DISTRICT COURT OF QUEENSLAND

CITATION:	*R v GJL* [2020] QDC 213
PARTIES:	**THE QUEEN** **v** **GJL**
FILE NO/S:	164/18
DIVISION:	District Court
PROCEEDING:	Judge Only Trial
ORIGINATING COURT:	District Court of Queensland, Cairns
DELIVERED ON:	7 September 2020.
DELIVERED AT:	District Court of Queensland, Brisbane
HEARING DATE:	9, 10, 11 June 2020
JUDGES:	Dick DCJ
ORDER:	**Count 1 – Guilty** **Count 2 – Guilty** **Count 3 – Guilty** **Count 4 – Guilty** **Count 5 – Guilty** **Count 6 – Guilty** **Count 7 – Guilty** **Count 8 – Not Guilty** **Count 9 – Not Guilty** **Count 10 – Not Guilty** **Count 16 – Guilty** **Count 17 – Not Guilty**
CATCHWORDS:	CRIMINAL TRIAL – JUDGE ONLY TRIAL – SEXUAL OFFENCES – MAINTAINING A SEXUAL RELATIONSHIP WITH A CHILD - RAPE - INDECENT TREATMENT OF A CHILD UNDER 16, UNDER CARE - separate consideration of charges – where there is a need to scrutinise complainant's evidence with care due to delay, inconsistencies and other reasons – whether complainants

evidence credible and reliable beyond reasonable doubt – whether the defendant is guilty or not guilty of the charges

BCM v The Queen (2013) 88 ALJR 101

De Silva v R [2019] HCA 48

Hackwill v Kay [1960] VR 632 at 634

KBT v R (1997) 191 CLR 417

MFA v The Queen (2002) 213 CLR 606

R v Far [2018] QCA 317

R v Far [2019] HCA Trans 129.

R v HBR[2017] QCA 193

R v Jacobs [1993] 2 Qd R 541

R v KAW [2020] QCA 57

R v Kringle [1953] Tas SR 52

R v KP; ex parte Attorney General (Qld) [2006] QCA 301

R v SCE [2014] QCA 48

R v Van Der Zyden [2012] 2 Qd R 568.

WGC v The Queen [2007] HCA 58

Criminal Code 1899 (Qld)

COUNSEL: E Coker for the Crown
A Kimmins for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions (Qld) for the Crown
Mellick Smith & Associates for the Defendant

Introduction

[1] The defendant is charged with the following twelve (12) offences:

i. One (1) count of maintaining a sexual relationship with a child;

ii. Eight (8) charges of indecent treatment of a child under 16, under care; and

iii. Three (3) charges of rape.

Elements of the offences (relevant at the time)

Rape s347 (now repealed – for offences occurring prior to 27 October 2000)

[2] In order to prove the offence of rape, the prosecution must prove the defendant:

i. Had carnal knowledge of the complainant.

The prosecution must prove that the defendant penetrated the genitalia of the complainant with his penis. Any degree of penetration is sufficient. It is not necessary for the prosecution to prove that the defendant ejaculated.

ii. Without her consent.

Consent is a common word in everyday use. When it is used in the context of sexual activity it means consciously permitting the act of sexual intercourse to occur. Consent may be defined as the agreement to, or the acquiescence in, the act of sexual intercourse by the complainant. The defendant does not have to prove she consented, the prosecution must prove that she did not.

Indecent Dealing with a child under 16 s210(1)(1)

[3] The prosecution must prove that:

i. The defendant dealt with the complainant.

The term "deals with" includes a touching of the child.

It does not have to be a touching of the child by the defendant's hand – it can be a touching of the child by any part of the defendant's body.

ii. The dealing was indecent.

The word "indecent" bears its ordinary everyday meaning, that is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.

iii. The dealing was unlawful, meaning not justified, authorised or excused by law.

iv. The complainant was under 16 years.

Maintaining a Sexual Relationship with a Child s 229B (Offences between 3 July 1989 and 1 July 1997)

[4] The prosecution must prove that:

i. The defendant did an act defined as an offence of a sexual nature in relation to the child on three or more occasions. If the prosecution has proved that the defendant did an act on three or more occasions, it does not matter that the dates or exact circumstances of those occasions are not disclosed by the evidence.[1]

ii. That an unlawful relationship of a sexual nature has been maintained.

iii. That the relationship of a sexual nature was unlawful – that is, it was not justified, authorised or excused by law.

iv. That the defendant maintained such a relationship with the child.

v. Maintained carries its ordinary meaning. That is carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.

vi. That the defendant was an adult – defined as a person of or over the age of 18 years.

---

1 *KBT v R* (1997) 191 CLR 417 discusses the requirement that a jury be agreed on the same three acts.

vii. That the complainant was a child; that is, under 16.

[5] It should be noted that in the charge of indecent treatment, consent is not an issue. I must be satisfied beyond reasonable doubt only that the offending occurred. In the charge of rape, it is necessary that the carnal knowledge be without consent.

[6] The defendant pleaded not guilty to these charges.

[7] All of the charges relate to the same complainant. The complainant was born on 4 April 1980.

[8] All of the charges are alleged to have occurred during the course of 1993, when the complainant was aged 12 and 13.

[9] This was a trial without a jury by an order pursuant to s 615(1) of the *Criminal Code 1899* (Qld) ("*Criminal Code*").

[10] The trial took place in Cairns before me on 9, 10, and 11 June 2020.

[11] I will apply, so far as is practicable, the same principles of law and procedure as would be applied at a trial before a jury pursuant to s 615B of the *Criminal Code*. Section 615B of the *Criminal Code* provides that if an act or the common law requires information or a warning to be given to the jury in particular circumstances, the judge in a trial, sitting without a jury, must take the requirement into account if the circumstances arise.

General Principles of Law

[12] There are some general principles of law which apply to all criminal prosecutions. I have set them out below. In this case, there are some additional principles to which I must have regard and I have dealt with them in the relevant parts of this judgment below.

[13] The prosecution has the onus of establishing the offence charged beyond reasonable doubt. There is no onus on the defendant.

[14] The defendant is presumed to be innocent. The Crown has the burden of proving the accused's guilt beyond reasonable doubt. That means, before making a finding of

guilt, I must be satisfied beyond reasonable doubt of the elements of the offence of rape.

[15] The issues that exist must be resolved by taking into account all of the evidence, but that does not mean that I have to resolve all of the questions or inconsistencies that may have been raised by the evidence or which may arise about the facts.

[16] The evidence which I accept and that which I reject may be based on a number of things, including what a witness had to say in the witness box, the manner in which the witness gave evidence, the general impression which he or she made when giving evidence, statements which a witness may have made at an earlier time, such as in a statement to the police or at the committal, and my assessment of other evidence including documents and other material.

[17] It is for me to decide whether I accept the whole of what a witness says, or only part of it, or none of it. The fact that I might not accept a portion of the evidence of a witness does not mean that I must necessarily reject the whole of that witness's evidence. I may accept parts of it if I think it is worthy of acceptance.

