SUPREME COURT OF QUEENSLAND

CITATION:	*R v JAI* [2022] QCA 235
PARTIES:	**R** **v** **JAI** (appellant)
FILE NO/S:	CA No 77 of 2022 DC No 40 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gympie – Date of Conviction: 22 April 2022 (McDonnell DCJ)
DELIVERED ON:	25 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2022
JUDGES:	Morrison and Flanagan JJA and Applegarth J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of three counts of indecent treatment of a boy under 17 relating to one complainant and was convicted of one count of indecent assault on a male relating to a second complainant – where the events relating to all counts occurred in 1979 and the 1980s – where the first complainant gave evidence of uncharged acts – where the first complainant identified the vehicle that the appellant owned at the time of the alleged offences, and the location of a shed at which the uncharged acts are said to have occurred – where the identified vehicle was not owned by the appellant at the time the alleged offences were said to have occurred – where the identified location did not exist at the time the uncharged acts were said to have occurred – where the evidence of the first complainant bolstered the evidence of the second complainant – whether the two deficiencies in the first complainant's evidence required the jury, acting rationally, to have entertained a reasonable doubt about the appellant's guilt in relation to the counts for which he was convicted *Dansie v The Queen* (2022) 96 ALJR 728; [2022] HCA 25, cited *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12, cited

R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Miller (2021) 8 QR 221; [2021] QCA 126, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: S G Bain for the appellant
A Nikolic for the respondent

SOLICITORS: Bernard Bradley & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with Applegarth J.

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

[3] **APPLEGARTH J:** The events to which this appeal relates occurred in 1979 and the 1980s. The complainants were teenage boys at the time. The appellant was some years older. The complainants were cousins. Their families mixed socially with the appellant's family in a rural community close to a regional city. I shall call the first complainant Mark and the second complainant Andrew. The appellant was about five years older than Mark and even older than Andrew. He was a good friend of one of Mark's older brothers.

[4] The appellant's alleged sexual abuse of Mark, of Andrew, and of other boys did not come to light until 2018, by which time Mark and Andrew were in their 50s.

[5] The appellant was convicted by a jury of four offences; three committed against Mark and one committed against Andrew. He appeals against his conviction on the ground that the verdicts were unreasonable.

[6] The three counts in respect of Mark of indecent treatment of a boy under 17 related to an occasion when Mark was aged about 15, alone at his family's home and painting a ceiling. He was up a ladder when the appellant arrived. They spoke for a short time before the appellant ran his hand up Mark's leg and grabbed his penis (Count 1). On the same occasion, and after Mark got off the ladder, the appellant, who was much larger than Mark, disrobed him, laid on the top half of Mark's body and sucked Mark's penis (Count 2). The appellant then masturbated Mark (Count 3). I shall call these three counts the Confederate Street counts, although that is not the actual name of the street in which Mark's family lived at the time.

[7] The indecent assault on Andrew was alleged to have occurred when he was aged 16 and living at his family's home while the rest of his family were interstate on a long holiday. According to Andrew, the appellant arrived at his house and took some photographs of a car that had been damaged in an accident. They spoke and ended up in the house where Andrew was sexually abused by the appellant. The appellant grabbed him and held him down on the floor by laying across the top half of his body. He managed to unzip Andrew's pants and pulled them down some way. The appellant put his hand down Andrew's pants and rubbed his testicles. Andrew struggled and eventually managed to get away, after which the appellant drove off. That offence was alleged to have occurred between 2 July 1985 and 5 September 1985.

[8] The appellant was found not guilty of another count in relation to Mark.[1] Count 4, in respect of which a not guilty verdict was returned, related to an alleged indecent

[1] This was Count 11 on the indictment. Counts 4-10 (inclusive), 14 and 15 on the indictment related to Mark's younger brother who died before the trial. Those counts and count 13 were the subject of

assault on Mark during the same period that Andrew's parents were on holiday. Mark's recollection was that he had just turned 17, had just got his licence, and was house-sitting at his uncle and aunt's place when the appellant came out there. He recalled the appellant grabbing hold of his penis and taking him into a room, masturbating him and then masturbating himself. Mark said that he was on his own at the home on that occasion and it was during a period when he and his cousin, Andrew, were house-sitting. During this period, Andrew worked as an apprentice in a nearby town.

