SUPREME COURT OF QUEENSLAND

CITATION:	*R v PBA* [2018] QCA 213
PARTIES:	**R** **v** **PBA** (appellant)
FILE NO/S:	CA No 123 of 2017 DC No 212 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich – Date of Conviction: 25 May 2017 (Lynch QC DCJ)
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2017
JUDGES:	Fraser and Philippides and McMurdo JJA
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where a jury found the appellant guilty of maintaining an unlawful sexual relationship with a child under 16 years, six counts of unlawfully and indecently dealing with a child under 16 years (with a circumstance of aggravation that the child was under 12 years) and two counts of rape – where the jury were unable to agree upon their verdicts upon three further counts of rape – where the appellant submitted that there was evidence of coaching in the complainant's evidence – where there were inconsistencies between the complainant's evidence and other witnesses' evidence – where the appellant submitted that the complainant admitted in cross-examination that one of the charged offences could not have occurred – where two potential witnesses were not called – whether the verdict was unreasonable having regard to the evidence *R v Clapham* [2017] QCA 99, applied
COUNSEL:	M Harrison for the appellant J A Wooldridge for the respondent
SOLICITORS:	Williamson & Associates Lawyers for the appellant Director of Public Prosecutions (Queensland) for the

respondent

[1] **FRASER JA:** After a seven day trial in the District Court a jury found the appellant guilty of maintaining an unlawful sexual relationship with a child under 16 years (count 2), six counts of unlawfully and indecently dealing with a child under 16 years (with a circumstance of aggravation that the child was under 12 years) (counts 3, 4, 7, 8, 9 and 10) and two counts of rape (counts 11 and 12). The jury were unable to agree upon their verdicts upon three counts of rape (count 1, 5 and 6). The appellant has appealed against his convictions on the ground that the guilty verdicts are unreasonable and cannot be supported having regard to the evidence.[1]

The Crown case

[2] The complainant in the alleged offences was seven years old on Christmas Eve 2012, the date on or about which the first offence (count 1), was allegedly committed. She was between eight and nine years old when the maintaining offence (count 2) was allegedly committed during a period of about 13 months between 1 June 2014 and 26 July 2015. Each of counts 3 – 12 alleged that the offence was committed on a date unknown during a specified period. The complainant was between eight and nine years old during the periods specified in counts 3 – 8 and she was nine years old during the periods specified in counts 9 – 12. In the complainant's evidence she referred to the appellant as her granddad. The appellant was the second husband of the complainant's maternal grandmother. (The complainant's mother was a child of her mother's first marriage.)

[3] The complainant has three siblings, WJ (two years older than the complainant), WZ (the complainant's twin brother) and WY (six years younger than the complainant). The complainant also referred in her evidence to "Aunty PY" and "Uncle TY". They are the children of the appellant and his wife (the complainant's maternal grandmother). PY is about eight and a half years older than the complainant. TY is about seven years older than the complainant. The family witnesses in the Crown case, in addition to the complainant, were PY, the complainant's mother and father, and the appellant's wife. The prosecutor also called a police officer and a doctor.

[4] The convictions were based upon the complainant's evidence. Her evidence comprised statements she made to police in a video recorded interview on 27 July 2015, when she was nearly ten years old and her pre-recorded evidence about 16 months later when she was 11 years old. In the complainant's cross-examination during her pre-recorded evidence, she denied repeated suggestions that the sexual conduct by the appellant which she described had not occurred, she denied having used information from the internet in her evidence of the sexual offences, and she denied having made up evidence against him.

[5] In relation to each count of rape upon which the appellant was convicted the complainant gave clear evidence of penile penetration (of the complainant's mouth (count 11) and the complainant's vagina (count 12)). Because a child under the age of 12 years is incapable of consenting to acts amounting to rape and it was not in issue that she was under 12 at the times of the alleged offences, the only issue at the

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[1] The notice of appeal includes six paragraphs of particulars of the ground of appeal. At the hearing of the appeal the appellant's counsel abandoned reliance upon those particulars.

trial upon counts 11 and 12 was whether or not the appellant did penetrate her with his penis as the complainant described.

[6] In relation to the indecent dealing offences alleged in counts 3, 4, 7, 8, 9 and 10, upon the complainant's description of each alleged offence the appellant deliberately dealt with the complainant, the dealing was indecent (as a sexual dealing by an adult with an eight or nine year old child), the dealing was unlawful (there was no possible suggestion that it was authorised, justified or excused by law), and at the time of the dealing the complainant was under 12. Count 7 alleged an additional circumstance of aggravation, that the appellant had the complainant under his care for the time being. The evidence made it reasonable for the jury to conclude that the Crown had proved that circumstance beyond reasonable doubt; the appellant did not contend to the contrary. Since absence of consent by the complainant is not an element of the alleged offence of indecent dealing, the only issue for the jury on each of counts 3, 4, 7, 8, 9 and 10 was whether the conduct described by the appellant occurred.