[18] In drawing any inferences, I must be satisfied that they are reasonable ones to draw from the facts that I find have been established by the evidence. I must not engage in speculation or conjecture to fill in any gaps in the evidence but it is up to me to decide whether I accept particular evidence and if I do, what weight or significance it should have.

[19] I also bear in mind that there is a difference between honesty and reliability. A person might honestly believe what he or she says about what he or she heard or saw and yet not be reliable in recollection, perhaps because of errors in observation, or of recall, or because of an inability to describe what they heard or saw. In this case, the passage of time between the events surrounding the charge and the giving of evidence in this trial is of particular importance.

[20] The defendant has not given or called evidence. That is his right. He is not bound to do so. The burden on the prosecution does not change and the fact that the defendant did not give evidence is not evidence against him. It proves nothing at all.

Separate Consideration of Charges

[21] In relation to all the charges, there are a number of matters to be taken into account. The first is the requirement that I consider each count separately and have a reasonable doubt concerning the truthfulness and reliability of the complainant's evidence in relation to one or more of the counts, which must be taken into account in assessing the truthfulness or reliability of her evidence generally.

[22] Further, in addition to charged acts, the prosecution relies on the evidence of uncharged acts in relation to the charges of indecent treatment and rape. If I am satisfied beyond reasonable doubt of a particular offence, that finding may make it more likely the defendant committed other offences charged in the indictment. In that case, I must consider whether I can conclude that the defendant had a sexual interest in the complainant, and if I am satisfied of that, I may use that finding in considering whether the defendant committed the offences charged. However, I am not entitled to reason that because the defendant committed one offence, he is generally a person of bad character, and for that reason, must have committed the other offences.

[23] In addition, the prosecution here has produced evidence of uncharged acts, acts which the prosecution say proved the defendant had a sexual interest in the complainant and was prepared to act upon it. The prosecution argues this evidence makes it more likely that the defendant committed the offences for which he is charged. However, I can only use this other evidence if I am satisfied beyond reasonable doubt that the defendant did act as that evidence suggests and that the conduct demonstrates he had a sexual interest in the complainant which he was willing to pursue. As I say, if I am not satisfied about those things beyond reasonable doubt, that may affect the assessment of the complainant's evidence in respect of the acts which are charged acts.

Previous Acquittals

[24] The accused has undergone a jury trial in respect of the same matters. In the first trial, the jury found the accused not-guilty of counts 11, 13, 14, 15 and 18 on the indictment. Further, the prosecution entered a nolle prosequi in relation to count 12.

[25] Accordingly, the accused was discharged on those counts on the indictment.

[26] In *R v FAR,* the court considered what effect prior acquittals would have upon the offences tried at a subsequent trial, concluding: [2]

> "…the fact of those acquittals were additional matters which may reasonably have caused the jury to afford the appellant the benefit of the doubt in respect to the counts which verdicts of guilty were entered into at the trial. Accordingly, there was a miscarriage of justice."

This trial is a retrial of the counts that the previous jury were unable to reach a verdict upon.

[27] However, in undertaking an assessment of whether or not a jury's verdict is unreasonable, regard should also be had for the fact that a verdict of not-guilty does not, of necessity, mean the jury found the complainant dishonest or unreliable. The jury may have accepted the complainant as reliable but had a reasonable doubt as to the defendant's guilt on that count.

[28] In *R v FAR,* the judgment referred to the case of *MFA v The Queen* where Gleeson, Hayne and Callinan JJ stated:

> "In the case of sexual offences, of which there may be no objective evidence … A juror may consider it more probable than not that a complainant is telling the truth but requires something additional before reaching a conclusion of beyond reasonable doubt… A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, the other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable

---

2 [2018] QCA 317 at (paras 138-144).
Special leave refused by the High Court on 21 June 2019 – [2019] HCA Trans 129.

> doubt in relation to some aspects of a complainant's evidence, might be that the complainant has shown some uncertainty as to the matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of her evidence, than about others." [3]

Their Honours also noted that where a number of offences are alleged, this may appear.

Absence of Motive to Lie

[29] In cross-examination the complainant's mother was asked questions concerning the break-up of the relationship. It was not actually put to her that she had put the complainant up to making a complaint in revenge or anything of that nature. It would be very unlikely because the complainant made the complaint when she was 16 and after she had moved out of her mother's home. The complainant renewed the complaint after a lengthy period of time had passed after the relationship had broken down.

[30] However, having said that, I bear in mind that any failure or inability on the part of the accused to prove a motive does not establish that such a motive does not exist. If such a motive existed, the accused may not know of it. There may be many reasons why a person may make a false complaint. Even if I am not persuaded that any motive to lie on the part of the complainant has been established, it does not necessarily mean the complainant is truthful. It remains necessary for me to satisfy myself that the complainant is truthful.

Preliminary complaint

[31] The complainant made preliminary complaints to three people before her initial police complaint in 1997.

[32] In this case, there is evidence of the complainant's preliminary complaints to her first boyfriend, second boyfriend and her mother. That evidence may only be used as it related to the complainant's credibility. Consistency between the complaints to those

---

3 [2018] 317 at 127, referring to *MFA v The Queen* (2002) 213 CLR 606 at 617.

people and the complainant's evidence before me is something I may take into account as possibly enhancing the likelihood that the complainant's testimony is true.

[33] However, I cannot have regard to the things said the out-of-court statements as proof of what actually happened. Evidence of what was said may bolster the complainant's evidence because of consistency, but it does not independently prove anything. Likewise, any inconsistencies may cause a doubt about her credibility or reliability. The mere existence of inconsistencies doesn't mean that of necessity, I must reject her evidence. Some inconsistency is to be expected. In addition, it may be that the person receiving the complaint may be mistaken.

[34] The first person the complainant made a preliminary complaint to was her first boyfriend, when she was around 15 or 16 years old.

[35] The complainant gave evidence that her complaint was as follows:

> "That my mother's boyfriend had sex with me when I was younger."

[36] The complainant moved out of her mother's home and in with this boyfriend and his father on her 16th birthday.[4]

[37] The complainant's first boyfriend, however, testified he had never had any conversation with, or information from, the complainant about anything sexual happening between herself and her mother's boyfriend.

[38] In *R v Van Der Zyden*, the Court of Appeal held that a complainant may give evidence of a preliminary complaint in the absence of evidence of complaint by the complainee. The Court said at para [68]:

> " Evidence by the complainant of a preliminary complaint, if unsupported by the evidence of a complainee, may serve to buttress the credit of the complainant if the complainant is believed, even though it suffers from a want of corroboration." [5]

[39] The complainant says that her complaint to her first boyfriend happened when she was 15 or 16 years old and prior to her initial police complaint in 1997; that is over 23 years ago. The complainant gave evidence she could not remember the catalyst for the

---

4 T 2-16, l 7.

5 [2012] 2 Qd R 568.

conversation, nor the exact conversation, but she remembers the effect of what she told him.[6]

[40] It appears from the transcript that the complainant's first boyfriend was not asked to provide a statement until December 2016. The fact that he does not remember does not automatically lead me to the view that the conversation did not happen, therefore impacting on the complainant's credibility. It is more likely that he was unable to correctly recall the conversation given the lapse of time.