[9] A problem with Mark's evidence in relation to Count 4 is that by the relevant date he would have been aged 20, not 17, as he recalled.

[10] The appellant does not contend that there is an inconsistency between the guilty verdicts on the Confederate Street counts and the not guilty verdict on Count 4. This is unsurprising since the jury could reasonably find that while Mark's evidence was credible and reliable about the circumstances and date of the Confederate Street counts, he was unreliable about the date of Count 4. Another difference between the Confederate Street counts and Count 4 is that there was corroboration of the occasion when he was painting his parents' bedroom ceiling and his age at the time. There is no similar corroboration of Mark house-sitting at his uncle and aunt's home when he had just turned 17. His aunt confirmed that he house-sat in 1985 when he would have been 20. Acting on the basis of a *Robinson* direction about the need to scrutinise Mark's evidence with great care before it could arrive at a conclusion of guilt, and a separate *Longman* direction about the delay in the complaints being made and the disadvantages that the appellant was at as a result of that delay, the jury might have been persuaded that a sexual assault of the kind described by Mark in connection with Count 4 probably occurred, but not persuaded that it occurred when and where Mark alleged.

[11] The unreasonableness ground of appeal does not relate to any suggested inconsistency between verdicts. Instead, it relates to the evidence of Mark in:

(a) recalling the car that the appellant was driving at the time of the Confederate Street counts; and

(b) recalling the location and dates of uncharged acts that were alleged to have been committed at a shed that the appellant occupied.

[12] Mark's recollection that the appellant drove a red Toyota HiLux at the time of the Confederate Street counts was incorrect because the vehicle was not purchased until June 1984.

[13] Mark recalled being sexually assaulted on occasions at a shed that the appellant resided in at an address that I will call Hastings Road, when Mark was aged between 15 and 17. This recollection was challenged by the fact that the appellant did not own the land at Hastings Road until November 1985, and did not erect a kit home on it until early 1986, by which time Mark would have been aged 21. The evidence left open the possibility that some of the uncharged acts may have happened at a different shed when Mark was aged between 15 and 17, but they

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a *nolle prosequi*. For simplicity, counts 11 and 12 on the indictment were described to the jury as Counts 4 and 5, and I shall adopt that description.

could not have occurred when Mark was that age at the large shed that the appellant built on his land at Hastings Road.

The contentions

[14] The appellant contends that Mark's evidence about the HiLux and his evidence about being sexually assaulted when he was aged somewhere in the vicinity of 15 to 17 at Hastings Road cast a shadow over his reliability as a witness. He submits that the unchallenged evidence about the date the HiLux was purchased and the dates when the Hastings Road property was purchased and a shed built upon it required the jury, acting rationally, to have entertained a reasonable doubt about the appellant's guilt regarding the offences in relation to Mark. If this argument is accepted, a consequence is that Mark's evidence was used to bolster the evidence of Andrew in a case in which the prosecution relied on concepts of cross-admissibility and similar fact evidence to bolster the credibility and reliability of both complainants.

[15] The appellant seeks verdicts of acquittal on the Confederate Street counts (Counts 1, 2 and 3) and an order quashing his conviction and ordering a new trial on the single count in relation to Andrew.

[16] In reply, the respondent points to the fact that, as Mark said when confronted during cross-examination, his recollection of the HiLux at the time of the Confederate Street counts was a mistake on a peripheral detail. He accepted that the appellant may have been driving a different car when he arrived at Confederate Street that day and that he was mistaken in thinking that it was the red HiLux. However, as he said, "You don't forget being sexually abused by anyone", and all "the other stuff becomes peripheral". The respondent submits that Mark's evidence in painting the ceiling when he was aged 14 or 15 was confirmed by his mother, that other details of the Confederate Street counts were consistent with his preliminary complaints to his mother and then his sister, which were capable of otherwise supporting his credibility and reliability. His detailed account of the first occasion that he was sexually abused by the appellant also was supported by Andrew's evidence in terms of the similarity of the conduct, which further reinforced his reliability. Likewise, the discrepancy about the location of the shed in which some of the uncharged acts were alleged to have occurred did not require the jury, acting reasonably, to have a reasonable doubt about the appellant's guilt in relation to the offences for which he was convicted.