[7] The Crown relied upon each of the specific counts, other than count 1, as particulars of count 2. As the trial judge explained to the jury when summing up, there was no dispute about the elements of the offence that during the relevant period the appellant was an adult and the complainant was a child under 16. One issue at the trial was whether there was an unlawful sexual relationship. That required the Crown to prove a relationship that involved more than one unlawful sexual act during the charged period. The offences charged as counts 3 – 12 certainly involved an "unlawful sexual act". The second issue was whether the appellant "maintained" the alleged unlawful sexual relationship. The trial judge appropriately directed the jury that this required proof that there was an ongoing relationship of a sexual nature between the appellant and the complainant, and that required some continuity or habituality of sexual conduct rather than merely proof of isolated or unconnected incidents. The appellant did not argue, and it could not reasonably be argued that, if the complainant's evidence about the circumstances of the offences charged as counts 3 – 12 was accepted by the jury, it could not reasonably be accepted by the jury as proof beyond reasonable doubt of both of the elements of the charge in count 2 that were in issue. Again, the only real issue was whether the complainant's description of the appellant's conduct charged as counts 3 – 12 occurred.

[8] I will refer to the evidence of the offences to which the parties referred and to other evidence which is arguably material to the ground of appeal.

Count 1 (rape: no verdict)

[9] The Crown case on count 1 was that the appellant digitally penetrated the complainant's vagina while she was in PY's bed at the complainant's grandmother's house. At the commencement of the complainant's police interview she said that her grandad had been doing something very bad. She was asked to tell the police officer everything about that and to start from the beginning. The complainant referred to one Christmas Eve when she was sleeping with her Aunty PY. Later in the police interview, the complainant was asked to identify when this conduct occurred. She replied that she thought it was Christmas three years ago (2012).

[10] In the police interview, the complainant said that she was at her grandmother's place, in a bedroom with her Aunty PY and her sister WJ. She "woke up and

someone was down the thing and it was touching where I shouldn't be touched and PY went and turned the light on and Granddad was under the bed hiding and when she turned the light off um Granddad came out from under the bed … And he walked out". In response to a series of questions the complainant made it clear that she referred to the appellant touching her vagina. The complainant was wearing a nightie, the appellant pulled her undies up, and he "just started putting his finger like tickling". Subsequently in the police interview the complainant said that she woke up when the appellant poked his finger in her vagina: "He went right in". The complainant said that she said, "Is that you Granddad?". That was when PY turned the light on. The appellant rolled under the bed and stayed there. PY turned the light off and the appellant "rolled back under from under the bed, walked to the door and slid the door open and went". She knew it was the appellant because PY saw him, "she seen her … his face 'cause the light was on um in the lounge room 'cause …"; "PY must have seen … I also seen his face".

[11] The complainant said that she "was sleeping on the end and then WJ was sleeping in the middle and PY was sleeping on the other end". It was a queen size bed. The complainant demonstrated that the bed was high off the ground and big. She told the police officer that when she went to bed her ear starting hurting and she went to her mother who put things in her ear. She went back to sleep, and the appellant came in after she had been sleeping for a little while: "he poked it in and it really hurt and it woke me up".

[12] It was put to the complainant in cross-examination that she was in the middle of the bed. The complainant responded that she thought she was on the outside. Defence counsel again put to the complainant that she was in the middle of the bed and she answered "Yep". Defence counsel then put that it was right that PY was on the outside of the bed and the complainant responded "I think so". She subsequently said that she thought she did make a mistake about where she was in the bed, but she did not remember being in the middle of the bed and remembered being on the end. She agreed that if it was the case that she was in the middle, then for the things that she said to have happened, the appellant would have had to lean over one person on the side or lean over from the end. She denied that the appellant just came in to say goodnight and that she made up her statements about what the appellant had done to her when her mother asked her questions.

[13] The complainant agreed that the appellant had a big, fat tummy. When it was suggested to her that it was not possible that he could hide under the bed the complainant said that that was what her aunty had said to her. The complainant agreed that when she woke up she could not see anything. Defence counsel asked the complainant whether it was possible that she went back to sleep after saying "Is that you, granddad?" to which the complainant responded "I don't remember".

[14] The complainant's father gave evidence that "from memory" on that Christmas Eve, PY was in the middle of the bed and the complainant and WJ slept on the outside. He said that after he had been asleep he was disturbed by the door of the girls' room being opened and he saw the appellant go in there with a flashlight. He thought that the appellant was looking for sticky tape but the door shut and the light got turned (meaning turned off), which seemed a bit suspicious to him. The appellant came out after a couple of minutes. The appellant met his wife (the complainant's grandmother) near the kitchen door and told her that he had been in the room getting sticky tape. The two of them left the house and he presumed that they went to the room at the end of the garage where they slept. In cross-examination, he

agreed that he was heavily intoxicated and under the influence of marijuana, he went to bed after his daughters went to bed, and they were asleep in the room with the door closed when he went to bed. He was pretty sure that he said goodnight to his children because he always did, but he could not answer that clearly. He was not confident that he went into the room. He agreed that he had attempted to reconstruct what he remembered from that night.