[41] The second person the complainant made a preliminary complaint to was her second boyfriend when the complainant was 17 years old. The complainant began dating this boyfriend before her 18th birthday and remained with him for around 6 years. The complainant gave evidence that she told this boyfriend but did not go into graphic detail. She said that he reacted with shock and told her that perhaps she should tell her mother.[7]

[42] She said the effect of her words was:

> "My mum's boyfriend had had sex with me when I was younger."

[43] The second boyfriend gave evidence that he first met the complainant in around 1996 and was in a relationship with the complainant for approximately seven years. He said he was about 23 when he met her and she was 17. He was asked:

> Q: "Do you recall during your relationship with [the complainant], having a conversation with her in which she told you some things that had happened between her and a former partner of her mother's?
>
> A: Yeah, it was along the lines of getting to know her or just you know, how old were you when it was your first time? And that's where the – the story started. It was – she was 14 and it was with the man her mother was dating… <u>She didn't go into too much detail</u> and knew his name was [the complainant's name] and that he was a [occupation omitted] and that he was dating her mother.[8]

[44] Later on he was asked:

> Q: "Without giving any detail at this point, did you have any other conversations with [the complainant] about these things?

---

6 T 2-16.
7 T 2-17, l 44.
8 T 3 -73, ll 10 – 15.

> A: We didn't – I mean she wasn't happy when you'd talk so we didn't talk about it too often. It was – I can't recall you know because it was quite a while ago. I remember the initial conversation what bought it on."[9]

[45] He later testified that he had had a discussion with the complainant about when they both lost their virginity and that the complainant had indicated she lost her virginity when she was 14 with mother's partner, 'something about a yacht' and 'that it happened on the water.'[10]

[46] He agreed that in his statement to the police he had said:

> "Her mother was dating [the complainant] and I think her mother was above deck and they were both below deck and from there I didn't ask her too many details about it…. That was her first sexual experience, I didn't want to know all of the details."[11]

[47] Here there is no submission such as contained *R v KAW*,[12] where there was an examination of whether the complaint was sufficiently comparable to some of the offending and was sufficiently linked to be a preliminary complaint. Here it is clear that there is sufficient linkage, although there is an inconsistency because the allegation from the complainant was not that she lost her virginity on the boat, rather some time earlier.

[48] It is also apparent that the second boyfriend did not ask for many details, did not want to know all of the details, and that the conversation had occurred in about 1996; that is to say, 20 years before he was asked to give a statement to the police.

[49] The complainant also made a preliminary complaint to her mother. The complainant told her mother than the defendant had touched her and had sex with her. The complainant said her mother burst into tears and was in shock.[13] The complainant cannot remember the two of them having any further discussion, but can remember the two of them hugging and her mother asking if she was okay. The complainant said her mother said 'We're going to tell the police.'[14]

---

9 T 3-74, ll 1 – 5.
10 T 3-74, l 24.
11 T 3-75, l 8.
12 [2020] QCA 57, [46].
13 T 2-18, l 20.
14 T 2-18, l 28.

[50] The complainant also says that she made a complaint to her mother as follows:

> "[The complainant] had done, like things, sex things – stuff with me."[15]

[51] Her mother's memory was that the complainant had said:

> "[The complainant] was touching me sexually."[16]

[52] Once again, while not exactly the same, there is sufficient comparability for this to amount to a consistent preliminary complaint.

Longman Direction

[53] It is further submitted that I should direct myself in terms of the Benchbook Direction relating to the Longman Direction, in that I would warn myself that it would be dangerous to convict upon the complainant's testimony alone unless after scrutinising the evidence with great care, and considering the circumstances relevant to its evaluation and paying heed to the warning, I am satisfied beyond reasonable doubt of its truth and accuracy.

[54] The features relied on by the defence to support such a submission are as follows:

1. The prior acquittals of the accused.
2. The complainant made an original complaint in 1997.
3. In January 1998 she signed a withdrawal of complaint.
4. There are no appointment diaries for his work still in existence.
5. The defendant's grandparents are dead, and this is relevant as they had resided in one of the premises the offending is alleged to have occurred and may have been able to speak to matters related to that.

[55] I think the matters raised are sufficient to require me to direct myself in terms of the Longman Direction, and I have done so accordingly.

Liberato Direction

---

15 T 1-54, l 43.
16 T 3-20, l 24.

[56] Evidence emerged that the accused denied the complainant's allegations when questioned by Detective Parker prior to the withdrawal of the complaint on 21 January 1998.

[57] The defence submission is that consideration should be given to the provision of a Liberato Direction where an accused person has provided a denial to allegations, but not in a sworn form.

[58] I am aware of the statement in *De Silva v R*, however it seems to me that that relates to trial where there is a real risk that the jury might view their role in an incorrect way. Nevertheless I have read and considered those cases.[17]

Background

[59] In the latter part of 1992, the complainant's mother started a relationship with the defendant after meeting him through work. The complainant met the defendant sometime in late 1992.

[60] In early 1993, the complainant and her mother moved in with the Defendant at his house at Redlynch.

[61] The complainant said that once they had moved in with the defendant 'he began paying more attention to me.'[18] When asked to elaborate on this, she described the attention as 'tickling me, throwing me in the pool and just mucking around.'[19] When questioned about the contact that occurred in the pool, the complainant said 'sometimes in the pool he'd accidentally maybe touch my breast when he threw me'[20] and 'sometimes my bum.'[21] This contact does not form part of the charged acts.

[62] The complainant said that 'sometimes after dinner we used to sit on the couch and he used to have his hand on my thigh.'[22] The complainant gave evidence that the defendant's conduct of having his hand on her thigh underneath the doona on the couch occurred for approximately three weeks, before the conduct escalated. The complainant said 'his hand got a lot closer and it was more on the outside of my shirts, between my

17 [2019] HCA 48.
18 T 16, l 20.
19 T 16, l 25.
20 T 16, l 40.
21 T 16, l 45.
22 T 17, l 5.

legs'[23] and that he was 'touching my vagina on the outside of my pants'[24] which occurred 'about twice a week.'[25]

Discreditable conduct and Uncharged Acts

[63] The complainant gave evidence that the physical contact between herself and the defendant continued after counts 2 & 3 in a similar manner before escalating to sexual intercourse. The complainant stated that the conduct 'involved him placing his hand down my actual shorts and underwear and touching my vagina'[26] and that this 'would always happen on the couch normally after dinner.'[27]

[64] The complainant's evidence was that the defendant would always be seated in the middle of the couch, between the complainant and her mother, after dinner, with a doona covering their laps.[28] The defendant would take his hand and 'slowly manoeuvre it to place it – like, lift my shirt a little bit and then place his hand straight down the front of the shorts and underneath my underwear'[29] before he 'would insert his index finger but he'd have his whole hand cupping my vagina.'[30] The complainant said that this conduct occurred around twice a week, unless the complainant chose to sit somewhere else.[31]

[65] The presence of the doona became relevant throughout the trial. The complainant did not refer to the doona in her evidence relating to counts 1 & 2, nor counts 4 through to 8. It became apparent throughout the course of the complainant's evidence that she referred to the use of the doona predominantly in relation to uncharged acts. The complainant often referred to the doona being used to cover, herself, her mother and the defendant, when they would be on the couch at night, watching TV after dinner.