[17] The effects of trauma and the significant passage of time that had passed since the commission of the offences explained why the appellant's red HiLux stood out in Mark's memory rather than another vehicle that the appellant or his family owned at the time of the Confederate Street counts. The discrepancy concerning uncharged sexual assaults at a shed could be similarly explained as a mistaken recollection of the shed in which they occurred or the dates they occurred.

[18] The respondent submits that these two discrepancies in Mark's evidence were insufficient to undermine the credibility and reliability of his evidence on the Confederate Street counts which was cogent, detailed and supported, to an extent, by evidence from Mark's mother, his sister and Andrew.

Relevant principles

[19] The principles governing the task performed in determining an appeal on the unreasonable verdict ground are well-settled.[2] The Court is to conduct an independent assessment of the whole of the evidence to determine whether it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt.[3] That assessment is undertaken with regard to the advantage enjoyed by the jury over an appellate court that has not seen or heard the witnesses.[4]

[20] *Pell v The Queen*[5] observes that the Court proceeds upon the assumption that the evidence of the complainant about the conduct that founded the conviction was assessed by the jury to be credible and reliable:[6]

> "The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."

[21] The relevant principles were discussed by this Court in *R v Miller*.[7] In the course of doing so, the Court stated:[8]

> "An appellant who contends that the verdict of the jury was unreasonable or that it was unsupported by the evidence must identify the weaknesses in the evidence and *must then also* demonstrate that these weaknesses reduced the probative value of the evidence *in such a way* that the appellate court ought 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. The mere identification of weaknesses in the prosecution case is not enough to sustain the ground. As Brennan J said in *M v The Queen*, and as criminal practitioners and trial judges know very well, it is a sad but salutary experience of counsel for the defence that the prosecution's "weak point" is often brushed aside dismissively by a jury satisfied of the honesty of the prosecution witness.[9]"

The evidence in greater detail

The evidence of Mark

[22] Mark was born in 1964 into a large family. His parents worked in paid employment and also ran two farms after hours and on weekends. The family lived in a house in Confederate Street. Mark's older brother, who I will call Dave, was a friend of the appellant. The appellant's family were friends of Mark's family.

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2 *M v The Queen* (1994) 181 CLR 487 at 492-495 ("*M*"); *Dansie v The Queen* (2022) 96 ALJR 728 at 731 [8].
3 *SKA v The Queen* (2011) 243 CLR 400 at 408-409 [20]-[22].
4 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].
5 (2020) 268 CLR 123 ("*Pell*").
6 *Pell* at 145 [39].
7 (2021) 8 QR 221 at 228-230 [13]-[19].
8 At 230 [18], emphasis and citations in the original.
9 *M* at 507-508.

[23] The appellant was about five years older than Mark. He had a much more solid build than Mark and was perhaps twice his size. When Mark was 15, he was very tall, "very, very thin", and probably weighed at most around 40-45kg. His sister described him as "a really scrawny kid".

[24] Work was a focus of Mark's family, which was not well off financially. The children would help with jobs around the farms after school and on weekends.

[25] The sexual acts that were alleged to constitute the Confederate Street counts occurred when Mark's parents were at work and he was at home alone. He described being up a ladder cleaning the ceiling in his parents' bedroom when the appellant arrived. The appellant came into the house through the front door and into the room. After chatting with Mark for a while, he ran his hand up Mark's leg and grabbed hold of his penis through his underpants. Mark told him to get away and the appellant said something like, "I don't know what you're talking about". The appellant ran his hand up Mark's legs a couple of times and grabbed his penis again. Mark was worried about falling off the ladder and got down from it, at which point the appellant grabbed him and took him into Mark's bedroom.

[26] It is unnecessary to elaborate upon much of the detail of the indecent treatment that occurred in the bedroom. Mark's evidence included detail of the type of dressing gown that he was wearing and being disrobed. He described how the appellant lay across him so that he had the top half of his body over the top of Mark's body while holding him on the bed.

[27] It is not clear from the evidence how Mark saw the appellant's car pull up outside the house when he was up a ladder. Presumably, he saw the vehicle pull up across the road by looking out the front window of his parents' bedroom. His recollection was that the appellant had pulled up in his HiLux.

[28] Mark gave evidence of subsequent uncharged acts that occurred at his parents' home and at a shed. He recalled an occasion when he was taken by the appellant to a shed that the appellant was living in. Mark said that it was at Hastings Road and he was taken there before he had a licence. He got his licence shortly after he turned 17. He gave a description of the shed as having no internal walls. There was a bathroom and a kitchen and there was a portable toilet rather than a plumbed-in toilet. There were no rooms and there was just one bed. The appellant lived there on his own.

