his total criminality.

[269] The fact that another judge may have structured the sentence differently or accorded some greater weight to the relevant principle so as to impose a total sentence of 15 years, as submitted by the appellant's trial counsel, rather than the 17 years in fact imposed, does not justify the conclusion that the sentences imposed were manifestly excessive.

[270] The appellant has not shown that a total term of imprisonment of 17 years for the offences against his daughter and a total term of imprisonment of about 23-and-a-half years imprisonment for his total criminality are manifestly excessive.

[271] No separate complaint is made about the fixing of the parole eligibility date, which required the appellant to serve a further period of five years and nine months (or a total period of about 12 years and 3 months) before being eligible for parole on 9 August 2025.

[272] The sentences imposed on 4 November 2019 took into account the totality principle and were not manifestly excessive in all the circumstances. Leave to appeal against sentence should be refused.

Orders

[273] I would order:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.