[15] PY gave evidence that she remembered there was a family gathering at her house on Christmas Eve 2012. She, the complainant and WJ slept under a blanket in a double bed in the same bedroom. She and WJ slept on the sides of the bed and the complainant slept in the middle. She turned the light off and fell asleep. She woke up hearing the complainant saying, "granddad, is that you?" a couple of times. She turned on the light and sat up but did not see anything at that point. She thought the other two girls were asleep so she turned the light off and lay back down. Then she heard "a sound of someone … in the corner", to the left as one comes in the door and adjacent to a desk. She "saw, like, a shadow just basically exit the room, and then open the door, close the door, because I heard the door open, and just saw the random shadow, like, exit, and then just shut the door behind it". She then went back to sleep. In cross-examination PY agreed that the appellant would come into the room and say goodnight pretty much every night. She confirmed that the complainant was sleeping in the middle of the bed. She also said that she normally had eight or more boxes under her bed stored with other things.

Counts 3 and 4 (indecent treatment: guilty)

[16] The Crown case on counts 3 and 4 was that the appellant rubbed his penis on the complainant's vagina and performed oral sex on her in his bedroom at the complainant's grandmother's house.

[17] After the complainant referred in the police interview to the appellant's conduct at Christmas, which she thought was three years ago, she said that "it stopped for a while". She had earlier said that after the first occasion the appellant had never done it for a long time and it started in the middle of "last year". Upon that evidence, counts 3 and 4 occurred during the second occasion of the appellant's offending in mid-2014. The complainant said that in the appellant's room at her grandmother's house, which was outside in a small shed area, the appellant "grabbed his parts started rubbing on mine". The appellant took her pants and undies off, pulled his shorts down, pushed her on the bed, and then started rubbing "it" against mine. The shed area had curtains and the appellant "closes them and … locks the doors and I can't get out and then um he started doing it and I didn't really like it". The complainant said that the appellant ignored her and kept going when the complainant asked him to stop. When the appellant took his pants off the complainant saw his bottom. He pulled his shirt up more and then took his "part", pushed her on the bed, spread her legs out, and started rubbing it "on mine". It is clear from further answers that the complainant's references to the appellant's "part" described his penis.

[18] The complainant went on to say that the appellant rubbed it on her vagina. When asked whether there was something other than using the appellant's part in that way that the appellant would use it for, the complainant said that he shoved it in her mouth one time. She then said that he did that to her twice. His part was big and couldn't really fit in her mouth. After he had started to put it into her mouth, he put

her vagina into his mouth. (The complainant said that he did this "stuff" about three or four times in the shed and three or four times at her house.) On this first occasion she was playing down in the area and the appellant grabbed her and took her to his room. Her mother, her grandmother, WJ, PY, TY, WZ and WY (WY) were inside the house at the time.

[19] Towards the end of the police interview, the complainant said that the appellant had told her not to tell anybody. The appellant said that is was "our secret thing".

[20] In cross-examination during the complainant's pre-recorded evidence, the complainant agreed that when the appellant grabbed her and took her into his room she did not scream or yell out to anyone. Her mother probably would have heard it if she had called out to her. Her grandmother was in the house with the rest of her family. The complainant's grandmother could have come in at any time. The complainant thought there was a lock on the door because she heard a lock sound, unless it was just the door shutting. When the complainant went back to the house she did not say anything to her mother or grandmother or anyone else. She did not appear upset.

Counts 5 and 6 (rapes: no verdicts)

[21] The Crown case on counts 5 and 6 was that the appellant penetrated her vagina and subsequently her mouth with his penis in the appellant's bedroom at the complainant's grandmother's house after playing Wii.

[22] The complainant said that the next time it was still in the shed (the appellant's bedroom). There was about a month between the first time and the second time but the second time was "worser". The complainant was watching television and the appellant said he would show her the pool. She went with him and then he took her into his room where he had the Wii. He turned the Wii on "and then he started touching it and then he turned the Wii off and then turned around and pulled my shorts off and he took his shorts off and he actually started raping me and then it hurt my um part and I said 'ow' and then he started .. he stopped doing it for a sec and then um and then he got up and just like all this creamy stuff came out". The complainant explained that the appellant had started touching her vagina. He tickled her leg and each time would go further up towards her vagina. When the complainant asked what he was doing when he pulled his shorts off, he did not say anything but just lay on top of her. The complainant described the appellant's penis. The appellant was "going right into the bit where you have the babies and that" and it really hurt. The appellant washed the ejaculate off her stomach with a cloth and told her to have a shower. She did so.