[29] Mark recalled visiting the shed that he thought was at Hastings Road between "sort of, 15 and up, I guess, and 17". He said he would have been in that sort of age bracket. He explained that he was visiting the shed because the appellant seemed to always find a reason to get him to go there. The appellant would mention something in front of Mark's parents about giving him a hand and, as Mark said, "we were compliant kids". Mark had been abused by another person from the age of 10 and had been "brainwashed that nobody would ever believe us if we ever said anything about it". He said that he did not visit the shed more times than he had to but could not quantify if it was 10 times. When he went to the shed, the appellant would do the same things that he did at Confederate Street, grabbing his penis followed by wrestling and fighting. The appellant would perform oral sex on Mark, masturbate him and then masturbate himself. Sometimes he forced Mark to suck his penis. Once the appellant had finished, he would allow Mark to go but "until he was finished, you weren't allowed to do anything or escape from it".

[30] Mark gave evidence of an occasion when he was house-sitting at his uncle and aunt's place. He recalled the appellant arriving there and coming into the house. The appellant grabbed Mark on his penis and took him into a room out the back of the garage in which the appellant masturbated Mark and then masturbated himself.

[31] Mark thought that this occasion happened when he had just turned 17 and had his licence. His cousin, Andrew, who was a couple of years younger than Mark, was doing an apprenticeship and the rest of Andrew's family were away.

[32] Mark's sexual abuse by the appellant stopped from when Mark was around 20 and spent less time in the region. Mark moved to Brisbane when he was about 24.

[33] Mark did not disclose that he was the victim of sexual abuse until an occasion when his mother said that she had to speak to him. This was decades later and after Mark's younger brother, who I will name Barry, disclosed to her that he had been sexually abused by the appellant. Charges in respect of the appellant's alleged abuse of Barry were Counts 4 to 10 (inclusive), 14 and 15 on the indictment. Barry died before the trial and the Crown did not proceed further upon those counts.

[34] Mark's mother asked Mark whether he had been sexually abused by the appellant and he replied that he had. This was the first time that he told anyone about it. Mark spoke to Barry, but they did not discuss the details of their abuse by the appellant. Barry simply told him that the abuse had happened from when Barry was 12 years old and continued on a very regular basis. Mark's "gut" told him that there was something not right with his cousin Andrew either, who had suffered mental health problems. Mark went to Andrew and had a chat with him, at which point Andrew disclosed to Mark that he had been sexually abused by the appellant. Andrew said it occurred when he was 15 or 16 but did not go into "the actual physical details of that abuse". Mark did not want to know and was dealing with his own "demons".

[35] Mark was not told before giving his evidence what the prosecution knew about the date that the appellant purchased and registered his red HiLux, namely 28 June 1984, and that the appellant did not purchase his property at Hastings Road until November 1985.

[36] When confronted in cross-examination about the discrepancy between his recollection of the HiLux being across the road when he was first sexually molested by the appellant and the registration details, Mark confirmed that the appellant molested him "way before I was driving", and that this would have been in around 1979 or 1980. Mark stated, "You don't forget being sexually abused by anyone".

[37] When further pressed about his recollection of a HiLux being across the road, Mark explained that it "doesn't actually take away from the fact that I was sexually abused by [the appellant] before I was able to drive". He explained that he thought that the HiLux was the vehicle that the appellant was driving at the time and did not know what vehicle the appellant had been driving before that.

[38] As for the shed, Mark said, under cross-examination, that the shed was smaller than the shed that was on Hastings Road. It was put to him that prior to 1986 that property had no structures on it and he denied having made up a story. Mark later stated that whether or not the appellant owned it, he went to a shed in Hastings

Road, there was a structure and when "you are violated by a person, you remember the violation. You never forget it. It is etched in your memory". Mark remained sure that the sexual assault occurred at the property at Hastings Road before he had his driver's licence. The sexual abuse at his parents' home started when he was between 15 and 17, when he was still at school. The house-sitting incident was said to have occurred when he was about 17. Mark said that there were many occasions when the appellant sexually abused him at his parents' house, and that he was assaulted dozens of times in the shed's makeshift bedroom or in the shower. He told police in his statement that he thought this occurred around 1981 to 1983 and in his evidence, he said that he was actually picked up and taken to the shed by the appellant. When asked about the car that took him there, Mark replied, "Well, I thought it was a HiLux but…maybe it wasn't".