---

23 T 17, l 45.
24 T 18, l 15.
25 T 18, l 30.
26 T 26, l 28.
27 T 26, l 31.
28 T 26.
29 T 26, l 40.
30 T 26, l 45.
31 T 27, l 10.

[66] The complainant's evidence was that this is how the offending began.

[67] The following exchange occurred in cross-examination:

Q: "Now, could I then ask you about the very first time in counts 2 and 3 when you were on the sofa, did you have the doona on you at that stage…

A: Yeah. No.

Q: No. All right. But is it the case that every other time after that you had a doona on you whilst you were inside the house – this house.

A: Yes, on the couch."[32]

[68] It was put to the complainant in cross-examination that it would have been too hot in April for the use of a doona. The complainant accepted that it would have been hot in April but explained that the air-conditioner was frequently being used in the house, hence the doona.[33] It was suggested in cross-examination that the house was not equipped with an air-conditioner in 1993. The complainant did not accept this.[34]

[69] The defendant argues that a doona with a thickness of 10cm would not have been used in an air-conditioned lounge room during the summer months of 1993 (my emphasis).

[70] It is incorrect to say these events occurred in summer, as no evidence was given as to when the uncharged acts occurred and the charged acts are alleged to have occurred from April - making it mostly autumn and winter – until they moved to another house in the last school term.

[71] The defence argues in their submissions that "for the complainant's evidence to have any credibility, the prosecution would have to effectively establish beyond reasonable doubt that the lounge room was air-conditioned during 1993."

[72] And, "to establish this, the complainant's evidence must have been so powerful that despite the evidence of [the defendant's wife], you would have no reasonable doubt that the air-conditioner was installed and functioning in the lounge room during 1993."

---

32 T 2-48, ll 5 – 20.
33 T 2-42.
34 T 2-42, l 30.

[73] These submissions are wrong in law for two reasons:

a) I do not have to be satisfied of every fact in the prosecution case. I must be satisfied the prosecution has proved every element of the charged and uncharged acts beyond reasonable doubt.

b) An honest witness may be a mistaken witness.

[74] The defence refer to the complainant's mother's failure to make reference in her statement to the conduct involving the doona. The mother did not know of the earlier conduct, but did give evidence of an incident involving the doona where she said that she pulled the doona off the defendant and the complainant, and the defendant had an erection and was naked.

[75] The defence say there is a "sheer unlikelihood" of the mother having sat on the couch on numerous occasions, never suspecting that the accused was sexually assaulting the complainant.

[76] The complainant's evidence was that, at first, the defendant would put his hand on her thigh. She said this happened "maybe a couple of times a week over a period of three weeks."[35]

[77] Neither she nor the defendant said anything during these occasions, nor did she react in any way.

[78] The touching escalated over time to digital penetration.

[79] If the complainant did not speak or react, and the pair were covered by a doona, there is no inherent unlikelihood, as is submitted by the defence.

[80] Offences of indecent treatment almost necessarily involve brazenness on the part of the perpetrator as there is always the risk the child could complain.

[81] Here, this build up allowed the defendant to watch for the reactions of the complainant and her mother. I found the evidence of the developing sexual relationship to be compelling.

---

35 T 27, l 10.

[82] The concept of the doona is a strange one if it is made up. The presence of the doona being used as a cover explains how the touching escalated without the complainant's mother knowing.

[83] The complainant's description is a logical, believable narration of the outset of what might have been almost innocent touching, through to a grooming period, culminating in serious offending.

Count 1

[84] Count 1 is a charge of maintaining a sexual relationship with a child and it encompasses each of the particularised counts as well as un-particularised sexual contact between the complainant and the defendant. In order to prove the offence as it stood at the relevant time, the prosecution must also prove that the defendant did an act on three or more occasions and the charge encompasses not only the particularised counts but also un-particularised sexual contact between the defendant and the complainant. In addition, the prosecution must prove that an unlawful relationship of a sexual nature has been maintained. This includes the necessity of proving that the "relationship" involved continuity or habitually of conduct.

Counts 2 & 3

[85] Counts 2 & 3 are offences of indecent treatment of a child, under 16, under care and those two offences are alleged to have occurred at the house at Redlynch after the complainant had arrived home from school, approximately two weeks before the complainant's 13th birthday.[36] Count 2 is particularised as the defendant rubbing the complainant's breast. Count 3 relates to the defendant rubbing the complainant's vagina.

[86] At the time, the complainant was in Grade 7 at school. The complainant gave evidence that she caught the bus home and when she arrived home, the defendant was also home from work. In cross examination, the complainant instead accepted she was alone at home and within the hour, the defendant joined her at home.

---

[36] T 22, l 30.

[87] The complainant gave evidence that she was sitting on the couch when 'he sat beside me on the couch, put his arm around me and started playing with my breast, on top of my clothes.'[37] The complainant's evidence was that 'he was sort of just squeezing my left breast'[38] on top of her clothing.[39]

[88] The defendant was wearing his work clothes.[40] The complainant was wearing her school uniform, which had a zip that unzipped all the way down past the belly button. The complainant gave evidence that the defendant used one hand to squeeze her left breast,[41] before unzipping her uniform down to where her rib cage was, and then touching her left breast again, in a squeezing motion.[42] The complainant said that this touching occurred outside of her training bra,[43] and that the defendant was using his right hand to touch her breast. The complainant said that the defendant had his left hand on her thigh underneath her dress before he used his left hand to touch her vagina on the outside of her underwear.[44]

[89] The complainant stated that the defendant used his whole hand to rub her vagina, rubbing up and down. [45] The complainant said this lasted 'probably five or ten minutes until mum got home.'[46]

[90] It was elicited from the complainant that the time frame for this conduct to have occurred was after 4pm (as this was when the complainant got home from school), likely to be only shortly after 5pm (as this was when the defendant typically arrived home), and before 5.15pm (as this was around the time the complainant's mother typically arrived home).[47]

[91] The complainant stated that upon her mother arriving home, the defendant 'quickly pulled away, moved closer to the other side of the couch where he sat and crossed his legs. I just moved back and zipped up my dress and, like, pulled my dress down.'[48]

---

37 T 19, l 1.
38 T 19, l 5.
39 T 19, l 10.
40 T 21, l 35.
41 T 19, l 25.
42 T 19, ll 30 – 45.
43 T 20, l 5.
44 T 20, ll 5 – 30.
45 T 20, l 30.
46 T 20, l 34.
47 T 20 – 21.
48 T 21, l 30.

[92] The defence argue that the versions given (a) to Detective Tucker and (b) at the trial are 'vastly different' as to the surrounding circumstances. The defence do not say how the circumstances are 'vastly different' and I am unable to divine any differences beyond what are explained by the time lapse between the two versions.

[93] The defence argue that the version to Detective Tucker could not reasonably have occurred over a 15 minute period. Once again this submission is not explained. In any event, I do not accept it. The allegations are set out above. It was clearly not a drawn out touching.