[23] The complainant did not then refer to oral rape. After the complainant went on to refer to the occasions the subject of the remaining counts, she was asked whether there was another time when the appellant made her put his penis in her mouth. Initially she answered "No", but when asked how many times the appellant did that she answered "Two". The second time was at her place in the bathroom (count 11). The complainant said that the first occasion it occurred was the second time at the appellant's place (count 6). The appellant asked the complainant whether she wanted to suck his penis. She said "no" and she did not want to do that. He just shoved it in. The appellant was wiggling it around her mouth. When asked whether it went in, the complainant initially answered, "Ah no". But when the police officer

said "So it didn't go into your mouth that time?" the complainant answered, "It went into my mouth". The complainant told her mother that at the complainant's grandmother's house the appellant would take her down to the room and do stuff to her down there. He touched her down there also when they were playing in the pool.

[24] At the commencement of that passage, the complainant referred to "one time at his place", which she described as being the second time. The police officer described that time as "the Wii time". In the course of the statements summarised in the preceding paragraph, the complainant was asked where the appellant sat her down. She replied, "On my bed". In examination-in-chief in the complainant's pre-recorded evidence, the prosecutor referred to that passage in the police interview. The complainant said, "I was supposed to stay (meaning 'say') in his bed". She agreed that this was "in the Wii time in the room that's separate to the house".

[25] In the complainant's pre-recorded evidence, when the prosecutor asked the complainant if thinking about her sister WJ's birthday helped her to remember when the appellant first started touching her "this way" the complainant agreed that it was round about her sister's birthday. WJ who is two years older than the complainant, was born in June. (The expression "this way" may have been a reference to the immediately preceding evidence in which the complainant answered questions about parts of her police interview concerning the appellant's penile penetration of her mouth (count 6).)

Count 7 (indecent dealing: guilty)

[26] The Crown case on count 7 was that the appellant rubbed his penis against her vagina on the complainant's brother's soccer day at her house.

[27] The complainant said that the third time, which was the first time at her house, it was WZ's soccer day. The appellant said that he was going to give her some money if she went down to get some wood. She "went and got the wood and then I went to my room to go pack my clothes away and then he came in and closed the door and put bags and all that in front of it and then he took my shorts off again and then um yeah and then um and um he .. so I packed my clothes up and then he took me to my brother's room I was supposed to say". The complainant said that the appellant took them (her shorts) off and then he started rubbing his penis against her vagina. The complainant's friend NDC (aged eight) walked into the room after the complainant had pulled her shorts up; the appellant could hear her walking and quickly told her to pull her shorts back up. The complainant said that NDC "is" eight. (The complainant's statement that NDC was eight years old (apparently at the time of the police interview) was consistent with NDC being aged six, seven or eight years old at the time when count 7 was alleged to have occurred.)

[28] The complainant went out to play with NDC and told her that the appellant was rubbing his penis up against her vagina. NDC said that she was not going to tell anyone about it. The police officer gave evidence that NDC's parents had refused to allow him access to her to take a statement and they did not want her involved in the case at all. In cross-examination the police officer agreed that NDC's mother said that NDC had no recollection of the conversation to which the complainant referred. The evidence does not reveal when the police officer spoke to NDC's

mother but the police officer gave evidence that he became the lead investigator in July 2015 when the complainant's parents brought her to the police station.

[29] In the complainant's pre-recorded evidence in cross-examination the complainant agreed that she remembered making a mistake when she gave her account to the police officer. She meant to say that it was in her brother's room. The complainant denied that someone had told her to say it was in her brother's room. She agreed that it was because she had told the story over and over again and she remembered it very well. She made a mistake on this occasion.

[30] Defence counsel suggested that when the complainant was asked about this she did not tell them that WZ was with her. The complainant answered that she "did say that WZ [WZ] was waiting – I – well, WZ [WZ] was waiting out just watching TV". The complainant agreed that she did not tell the police that WZ was there when she told them about this conduct. The complainant agreed that the appellant had offered the complainant and WZ money to go and get firewood. She agreed that from the position where WZ was sitting on the couch watching TV he could see into his bedroom through a window. This exchange occurred: "This couldn't have happened if – in the way that you say it happened because WZ [WZ] was there, wasn't he? --- Yes".

Count 8 (indecent dealing: guilty)

[31] The Crown case upon count 8 was that the appellant licked the complainant's vagina in the appellant's room at the complainant's grandmother's house.