[39] Leaving aside many other occasions that occurred at Mark's parents' home or at the shed, Mark's evidence was that the first specific incident that he recalled was when he was still at school and up a ladder at Confederate Street. Another specific occasion was when he was house-sitting. These were reflected in the Confederate Street counts and Count 4.

[40] Mark was aged 40 when his father died and this prompted mental health issues. He sought and obtained treatment and reported having "a racing mind". He was eventually diagnosed with complex PTSD as a result of the sexual abuse that occurred to him as a child. He explained that he did have "a racing mind" and had "flashbacks".

[41] In re-examination in relation to the car, Mark said that he did not have any memories of any other cars that were owned by the appellant's family and that he did not think his parents still owned the house in Confederate Street in 1985. He said that if the details about the HiLux registration were correct, then "maybe the car isn't right. I mean, the violation of me definitely is right". He further explained:

> "All the other stuff becomes peripheral because it's – it's, I guess – you know, you remember what's happened to you because you become enclosed and you just try to protect yourself, is what, I think, has happened. But – but to say the abuse didn't happen is absolutely ludicrous."

The evidence of Mark's mother

[42] Mark's mother gave evidence about her family's circumstances, about the appellant's friendship with her son, David, and that the appellant came to their home at Confederate Street quite often.

[43] Under cross-examination, Mark's mother recalled an occasion when Mark painted the ceiling of her bedroom one day. She was not present at home on the day he did so. She gave preliminary complaint evidence about Mark's disclosures to her after she went to see him. She recalled that Mark got up off his chair, walked out of the room, came back in and "all this stuff came pouring out of him". Mark told his mother that "the first time" happened in their house at Confederate Street when he was painting, that the appellant touched him when he was up the ladder and said to Mark "it's not what you think it is". Mark told her that the appellant "raped him on

several occasions". She explained that Mark "is a closed person and he doesn't really want to talk about these kind of things", so she respected his wishes.

[44] Her preliminary complaint evidence was apt to bolster Mark's credibility, particularly in relation to the first occasion that he was sexually assaulted by the appellant, since it was consistent with the substance of Mark's evidence.

The evidence of Mark's older sister

[45] The same observation applies to the preliminary complaint evidence of Mark's sister. She was much older than Mark and had moved to Brisbane in around 1976 – 1977.

[46] On 4 September 2018, Mark called her when she was at work and told her that he wanted to catch up with her because there was something that he needed to tell her. He disclosed words to the effect that he was raped and molested as a child. He mentioned the appellant by name and disclosed that the first time was at Confederate Street. Mark reported that the appellant walked in the front door and was told that David was not there. The appellant reportedly rattled the ladder that Mark was up and said something like, "It's not what you think". Mark told her that the appellant then grabbed hold of his shorts, pinned him down and assaulted him. She confirmed that the appellant would have been much stronger than Mark who was "a really scrawny kid".

[47] Mark's sister also confirmed that their parents had full-time jobs and farms, so they were very busy. Quite often their children were at home alone.

The evidence of Andrew

[48] My summary of Andrew's evidence may be relatively brief because there is no independent challenge to his credibility and reliability. Instead, as noted, if the conclusion is reached that the jury could not have properly found that the offences relating to the Confederate Street counts were committed, Mark's evidence about them has been used to bolster Andrew's evidence.

[49] Andrew gave evidence of an indecent assault on him when he was house-sitting at his family's home when he was 16. I have previewed his evidence. The evidence was able to arrive at the approximate date by a combination of Andrew's evidence and the evidence of Andrew's mother, who kept a diary of the family's trip while Andrew remained at home, working as an apprentice at a job that he had recently started. In addition, both Andrew and his mother gave evidence about a Torana car that had been purchased for Andrew before he had a driver's licence. Contrary to his parents' instructions, Andrew drove this car while they were away on holiday, and it was damaged.

[50] Andrew recalled that the appellant came over to his family's house to photograph the damaged car. Andrew was still unlicenced at the time. He must have been 16. Notes that Andrew's mother made in her diary indicated that she received the report about the damage to the Torana on 5 September 1985, when the family was in Western Australia. The family returned from the holiday on 8 November 1985.