[94] I have kept in mind the Longman Directions and scrutinised the evidence with great care. I have considered the circumstances relevant to its evaluation:

a) The inability to identify when the complainant and her mother moved to the accused's address;

b) The inability to check the accused's work appointment diary to identify if he had opportunity to commit the offence;

c) The inability to check the work rosters of the complainant's mother.

[95] Nevertheless, I am satisfied beyond reasonable doubt that the accused is guilty of counts 2 and 3.

Counts 4 to 8

[96] Counts 4 to 7 are counts of indecent treatment. Counts 8 is one of rape. In count 4, the indecent treatment is said to be that the defendant touched the complainant's breast. In count 5, the indecent treatment is said to be that the defendant penetrated the complainant's vagina with his finger. In count 6, the indecent treatment is said to be that the defendant licked the complainant's vagina. In count 7, the indecent treatment is said to be that the defendant licked the complainant's breasts.

[97] Counts 4 to 8 are alleged to have occurred after the complainant attended the defendant's workplace for a short period of work experience during the Easter school holidays in 1993.

[98] On the first day of the work experience, the defendant brought the complainant home at a time shortly after midday.[49]

[99] It took approximately 15 minutes to travel from the defendant's workplace to the house at Redlynch. When they arrived home, the complainant sat on the lounge and the defendant did the same. The defendant asked the complainant, "Would you like to go and have a lie down?"[50]

[100] The complainant and the defendant went to the defendant's bedroom, and the defendant laid down next to the complainant and placed his left hand on her stomach.[51] The complainant gave evidence that the defendant said he would like to 'make love' to her.[52] The complainant's evidence was that she did not respond to this remark, as she 'thought he meant like when I [sic] was older.'[53]

[101] The complainant remembered wearing a navy-blue vest with a collar and three buttons, and white pants or tights.[54] The complainant said in evidence that the defendant undid her vest and began touching her breasts. She described this contact: 'like he'd sweep his hands through both, rubbing them continuously.'[55] The defendant did this with one hand, whilst the other hand supported his head.[56] This conduct comprises count 4.

[102] From there, the defendant 'manoeuvred' the complainant so that he could take off her vest and bra off.[57] After taking off her vest and bra, the complainant's evidence was that 'he went and took my pants and undies off at the same time. He then came back and lied next to me and was inserting his fingers into my vagina and – whilst rubbing my breasts.'[58] Regarding taking off her pants and underwear, the complainant gave evidence that 'he just sort of moved his hands to lift my bum up, like lift and then just pulled them both off together.'[59]

---

49 T 30, l 10.
50 T 28, l 4.
51 T 28, l 10.
52 T 28, l 13.
53 T 28, l 15.
54 T 28, l 23, 29.
55 T 28, l 35.
56 T 28, l 38.
57 T 28, l 47.
58 T 29, ll 1 – 4.
59 T 30, l 35.

[103] The complainant said that the defendant penetrated her with one finger for less than five minutes,[60] and whilst digitally penetrating her the defendant asked her if it felt good.[61] This conduct comprises count 5.

[104] The complainant said the defendant then 'went to the end of the bed, took off his clothes, sort of spread my legs with, at my ankles and started to perform oral sex on me.'[62] The complainant described the oral sex: 'his tongue was going in and out of my vagina.'[63] This conduct comprises count 6.

[105] The complainant said that after the defendant had licked her vagina, 'he then moved forward and started licking my breasts.'[64] The defendant licked her breasts one at a time.[65] This conduct comprises count 7.

[106] The complainant gave evidence that at the same time the defendant was licking her breasts, he was also penetrating her vagina with his penis.[66] The complainant remembers the defendant putting his penis 'in and out' of her vagina.[67] The defendant was positioned above the complainant in a sort of 'push up' position, over the top of the complainant with his hands as he pushed up and down.[68]

[107] The complainant said that during this time, she closed her eyes. She gave evidence that during the penetration, it 'hurt' and it 'burned'.[69] The penetration lasted around 5 to 10 minutes before the defendant ejaculated on her stomach.[70] The defendant described the ejaculate as 'warm, sticky gooey.'[71] This conduct comprises count 8.

[108] The complainant's evidence is that after the defendant ejaculated, he went to the en-suite and 'grabbed a towel and wiped it off.'[72] He asked the complainant how it had

---

60 T 31, l 10.
61 T 31, l 2.
62 T 29, l 6.
63 T 29, l 10.
64 T 29, l 15.
65 T 29, l 18.
66 T 29, l 15.
67 T 29, l 25.
68 T 29, ll 27 – 29.
69 T 29, l 31.
70 T 29, l 40.
71 T 31, l 28.
72 T 29, l 45.

felt, and she replied that it had hurt. The defendant told the complainant not to tell her mother and then went and had a shower.[73]

[109] When questioned why the defendant had said not to tell her mother, the complainant gave evidence that the defendant had told her 'because I'd get in trouble and it'd basically be all my fault and then they'd break up and we wouldn't live such a luxury lifestyle.'[74]

[110] Whilst the defendant showered, the complainant said that she put her clothes in the laundry, changed, and laid on the couch. The defendant then asked if the complainant was okay, and she said yes. The defendant kissed her on the head and went back to work at around 1.30pm.[75] When questioned, the complainant said that she had not, in fact, felt okay,[76] and that she did not consent to the sexual intercourse.[77]

[111] The complainant gave evidence that when her mother and the defendant got home from work later that day, the defendant was a 'bit clingy' as he would normally go off and 'do his own thing after work,' but on this occasion hung around the kitchen with the complainant and her mother.[78]

[112] The complainant accepted in cross examination that she did not express any discontent to this penetration. She said 'No, I just closed my eyes really tightly.'[79]

[113] The defence point to some inconsistencies:

a) Whether the complainant undertook work experience over one or two days;

b) Whether it was the first or second day of work experience;

c) Whether the complainant ate lunch or not.

[114] I have directed myself that in view of the inability of the accused to check his diaries to ascertain whether or not he had an opportunity to commit the offences charged, I must scrutinise the evidence carefully and consider the circumstances before I can convict.

---

73 T 29, l 46.
74 T 30, l 3.
75 T 31, ll 40 – 46.
76 T 32, l 1.
77 T 33, l 23.
78 T 56, l 5.
79 T 2-56, l 35.

[115] Having done so, I am satisfied beyond reasonable doubt that the accused is guilty of counts 4 to 7.

[116] To establish count 8 (rape), the prosecution must establish beyond reasonable doubt that the complainant was not consenting.

[117] The complainant blandly stated she did not consent to intercourse but not that she resisted.

[118] Without any criticism of the complainant, who was a child at the time, I am left with the impression that the complainant had a 'relationship' (not in the legal sense) with the accused.

[119] The complainant's mother agreed that after she and the accused separated, the complainant was 'unhappy' and a 'bit distressed.' The complainant's mother said 'I believe she was having separation issues with [the complainant]'[80]

[120] I do not accept the complainant's mother's evidence in its entirety, nor do I reject it entirely. I am not persuaded she is a totally reliable witness but I accept her evidence above, and it is both because of the bland denial of consent and the complainant's apparent feelings for the accused that I am not satisfied beyond reasonable doubt that the complainant did not consent to Count 8.