[32] In the complainant's police interview she said that the appellant took a lolly out and she followed him. He put the lolly into his room. The complainant went to grab it and the appellant closed the door and locked it and closed the curtains. He did not take her whole shorts off this time but just pulled them down a little bit. The appellant started to lick her vagina. Uncle TY knocked on the door and said "dad". The appellant pulled his shorts back up. He told the complainant to pull her shorts up. The appellant told her to go, which she did. He then started helping TY with a school project for which TY was making a "pretend gun".

[33] During the complainant's pre-recorded evidence, she agreed in cross-examination that her grandmother, mother, TY, WZ and WJ were all inside the house at this time. No one said anything to her about the appellant taking her outside on her own. She did not say anything. When she got back she did not tell anyone "because I was told to keep it a secret". The complainant agreed that her mother had told her many times that if she ever felt uncomfortable she should go and talk to her about it.

[34] The police officer gave evidence that he had not taken a statement from TY.

Count 9 (indecent treatment: guilty)

[35] The Crown case on count 9 was that the appellant rubbed his penis on the complainant's vagina in her room at her house.

[36] In the complainant's police interview she said that about a month before the police interview the appellant took her into her room, took her shorts off, lay her on the bed again, pulled his shorts off, lay on top of her again, and "put his penis into my

vagina but he didn't go all the way in this time". The complainant said that the appellant "just was rubbing it in a bit". The complainant said that she did not want to do that anymore but the appellant ignored her. The complainant's brother yelled out "we've got to go to soccer" or "it's time to go". The appellant told the complainant to pull her shorts up. She did so and went out to the car. The complainant was in the room with the appellant only for about five minutes.

Counts 10 and 11 (indecent dealing and rape: guilty)

[37] The Crown cases on counts 10 and 11 respectively were that in the bathroom at the complainant's house the appellant licked her vagina and penetrated her mouth with his penis.

[38] In the complainant's police interview she said that she had gone to the toilet in the bathroom, pulled up her pants and washed her hands. The appellant walked in, pulled her shorts back down, and lifted her onto the top of the bench. He started licking her vagina again and then told her to touch his penis. She did not want to but the appellant made her. He made her suck his penis. The complainant said that "it was really gross" and she was "nearly choking". Her mother called her. She had to do some jobs outside, including feeding the animals. The appellant said that he hoped that the complainant could do this another time. The complainant walked outside and did her jobs. She did not know how long ago this was.

[39] In cross-examination in her pre-recorded evidence the complainant agreed that the door to the bathroom did not lock and that her grandmother had often complained about people walking in on her when she was using the bathroom. The complainant agreed that her mother, grandmother, WZ and WJ were outside or at the house on this occasion. It was put to the complainant that if this had occurred her mother and grandmother would have been able to see the appellant go into the bathroom. The complainant said that the door would be closed and "he usually closed the door".

[40] Defence counsel put to the complainant that on the occasion when she was in the bathroom the appellant and her grandmother had come to give some presents to WJ. The complainant responded. "I don't remember, but I'm pretty sure, yes". She disagreed with the suggestion that everyone usually sat at the kitchen table and said that they usually sat outside.

Count 12 (rape: guilty)

[41] In the complainant's police interview she said that the last time was about two weeks ago. The appellant was in her room again. He pulled her shorts down. He pulled his shorts down too and started rubbing his penis up against her vagina. The complainant tried to push him away. The appellant pushed her down onto the bed then lay on top of her again. He "started raping me a little bit". He was moving up and down and his penis was going all over her vagina. The complainant explained that she meant "in" rather than "over". She said "that stuff came out and it went all … over my [undies] … and then he got my undies and wiped it off and then put my undies in the washing and then um I wanted to go so he let me and then I walked out of the room and my next door neighbour was there so I just went over there". During the complainant's pre-recorded evidence, in examination-in-chief the complainant was asked what she meant when she said that the appellant started raping her a little bit. The complainant said that the appellant's penis was going into her vagina a little bit.

Preliminary complaint evidence

[42] In the complainant's police interview she said that her mother found out about "it" on the previous day. The complainant told her mother "basically everything I told you". There was not anything that the complainant told the police officer that she had not told her mother about. The complainant had not told anybody else other than NDC and her mother. During the complainant's pre-recorded evidence, in cross-examination: the complainant remembered that on the night before she went to the police station her mother asked her whether the appellant had touched her; the complainant had not told her mother that the appellant had touched her before that day; the complainant's mother was very upset and crying when she asked the question; when the complainant told her mother something her mother rang the complainant's grandmother; after that, the complainant's mother started asking her lots of questions quickly; the complainant wanted to answer her mother's questions; at that time her mother was upset; and the complainant later found out some things that had happened to her mother when she was a little girl.