[51] Andrew gave evidence that after the appellant took photographs of the Torana they spoke and ended up in the house. The appellant abused Andrew by trying to take

his pants off and trying to masturbate him. All of this was happening against Andrew's will, while the appellant was telling him certain things. There was more than one attempt by the appellant to put his hands down Andrew's pants. The appellant held him down on the floor, rubbed Andrew's testicles and tried to masturbate him. The appellant was laying across the top half of Andrew's body, such that Andrew's left arm was held against his body and his right arm was trying to hold his pants up. The appellant outweighed Andrew "probably two to one" and there was not much that Andrew could do apart from yell and scream and tell him to stop. Eventually, Andrew managed to wriggle and squirm his way from underneath the appellant and was pretty sure that he hit the appellant in the jaw or the face. Andrew managed to get outside and after that, the appellant left. No one else was at home at the time.

[52] Andrew did not disclose this episode to anyone until his cousin Mark spoke to him around the end of 2018. Andrew did not go into the details but told Mark that he had been abused by the appellant.

[53] Under cross-examination, Andrew denied having made up the evidence so as to support Mark's allegations.

[54] Andrew did not recall anyone else staying with him during the period that his parents were away on holidays. He denied the suggestion put to him in cross-examination that the occasion when the appellant visited and took photographs of the damaged Torana was after his family had returned from holiday, and that Andrew's mother and brother were there that day. He denied the proposition that no assault had occurred on the day that the appellant took photographs of the damaged Torana at Andrew's house.

The evidence of Andrew's mother

[55] Andrew's mother gave evidence of the dates that she and other members of her family were away on holidays in 1985. They were away from between 4 July and 8 November 1985. These dates and the approximate date the Torana was damaged were based on a diary that she kept, together with postcards and photographs. She recalled that, during this period, Mark and one of his friends (who I will call Julie) stayed at the house. Mark found Andrew "a bit of a handful", being a teenage boy, and so Mark and Julie moved out after a time.

[56] As discussed earlier, this evidence incidentally confirmed Mark's evidence about house-sitting at his uncle and aunt's house, but was inconsistent with Mark's evidence about the age that he was at the time. Mark's evidence was that he was aged around 17. Count 4 was charged on the basis that the indecent assault on Mark occurred between 2 July 1985 and 5 September 1985. However, Mark would have been 20 years old by then and not 17, as he recalled.

[57] The evidence of Andrew's mother was supportive of Andrew's evidence. She was definite in her recollection that the appellant did not come and photograph the Torana after she returned from holidays. She did not remember the appellant ever coming to her house.

[58] Andrew's mother's evidence included the fact that Andrew had not disclosed the alleged sexual abuse to her. She described Andrew as "a closed book".

Other evidence and admissions

[59] A joint admission was made by the parties that the red 1984 Toyota HiLux was registered by the appellant on 28 June 1984. Another admission was that the appellant obtained title to the Hastings Road property on 19 November 1985. Documents indicated that the property was conveyed as vacant land when the appellant obtained title to it. He purchased a kit to build a shed on 6 December 1985.

[60] The appellant did not give or call evidence.

Overview of the evidence

[61] Mark's evidence about the Confederate Street counts was detailed. He said that he was 15 or 16 and still at school. His evidence about working on the ceiling of his parents' bedroom was confirmed by his mother. Her evidence and other evidence indicated that his older siblings' work and his parents' work meant that there were occasions when Mark was at the Confederate Street home on his own.

[62] The preliminary complaint evidence of what happened on the first occasion that Mark was sexually assaulted by the appellant was supported by the preliminary complaint evidence of his mother and the preliminary complaint evidence of his older sister.

[63] His account also was supported by Andrew's evidence in respect of the similarity of the appellant's conduct towards Andrew when he was a similar age.

[64] The occasion upon which the appellant sexually assaulted Andrew was able to be identified by its approximate date. Andrew gave a detailed account of the circumstances of the assault. The suggestion that the appellant only came out to Andrew's house to photograph the Torana after Andrew's family returned from holiday was rebuffed by the evidence of Andrew and his mother.

[65] There was evidence that Mark did not disclose to Andrew the detail of the Confederate Street counts. There was evidence that Andrew did not disclose to Mark details of the sexual assault that occurred when Andrew was home alone and house-sitting.