Trip to Bowen for the Easter Long Weekend

[121] The complainant, her mother and the defendant went to Bowen for the Easter long weekend for a boat regatta. They left Cairns on Good Friday, arrived at Bowen in the afternoon and returned to Cairns on Easter Monday.

[122] They stayed at a hotel in Bowen. The hotel room had one double bed and one single bed. The complainant slept in the double bed with her mother and the defendant. The defendant was in the middle, and the complainant was on the right side facing the window. It appears from the evidence that the complainant fell asleep watching TV on that bed, and her mother and the defendant did not move her.[81] The complainant said that the reason she was in this bed was because the TV was directly in front of it.[82]

---

80 T 3-19, l 15.
81 T 35, l 37.

Counts 9 and 10

[123] Count 9 is a charge of indecent treatment, being that the defendant penetrated the complainant's vagina with his penis. Count 10 is a charge of rape.

[124] Counts 9 and 10 are alleged to have occurred at the motel in Bowen, whilst the complainant was in the bed with her mother and the defendant. The complainant gave evidence that at some point during the night, she remembered the defendant touching her by rubbing her body in general, and also rubbing her breasts.[83] In cross-examination, the complainant said that she woke up as a result of the defendant touching her. She could not remember whether he had clothes on or not, but remembered that she had on baggy pants and a t-shirt.[84]

[125] The complainant's evidence was that the defendant touched her breasts over the top of her shirt and then down towards her vagina. The defendant pulled her underpants halfway down her thigh.[85] When talking about the removal of her pants, the complainant said 'as he has then pulled it down he has inserted his finger into my vagina…'[86]

[126] The complainant gave evidence that the defendant inserted one finger into her vagina, and the penetration lasted a 'couple of minutes.'[87] In cross-examination, the complainant said that the defendant touched around her vagina before inserting his finger.[88] She said the penetration 'wasn't long.'[89] The complainant accepted that the defendant did not have any difficulty penetrating her vagina with his finger.[90] This conduct comprises count 9.

[127] The complainant gave evidence that the defendant 'manoeuvred' her onto her right-hand side and then pulled her 'shorts and undies down at the back and inserted his

---

82 T 2-61, l 46.
83 T 35, l 15.
84 T 2-62, l 30.
85 T 36, l 44.
86 T 36, l 3.
87 T 36, l 30.
88 T 2-62, l 38.
89 T 2-63, l 3.
90 T 2-63, l 5.

penis.'[91] When questioned as to what 'manoeuvring' entailed, the complainant said 'he just sort of pushed me just with his hands, like, sort of on the side on my hips as to sort of roll over, because I was on my back' so that the two of them were in a 'spooning sort of position.'[92]

[128] The complainant remembered that he 'moved very slowly up and down, and then all of a sudden he stopped and then rolled over and turned towards my mum.'[93] The complainant gave evidence that the defendant 'just moved up and down' and that 'it didn't last long' – 'only a couple of minutes.'[94]

[129] The complainant said that the defendant stopped as her 'mum moved or something happened cause he sort of just stopped suddenly and then just rolled over.'[95]

[130] The complainant did not remember the defendant saying anything when he stopped. The complainant remembered that the defendant said something when he was manoeuvring her, but is unsure what he said.[96]

[131] In cross-examination, the complainant agreed that the defendant 'moved in and out' of her for a number of minutes, doing so quite slowly, before stopping and rolling over.[97] This conduct comprises count 10.

[132] The complainant stated in her evidence that she did not consent to this sexual intercourse.[98]

[133] The complainant said she went back to sleep after this incident. The complainant stated 'the next day we just got up. It was like nothing had happened… he went to the regatta and mum and I just went out.'[99]

[134] The complainant slept in the single bed in the hotel room the following night. The complainant remembers the defendant jumping on her the following morning and

---

91 T 35, l 18.
92 T 36, ll 35 - 40.
93 T 35, l 22.
94 T 37, ll 1 – 4.
95 T 37, l 7.
96 T 37, ll 10 – 25.
97 T 2-63, ll 20 – 30.
98 T 37, l 26.
99 T 37, l 30.

tickling her whilst he was naked. A photo of this was tendered during the trial, and was marked as Exhibit ….

[135] The complainant gave evidence that the defendant slept naked and that she would often see both her mother and the defendant naked, walking to the shower, bathing together[100] or in their room.[101]

[136] The defence argue that there are differences in how the complainant and her mother remember the layout of the motel room. I consider this to be inconsequential, as it was nearly thirty years ago.

[137] There is also a discrepancy as to which side of the bed the complainant was on. This is also of no consequence. What is important, is that either way, according to both the mother and the complainant, the accused was in the middle.

[138] The complainant could not remember whether the defendant had clothes on during the night, but the photograph taken the next morning shows him to be naked.[102]

[139] In her original statement, the complainant said "I could feel someone was touching me on the breast and vagina…"

[140] The complainant changed her original statement from alleging he touched her breasts to crossing out the word 'breast.' She agreed that in 1997 there was no reference to digital penetration.

[141] However, in her later statement she crossed out the words 'the breasts.' Importantly, in neither statement did she mention digital penetration of her vagina.

[142] For this reason, I am left with a reasonable doubt as to the particulars of Count 9.

[143] Whilst I am not prepared to find the accused guilty of count 9, it is because I am not satisfied that the complainant is accurate about that charge. This is because the complainant has not been consistent. On the other, the event happened decades ago when the complainant was a child. This inconsistency does not affect my general assessment of her as a witness.

---

100 T 38, l 45.
101 T 37, l 45.
102 Exhibit no. 18

[144] Further, for the reasons already stated above, I am not satisfied beyond reasonable doubt as to lack of consent on Count 10.

[145] I am satisfied the penetration occurred but I am of the view that the complainant must have been complicit to effect it in the circumstances.

[146] She did not alert her mother, despite her mother being very close by to her. I am not being critical of the complainant. She was a young, naïve child. I am left with the impression that she was somewhat infatuated with the accused.

[147] I find the defendant not guilty of counts 9 and 10.

Count 16 & 17

[148] Count 16 is a charge of indecent treatment, alleging that the defendant rubbed the complainant's breasts. Count 17 is a charge of rape.

[149] The complainant gave evidence that herself and her mother moved into the house the defendant had built at Caravonica in the last school term of 1993.[103] Counts 16 & 17 relate to incidents at this residence.

[150] The complainant said in evidence that she was lying on the bed the defendant and her mother shared. The complainant was watching TV, when the defendant came in and asked if he could give her a massage. The complainant said the reason for her watching TV in the bedroom as opposed to the lounge room was 'because it was probably more comfortable than the couch.'[104] The complainant's mother was not at home.