[43] The complainant's mother asked whether the appellant had ever put his thing inside her. The complainant said "yes". The complainant later heard her mother say on the phone that the appellant had raped the complainant. That was the first time the complainant had heard the word "rape". The complainant agreed that before they went to the police station the next day, her mother asked her about the events several times over and over and talked to the complainant about it many times. Subsequently during cross-examination, the complainant denied the suggestion that she had made things up because of what her mother had asked her. In cross-examination, defence counsel suggested that the complainant had made her account up to tell her mother and that the things she told the policeman she had seen were things she had seen on the internet. The complainant denied both suggestions.

[44] The complainant's mother gave evidence that she and her family visited the appellant about every three weeks in 2014 to 2015, although less frequently in 2015 until the visits stopped after July. During the same period her mother and the appellant visited the complainant's family's house for quite a few weekends to watch WZ play soccer. If it was an early game they would meet at the soccer fields. If it was a later game they would come to the home first and later go down to watch the games. The complainant's mother gave evidence that both at her mother's house and her own house there were occasions during the visits when the appellant had opportunities to be alone with the complainant. During visits to the complainant's mother's house, she and her mother, and sometimes one or more of the children, would go shopping. Usually the complainant and the appellant would stay at the home, occasionally with WJ.

[45] The complainant's mother gave evidence that she spoke to the complainant the day before the complainant participated in the police interview. The complainant's mother asked the complainant whether the appellant had ever touched her. The complainant said "Yes". She asked how many times he had touched her. The complainant said "About five or six". The complainant's mother telephoned her mother. After speaking to her mother she spoke again to the complainant. She asked the complainant what the appellant did to her. The complainant said that he got on top of her and rubbed himself up against her really fast. When asked whether the appellant "put it inside of you", the complainant said "Yes". When asked, "Fully inside of you?", the complainant said "Yes". The complainant's mother asked how

many times that had happened, to which she responded "Only that once". The complainant's mother asked the complainant whether it hurt. The complainant said "Yes, I said 'ow'". The complainant's mother asked whether anything came out of the appellant's thing. The complainant said "Yes". The complainant's mother asked where it went. The complainant said, "all over her belly". The complainant said she had to take her undies off and wipe it all off of her belly, and she threw her undies in the washing. The complainant also said that the appellant had done the same thing another time and it had just gone a bit down below. The complainant's mother asked her whether she was bleeding. The complainant said, "No".

[46] The complainant also said that it happened in WZ's room, and also in WJ's and WY's room, and in the bathroom. The complainant's mother asked her if he put it in her mouth. She said "yes, on a few occasions". The complainant told the appellant that she didn't like it but he kept on doing it. The complainant also referred to an occasion when a next door neighbour came in and alarmed them, and they had to quickly get up, pull their pants up, and walk out.

[47] The complainant said that the first time she was touched by the appellant was Christmas 2012 when the complainant, WJ and PY were sleeping in PY's room. She woke up to somebody touching her in the middle of the night. She asked whether it was the appellant. PY turned the light on. The complainant's mother added that the complainant said the appellant had his hands down her pants, or "whomever it was, and she thought it was Grandad". That was all the complainant said on that occasion.

[48] Both the complainant and her mother gave evidence that the bathroom door did not lock and that it opened into the kitchen where preparations were being made for the complainant's sister's birthday party.

Other evidence

[49] The appellant's wife (the complainant's grandmother) gave the following evidence in the Crown case. On Christmas Eve 2012 (the occasion of count 1), the complainant slept with PY and WJ in PY's room. All of the adults present, except for herself, were drinking when she went to bed at about 10.30 or 11.00 pm. She woke up at some unknown time during the night, looked out of the window and saw the appellant vomiting in the garden. Later she went looking for the appellant around the house and in all of the rooms. Everyone was asleep. She found the appellant asleep near the front of the house in the early hours of the morning. On the following day the only thing that PY said about what had happened was that the appellant was drunk.

[50] On WJ's birthday in 2015 she and the appellant went to a birthday party at her daughter's house. They went to a soccer match before going to the house. She went with her daughter and WJ to pick up the cake. The complainant, WZ and WY were at home with the appellant. She thought that the complainant was next door at the time – she "usually always" was with the little girl next door (NDC).

[51] In cross-examination, the appellant's wife said that the bedroom she shared with the appellant was in a shed out the back of their house. The door did not lock from the inside.

[52] When, on Christmas Eve 2012, the appellant's wife opened the door to PY's room, PY was sleeping on the outside of the bed, the complainant was in the middle and

WJ was on the outside. The complainant always liked being in the middle. They were covered by a blanket. PY always slept with a blanket.

[53] She never noticed a time when the appellant and the complainant were missing from the appellant's house when the complainant was visiting with her family. She would have noticed that. If she had noticed that the complainant was not with her sister WJ then she would have gone looking for the complainant. She did not ever see the appellant encouraging the complainant to leave the house with him. She never saw the appellant use a lolly to get the complainant to leave the house. For that to have happened they would have had to pass by her and the complainant's mother.