The two deficiencies in Mark's evidence

[66] Mark's recollection that the appellant pulled up and parked opposite his house in the red HiLux was mistaken. The fact that he was mistaken was put to him for the first time when he was cross-examined at a pre-recording of his evidence on 23 July 2021. He accepted that his recollection about the red HiLux being parked across the street at the time of the Confederate Street counts was incorrect, and explained that this was a peripheral detail.

[67] Mark's mistake in relation to the HiLux was brought to the attention of the jury in the prosecutor's opening at the trial on 20 April 2022. The prosecutor accepted that Mark could not have seen the red HiLux when he was 15 years old.

[68] The prosecutor also told the jury, when opening the evidence in relation to uncharged acts, that Mark gave evidence about some of them occurring at the appellant's shed at Hastings Road when Mark was aged between 15 and 17, which

was well before the property at Hastings Road was transferred as vacant land in November 1985.

[69] The two deficiencies in Mark's evidence that are relied upon in this appeal featured in the address of each counsel at trial.

[70] The trial judge warned the jury of the need to scrutinise Mark's evidence with great care before it could arrive at a conclusion of guilt. One reason was because he referred to a number of uncharged acts taking place at the shed at Hastings Road when the kit-home shed was not constructed on the Hastings Road property at the time Mark said the events occurred. The trial judge also referred to the evidence of Mark's "flashbacks" and the "unknown effect of the sexual abuse which occurred when [Mark] was aged eight to 10 years old and his subsequent diagnosis of complex PTSD". The jury was warned that it should only act on Mark's evidence if, after considering it with that warning in mind and all the other evidence, it was convinced of its truth and accuracy.

Were the two deficiencies such that the jury ought to have had a reasonable doubt about the Confederate Street counts?

[71] I will deal with each deficiency in turn before considering their combined implications for the jury's assessment of Mark's credibility and reliability concerning the Confederate Street counts.

The red HiLux

[72] Mark remained living in the district until his early 20s, by which time the appellant had bought the red HiLux. The appellant retained the red HiLux until 1993. The appellant was invited by Mark's parents to be MC at Mark's wedding when Mark was in his mid-20s. Mark clearly recalled the appellant's red HiLux. The appellant would have been driving the red HiLux at the time of the house-sitting counts in 1985.

[73] It was reasonably open to the jury to consider that the colour and make of the appellant's vehicle at the time of the Confederate Street counts was a peripheral detail and that it was not central or essential to Mark's account of events.

[74] Mark readily conceded that he made a mistake in recalling that it was the red HiLux that pulled up across the street when he was up the ladder. Mark's evidence explained that, "You don't forget being sexually abused by anyone" and all "the other stuff becomes peripheral".

[75] The jury had the advantage of hearing all of the evidence. It could reasonably accept that Mark made an error about the type of car the appellant was driving at the time of the Confederate Street counts because this was a peripheral detail. The jury could reasonably conclude that Mark's mistake was an understandable, though erroneous, reconstruction because he could not recall what vehicle the appellant was driving at the time. It was also reasonably open to the jury to reason that the red HiLux was more memorable and, over the ensuing decades, could have become part of his recollection of the vehicle in which the appellant arrived at Mark's house on the day that he was first sexually abused by the appellant.

[76] Mark's error in relation to the presence of the red HiLux on that day did not require the jury, acting rationally, to have entertained a reasonable doubt about the appellant's guilt.

The shed

[77] The location of the shed and Mark's age when he was sexually assaulted at a shed related to evidence of uncharged acts.

[78] If Mark was correct in recalling that he was sexually abused in a shed on the Hastings Road property, and if the shed was the one that was constructed after the appellant purchased the kit in December 1985, then Mark's evidence of being sexually assaulted in that shed when he was aged about 17 was wrong to a significant degree in relation to his age. He would have been 21, not 17, at the relevant time.

[79] Another possibility is that there was the kind of basic shed that Mark described on that property when he was 17 and that it was removed before the appellant purchased the Hastings Road property and constructed his own shed there.

[80] Another and more likely possibility is that Mark was sexually assaulted by the appellant at a shed when he was aged about 17 and was mistaken in his recollection that the shed was at Hastings Road.