[151] The defendant said to her 'roll over I'll give you a massage.'[105] The defendant told her to roll onto her stomach, before taking off her clothes and underwear and rubbing her with massage oil.[106] The complainant said the defendant 'started massaging my back for a while, and then sort of flipped me over and started rubbing from my ankles to my vagina, all over my breasts, and then back around my vagina, inserting his fingers into my vagina. Once he turned me over at that point he was naked.'[107]

---

103 T 47, l 1.
104 T 2-81, l 4.
105 T 2-81, l 14.
106 T 48, l 35.
107 T 48, l 40.

[152] The complainant did not explain when or how the defendant (or herself) took her clothes off, but accepted in cross-examination that she did not have clothes on during the massage.[108]

[153] The complainant gave evidence that the defendant manoeuvred her onto her back, then began touching her ankles before moving up towards her vagina, then her breasts again, then back to her vagina and then began intercourse.[109] The complainant stated that the defendant put his finger into her vagina and that she did not consent to this. The penetration of the complainant's vagina with the defendant's finger is not a charged act. Count 16 is particularised as the defendant rubbing the complainant's breasts.

[154] The complainant said 'I didn't see him undress while I was on my stomach. He turned me over, naked and put his penis in my vagina as he's had sex with me, rubbing his body at this time while he was having sex with me.'[110] The defendant asked her intermittent questions such as whether it felt good, and the complainant did not respond.[111]

[155] The complainant said that the intercourse went for 'quite a while,' 'about half an hour' before the defendant ejaculated onto her stomach.[112] The defendant then wiped the ejaculate off the complainant's stomach, put his clothes back on and said something like 'you can't tell Mum, as always' then left. The complainant then put her clothes on, had a shower and went to her room.[113]

[156] When, under cross-examination, the complainant was asked 'when it came to him having intercourse with you, he got on top of you, put his hands above your shoulders, put his penis against your vagina and then thrust his hips forward?' The complainant answered yes. She accepted that she did not say anything or make any movement during the course of this.[114]

---

108 T 2-81, l 23.
109 T 49, l 38.
110 T 29, l 5.
111 T 50, l 9.
112 T 29, l 8.
113 T 49, l 10.
114 T 2-81, ll 35 – 45

[157] When questioned, the complainant stated that she did not consent to the intercourse.[115] This conduct comprises count 17.

[158] The complainant said that this was the last time sexual intercourse occurred. The relationship between the complainant's mother and the defendant ended soon after.[116]

[159] The defence argues in their submissions that although the complainant alleged she was rubbed with massage oil, "she made no reference to any towel or other item being on the bed before, during or after the oil massage."

[160] Later, defence say "it is unfathomable that the accused would have given the complainant a full body massage without any protection on the bed." I find this submission confusing and unpersuasive.

[161] During cross examination, the complainant was asked:

Q: "…and there was no towel or anything under you?

A: I'm not sure; there might have been… being it was oil"

[162] I am of the opinion that it is understandable that the complainant may not be certain of whether there was a towel or not. In addition, there is no evidence about how much (or how little) oil was used. In any event, I am satisfied beyond reasonable doubt that the accused is guilty of Count 16.

[163] In respect of Counts 16 and 17 the defence argued that the indictment alleges that the offending occurred between 1 May 1993 and 30 September 1993. The complainant gave evidence that the alleged offences occurred in the address at Caravonica. She was asked by the prosecutor:

Q: "Do you remember what year it was that you moved into that house?"

A: Probably end of 93.

Q: The end did you say?

A: Around like the – so the last term of 1993.

Q: The last term?

---

115 T 49, l 45.
116 T 50, l 17.

A: Yes."[117]

[164] The defence then analysed the complainants mother's testimony including that the move to Caravonica was at the end of 1993 and could have been after the September school holidays. After moving into the house at Caravonica, her relationship with the accused ended within a couple of days, and she and the complainant left the premises within a month of moving in.

[165] The defence submission is that even if the prosecution established beyond reasonable doubt that Counts 16 and 17 occurred, they have not established that the offending occurred prior to 30 September 1993.

[166] This submission only has force if the conduct of the trial was such as to make the span of dates a material particular. Information of a date of the commission of an offence is immaterial unless it would be an essential element of the offence.[118]

[167] In *WGC v The Queen*, the appellant was charged in the District Court of South Australia with two counts of having sexual intercourse with a person under the age of 17 years.[119] Although there were two counts, it was alleged that there had been a single sexual encounter. The particulars were that the offences occurred between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place. Prior to any evidence being called counsel for the appellant made a short statement to the jury identifying the issue at the trial as "when did it occur, did it occur, as the complainant alleged, in 1986 when she was 13?" or as would be the defence case "did it occur on a house boat trip that occurred in 1989 when she was 16?" The appellant gave evidence in his own defence. In the joint judgment of Hayne J and Heydon J, it was said:

> "By contrast, if the dates of the offences are not constituent elements of the charges, but matters only of particulars, the information could be amended without difficulties of the kind just mentioned. In particular, there would be no additional charges laid and no rearraignment of the accused."[120]

---

117 T 1-46, 47.
118 *Hackwill v Kay* [1960] VR 632 at 634.
119 [2007] HCA 58
120 Ibid, [136].

[168] In the case of *R v HBR*, the question was identified again.[121] The appellant was convicted after a trial of four counts of indecent treatment of a child, one count of using electronic communication to procure a child under 16, two counts of indecent treatment of a child under 16 under care and two counts of carnal knowledge with a child, under 16, under care.

[169] The appellant appealed his convictions on two grounds. The first, that the verdicts of the jury were unreasonable or cannot be supported having regard to the evidence; and the second, as a result of evidence available at the time of the appeal of an alibi in respect of Count 1, there had been a miscarriage of justice that affects all the guilty verdicts and not just for a guilty verdict on Count 1. The first count had been particularised as occurring on Boxing Day 2012. Evidence from other witnesses relied on as new evidence was that the appellant had an alibi for that date. Justice Mullins found that the failure to produce such evidence at the trial was not attributable to any forensic decision. The evidence sought to be led at the appeal was evidence that did exist at the time of the trial and could have been discovered with reasonable diligence. Her Honour said:

> "In the normal course the date on which an alleged offence is committed that is particularised in the count on the indictment is not a material element of the charge. The particulars of the alleged time and place of committing the offence must be included on the indictment pursuant to s 564(1) of the *Criminal Code* (Qld) in order to ensure the defendant has sufficient information of the nature of the charge to be able to meet the charge and understand the case against him or her: *BCM v The Queen* (2013) 88 ALJR 101 at [43]. It is submitted on behalf of the appellant, however, that the prosecution case was conducted on the basis the conduct that is the subject of count 1 took place on the date particularised in the count, so that the date became a material element of the offence. Reliance is placed on *R v Jacobs* [1993] 2 Qd R 541."[122]

---

121 [2017] QCA 193.