[54] The only time that the appellant was alone in the complainant's house was on the date of WJ's birthday when the appellant's wife and the complainant's mother collected the cake, which occupied a maximum of half an hour. The bathroom in that house (in which counts 10 and 11 were allegedly committed) had a door that could not be locked. She normally sat at a table where she would have seen the appellant go into the bathroom had he done so.

[55] In re-examination she agreed that when the complainant's family visited her house there were plenty of times when she was showing the complainant's mother around the garden. She said that the appellant would be following her around the garden and if they were inside they were all making a cup of coffee. She also said that they "usually" were all together.

[56] A paediatrician gave evidence in the Crown case. He was the clinical director of the child protection unit at a hospital. He had very significant experience in forensic examinations of children alleged to have been the victims of sexual and physical abuse. He examined the complainant in early August 2015. He had been informed by the complainant's mother that on occasions she had some vaginal pain but never had vaginal bleeding. The doctor expressed the following opinions. Examination of the vagina did not show any signs of injury past or present. An intact hymen did not exclude sexual intercourse having occurred. There was no evidence of a blunt force penetration of the vagina. The finding of normal vaginal anatomy on forensic examination did not exclude sexual abuse. Absence of evidence of forceful digital or penile penetration did not exclude the act having occurred. It was quite common to find no evidence upon a child of an alleged sexual assault upon forensic examination.

[57] In cross-examination, the doctor agreed that what he was saying did not exclude things that did not involve forceful digital or penile penetration. The use of the word "forceful" involved full insertion of a blunt force trauma. Insertion of a fully erect male penis into the vagina of a girl of eight or nine years old would be considered forceful penile penetration. By forceful penile penetration he referred to "fully inserting a penis all the way into a child's vagina – opening it up all the way and the penis is fully inserted…" "Forceful" meant that the erect penis was being pushed through an opening that did not necessarily accommodate the size of the penis, thereby causing trauma to the hymen. There was no evidence that occurred in this case. If there were forceful insertion of a fully erect penis in the way described by the doctor you would expect to see tearing or cutting through of the hymenal edge. There was no evidence of that.

[58] In re-examination, the doctor said that full penile penetration of the adult erect penis in a child vagina causes trauma to the hymen manifested at the transaction of that hymen, but presumably there were cases where there may be no injury. If nothing was found, it was not expected that there was full blunt force penetration of the vagina. That did not mean that the sexual act did not take place. Many times, sexual penetration was restricted to the introitus of the vagina.

[59] The doctor agreed in cross-examination that where a child alleged penetration on a number of occasions over a period of a year he would often see sexualised behaviour; changes in behaviour at school, acting in a way that was inappropriate for a child in relation to sexual matters, doing and talking about things such as imitation of sexual activity and making drawings of the genitalia that were inappropriate for the child's age, and other effects of the abuse. It was suggested to the doctor that the things he described could include changes in the child's academic performance at school. The doctor responded, "No, not necessarily … Emotionally, they can be … they're often affected by the abuse". He added that it did not necessarily reflect in scholastic or academic performance. Sexualised behaviour was often the precursor to the matter coming to the attention of the school. It was probably more commonly detected by the teachers than by the parents, but the doctor would not exclude the parents detecting it.

[60] The complainant's mother gave evidence that the complainant's performance at school had always been pretty good, she received very good marks throughout 2014 and 2015, she had received awards from her teachers, and the school did not alert her to any issues with the complainant's behaviour. The complainant's mother said that she was quite sensitive to look for any behaviour in her children that would indicate anything of concern because she herself had been molested as a child by her biological father. She did not observe anything like that, including any sexualised behaviour.

[61] There was evidence (concerning counts 10 and 11) that the bathroom door opened into the kitchen.

Consideration

[62] In oral submissions the appellant referred to four points which, in addition to points made in the appellant's outline of submissions, were submitted to justify the conclusion that there are serious doubts about the credibility of the complainant such as to render the convictions unreasonable.

[63] The appellant's first point is that there is evidence of coaching in relation to counts 5 and 7. The appellant disavowed any suggestion that the complainant's mother had suggested particulars of how offences occurred. The suggested evidence of coaching comprised the complainant's references to what she was "supposed to say" when she made statements about counts 5 and 7, the evidence that the complainant's mother asked leading questions about what had occurred, and the complainant's agreement that she had practised what she had to say in her evidence over and over again.

[64] The complainant agreed that her mother questioned her repeatedly and that she had recounted the events over and over again. She did not give evidence that she had "practised" her evidence over and over again. That the complainant's mother elicited much of the complainant's account in the way she did, including by

questions which referred to forms of sexual abuse, required consideration by the jury. It is also relevant however, that the complainant volunteered details of circumstances which were not suggested by any question asked by her mother. It was reasonably open to the jury to conclude that, the complainant used the expression "I was supposed to say" as meaning "I should have said", rather than as meaning that someone had coached her about what she should say.