[81] This scenario was suggested by the prosecutor to the jury. It was said to be a similar conflation to Mark's conflation of the car the appellant drove with the more distinctive or memorable red HiLux from a few years later. As for the shed, the prosecutor suggested that there was a similar conflation of the location of the shed in Mark's memory. His recollection confused the shed that the appellant later built with a shed at another location.

[82] Defence counsel at the trial responded to this by submitting that there was no other shed on Mark's account and there was no room for thinking that there was another shed. However, the different shed at another location was a plausible explanation for Mark's mistake and had some support in the evidence. Although Mark was firm in his recollection that the shed in which he was sexually abused was located at Hastings Road, his description of the fairly basic shed was not necessarily reconcilable with the plan of the shed that the appellant constructed in early 1986 (to which additions were made in 1991). The prosecutor's argument about an error being made by Mark in the location of the shed in which he was abused when he was aged about 17 is a reasonable one.

[83] The passage of time between the uncharged acts at the shed (starting in about 1981) and Mark's disclosures in 2018 raised the distinct possibility that, over that period, he had made an honest mistake about the location of the shed. Even if the jury considered Mark's evidence about the shed and him being 17 when sexual abuse first occurred at a shed located on Hastings Road was unreliable, these discrepancies do not lead to a conclusion that there is a significant possibility that an innocent person has been convicted.

[84] The jury was given conventional directions about the assessment of the truthfulness or reliability of evidence and more specific directions including the need to scrutinise Mark's evidence with great care for three reasons, including the date at which the appellant's shed was constructed on the Hastings Road property.

[85] The jury, acting reasonably, was not required to have a reasonable doubt about the appellant's guilt in relation to the charges he faced by reason of a deficiency in Mark's evidence about uncharged acts at a shed. A jury, acting reasonably, might conclude that Mark was honest, but unreliable, in saying that the shed in which he was sexually abused at the age of 17 was located on the property at Hastings Road. Such a conclusion did not require the jury, acting reasonably, to have entertained a reasonable doubt about the appellant's guilt on the Confederate Street charges. Mark's unreliability in relation to the location of the shed did not necessarily render his evidence about the Confederate Street charges unreliable, let alone dishonest.

Conclusion

[86] The deficiencies in relation to the red HiLux and the shed, taken together, were not discrepancies making it such that the jury, acting rationally, ought to have entertained a reasonable doubt as to the appellant's guilt on the Confederate Street counts. Mark's evidence about those offences was supported by other evidence about painting his parents' ceiling at the relevant time. Mark's credibility was reinforced by the preliminary complaint evidence given by his mother and by his sister. The details recounted by those preliminary complaint witnesses was consistent with Mark's evidence.

[87] Mark's evidence about what occurred to him at Confederate Street the first day he was sexually assaulted by the appellant was supported by Andrew's evidence in terms of points of similarity. The jury was entitled to accept Andrew's evidence about being sexually assaulted by the appellant.

[88] The two highlighted deficiencies in Mark's evidence relate to traumatic events that occurred decades before Mark reported them to police. There is no evidence that Mark's diagnosed PTSD made his evidence about the Confederate Street counts unreliable. An assessment of the evidence leaves open the conclusion that the passage of time and the process of recollection led him to recall, mistakenly, that the appellant was driving a red HiLux when he pulled up at Confederate Street, and that the shed in which he was sexually assaulted by the appellant when he was aged around 17 was located at Hastings Road.

[89] Mark explained his mistake in thinking that it was a red HiLux by saying "You don't forget being sexually abused by anyone" and all "the other stuff becomes peripheral". He could not recall any other vehicles that the appellant or the appellant's family owned at the time, and he mistakenly reconstructed a recollection of the more memorable red HiLux. A similar process of mistaken reconstruction reasonably explains a mistake in the location of the shed.

[90] These were weaknesses in Mark's evidence. They were weaknesses to which the jury was alerted. There is no ground of appeal in relation to the trial judge's directions about the evidence, including the *Robinson* and *Longman* directions that were given.

[91] The appellant has identified two weaknesses in Mark's evidence. However, he has not demonstrated that those weaknesses reduce the probative value of Mark's evidence in a way that leads to the conclusion that the jury ought to have entertained a reasonable doubt about the appellant's guilt.

[92] I am not satisfied that the discrepancies or weaknesses in Mark's evidence about the vehicle or the shed required the jury, acting rationally, to have entertained a reasonable doubt about the appellant's guilt.

[93] I would dismiss the appeal.