122 Ibid, [84].
Citing *BCM v The Queen* (2013) 88 ALJR 101, [43]; *R v Jacobs* [1993] 2 Qd R 541.

[170] Her Honour analysed the evidence in *R v Jacobs*.[123] In *R v Jacobs,* count 1 was a charge of trafficking particularised as being between the 1st of December 1989 and 19th of June 1990. Counts 2 and 3 were counts of supply of cannabis sativa particularised as occurring between the 1st of December 1989 and 31st of January 1990. Mr Jacobs gave and called alibi evidence as a result of which it was indisputable he was overseas between 18 December 1989 and 20 January 1990. Although that left 11 days between his return from overseas and 31 January 1999, to conclude that these supplies occurred in that period would imply acceptance of the assertion made by the crown in the particulars on the indictment which would, in effect, be placing an onus of proof upon Mr Jacobs to show he had not supplied after he returned from overseas. Dowsett J said at [567]:

> "The case was conducted in such a way that it would be unjust to allow a conviction for an offence when the offences alleged in the indictment can clearly not have occurred. It is not to the point to say he may have supplied on other occasions outside of that time frame. Such supplies were not the offences for which he was tried."[124]

[171] Her Honour said at para [89]:

> "The statements of principle made in *Jacobs* must be understood in the context of that case where the defence was conducted on the basis of the defendant's guilt of the defendant's alibi."[125]

[172] In *R v KP; ex parte Attorney General (Qld)*, Williams JA said:

> "…. Courts are now being called upon to adjudicate upon conduct which occurred many years prior to trial, and in most of those cases it is not possible for the complainant to give a precise time and date for the conduct constituting each of the numerous offences which are almost invariably involved. The inability to provide a precise time and date does not mean that each charge is insufficiently particularised so that the accused is deprived of a fair opportunity of mounting a defence to it.

---

123 [1993] 2 Qd R 541.
See also *R v Kringle* [1953] Tas SR 52.
124 Ibid, [567].
125 *R v HBR* [2017] QCA 193, [87].

> What is important is that the evidence in relation to each charge is clear and distinct, and readily distinguishable from the other charges levelled against the accused. I do not accept this submission."[126]

[173] I am satisfied that the evidence in relation to charges 16 and 17 is clear and distinct. I am satisfied beyond reasonable doubt that the accused is guilty of Count 16.

[174] As to Count 17, for the same reason I have enunciated earlier, I am left with a reasonable doubt on the question of lack of consent. For this reason, the accused is acquitted on Count 17.

Further Uncharged Act

[175] The timing of, and the reason for, the termination of the relationship between the complainant's mother and the defendant was contentious at trial.

[176] The complainant inferred in her evidence that the relationship between her mother and the defendant ended relatively soon after a particular incident, described by her as follows: 'I remember [the defendant] and I being on the lounge. Mum came in, sort of – like, 'What's going on? What are you two up to?' Took the doona cover off, saw that [the defendant] had an erection, and got angry. And I went to my room. And they had words.'[127]

[177] When questioned about this incident, the complainant stated that it was the 'same as always, he would have just had his hand down the front of my pants and playing with my vagina.'[128] The complainant said that her mother asked her after this incident if there was something going on between the two of them, and she replied no.[129]

[178] The defence criticism of this evidence is:

i. That the complainant made no reference to this incident in her first statement in 1997;

ii. The mother said he was naked, and the complainant did not say this;

---

126 [2006] QCA 301, [2].
127 T 1- 50, l 40.
128 T 1- 51, l 10.
129 T 1- 71, l 4.

iii. When the complainant told Detective Tucker in 2016, she said it happened at the Caravonica address, whereas as the committal hearing she said it happened at Redlynch – saying it had been a "typo."

[179] In cross examination, the complainant agreed that when she initially made a police complaint in 1997, she did not mention this incident.[130] She agreed that the first time she mentioned the incident was on the 16th of December 2016 in her police statement.[131]

[180] The complainant also agreed that there was some confusion in her statement as to whether or not this event happened at the house in Redlynch or in Caravonica. She did not accept in cross-examination that it was her mother who told her to change her statement to specify where the event occurred.[132]

[181] The complainant then said she had discovered the mistake after her mother had prompted her to re-read the statement. I do not make much of the difference between 'a typo' and 'a mistake.' I accept the complainant's evidence that the event occurred. She clearly believed it was the cause of the breakup.

Initial Police Complaint

[182] The complainant gave evidence that on the 21st of September 1997, when she was 17 years old, she met with Senior Constable Russell Parker and gave a statement.

Withdrawal of Police Complaint

[183] The complainant withdrew her police complaint on the 24th of January 1998, when she was 17 years old.

[184] The complainant stated in cross-examination that the withdrawal of the complaint was not because she had been informed that the defendant had denied the offending, but rather that she thought it would not be emotionally beneficial for her. She denied that

130 T1- 60, l 42.
131 T 1- 60, l 45.
132 T 1- 70, l 5.

she withdrew the complaint due to a lack of money to proceed with the legal process.[133]

Re-enlivening of police complaint

[185] The complainant went to some trouble to re-enliven the complaint. She lived interstate at the time. She asked her mother to find a police contact in Cairns who she could talk to. In November of 2015, she contacted Rebecca Tucker who investigated the matter and was in contact with the complainant over a period of 12 to 15 months.

[186] This complaint was made over 20 years after she had last lived with the accused. Her life had changed dramatically and she lived interstate.

[187] I find that the renewal of the complaint does not detract from the complainant's credibility in the circumstances.

Complainant attends Defendant's work place

[188] It is was not clear if the complainant attended at the defendant's workplace before withdrawing the police complaint, or after. There was evidence that the complainant was 17 years old at the time, which could be any time between 4 April 1997 and 4 April 1998.

[189] The complainant stated that the purpose of her attending the workplace was because she wanted an apology. The defendant was very angry to see her, told her he could not be seen with her, and asked her to leave, which she did.[134] It was apparent the defendant did not want to see her, and stated that she had got him in trouble. In cross examination, the complainant accepted it could be possible that she had said to the defendant 'Mum made me do it.'[135]

Maintaining an unlawful sexual relationship

---

133 T 2-51, l 20.
134 T 57, l 55.
135 T 2-21, l 45.

[190] In this case, the prosecution relies on the uncharged acts to establish that the accused maintained a sexual relationship with the complainant.

[191] I have found beyond reasonable doubt that the accused committed the uncharged acts – i.e. the touching under the doona in the early stages and the event when the complainant's mother pulled the doona away, in the final stages. This is not a case like *R v SCE* (referred to by the defence).[136] In that case, the uncharged acts were not particularised as matters relied on by the prosecution to prove the element of habituality in the maintaining count.

[192] There is no doubt the acts are acts defined as an offence of a sexual nature. The charged acts are of unlawful and indecent treatment. The uncharged acts amount to indecent treatment. There is no doubt the accused was an adult and the complainant was a child.

[193] If I were to have doubt about the specific offences, then I should only convict the defendant on the basis of the evidence of the other alleged acts, if, after carefully scrutiny, I am satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment. Of this, I am satisfied.

[194] I have found the accused guilty of Counts 2 and 3.

[195] I have found the accused guilty of Counts 4, 5, 6 & 7, occurring the day of work experiences.

[196] I have found the accused guilty of count 16, the massage at the house at Caravonica.

[197] Accordingly, I have found that the accused did an act defined as of a sexual nature on 3 or more occasions. I am satisfied an unlawful relationship had been maintained and carried on, kept up or continued. It was an ongoing relationship of a sexual nature between the defendant and the complainant. These were not isolated incidents, there was continuity and habituality of sexual conduct.

[198] I find beyond reasonable doubt the relationship was unlawful, and therefore, I find the accused guilty of Count 1.

---

136 [2014] QCA 48.