[65] The appellant's second point is that there was an inconsistency between the complainant's evidence and the evidence of PY that she remembered that the complainant said words to the effect of, "is that you grandad?", the complainant was in the middle of the bed with the covers up, she did not see anybody rolling around the floor or coming out from under the bed, she saw a shadow she believed to be the appellant exit the room, and she said that the appellant often came in to say goodnight.

[66] Those submissions relate to count 1, upon which the jury was unable to reach a verdict. There are a variety of possible explanations for that inability, including that it occurred some two years further into the past than the other sexual offending she described in her police interview and her pre-recorded evidence, she accepted in cross-examination that she might have been mistaken about some details, she acknowledged that some of what she said was what PY had told her, and she was asleep at the commencement of the appellant's conduct and fell asleep shortly after it ended. There is no reasonable basis for a conclusion that any of those matters, or the inconsistency upon which the appellant relies, requires the Court to conclude that there is a reasonable doubt whether the appellant committed any of the offences of which he was convicted. In circumstances of this kind it to be expected that there will be inconsistencies in the details of honest evidence of events. That is very more likely to occur where, as here, the witnesses were children, the alleged events awoke them, those events may have occupied a very short period of time, and they occurred years before any complaint was made.

[67] The appellant's third point is based upon the medical evidence. The appellant referred to the complainant's statement towards the end of the police interview that "when he would put it right in it would um like open it up and it would really really really hurt", and submitted that it could be drawn from the medical evidence that the doctor would have expected to have seen some injury where the penis had gone into the vaginal canal.

[68] The quoted statement concerned Count 5. (In relation to count 12, the complainant described the appellant as "raping me a little bit", which she explained meant that "penis was going in [her vagina] a little bit". The doctor's evidence did not suggest that he would expect to see any injury resulting from such an act.) In relation to count 5, the complainant also said that, "it was going right into the bit where you have the babies and that". The jury could take into account that an eight or nine years old girl's perception about any extent of vaginal penetration by her grandfather might be influenced by the pain and shock of unwanted penile penetration. The jury might well have thought that what occurred fell well short of "**fully** inserting a penis **all the way in** … opening it up **all the way** and the penis is **fully** inserted". The doctor's general evidence is too slender a reed upon which to base a conclusion that there is necessarily a reasonable doubt about the complainant's credibility or the reliability of her evidence about count 5 or the other counts of which the appellant was convicted.

[69] The appellant's fourth point is that the complainant's evidence about WZ made it unlikely that the appellant committed that offence: the event happened in a bathroom at the appellant's house that was in close proximity to other people in the house, the complainant's mother agreed that the bathroom door could not be locked, and the complainant agreed that the offence couldn't have happened in the way she described because WZ was there.

[70] The last point refers to the complainant's answer to a confusing question (quoted in [30] of these reasons). A number of factors contributed to a lack of clarity in the meaning of the complainant's answer to that question: the use of the word "if" in conjunction with the phrase "in the way that you say"; WZ's presence on the couch would not have made it impossible for the offence to have happened or to have happened in the way the complainant described, merely that the commission of the offence would have involved a risk of discovery; and, most importantly, the only question asked was whether WZ was there on the couch ("WZ was there, wasn't he?"). The words preceding that question were in the form of a statement: "This couldn't have happened if – in the way that you say it happened". This was a confusing way to question any witness, much less a child giving evidence about having been sexually abused by an adult in her family. The meaning of the complainant's answer was a matter for the jury to determine. It would not be surprising if the jury understood the affirmative answer as being referable only to the question whether WZ was on the couch. The jury was not bound to treat the complainant's answer as contributing to any doubt about her evidence that the appellant engaged in the conduct she described.

[71] The appellant argued that because the Crown did not call NDC and the complainant's uncle the appellant was denied the opportunity to adduce evidence which might have assisted him. As the respondent argued, it was not submitted that the appellant requested that TY be called as a witness and what evidence he might have given was speculative (about count 8). In relation to NDC, the Crown adduced the evidence that her mother told the police officer that NDC did not have any recollection of the conversation relating to count 7. Contrary to a submission by the appellant, the circumstance that those witnesses were not called does not contribute to any "reservations about aspects of the complainant's evidence".

[72] The appellant relied upon the evidence of the doctor and the evidence given by the complainant's mother to the effect that there were no changes in the complainant's behaviour. The appellant submitted that the absence of any change in behaviour by the complainant discerned by her mother or by the school, was significant in light of the doctor's expert opinion. However, as the respondent submitted, the doctor's evidence was not related to the complainant. It did not go beyond the expression of a general opinion that indicia of sexual abuse would often be seen. Jurors could use their own worldly knowledge to decide whether the fact that no school teacher or the complainant's mother observed any behaviour indicative of sexual offending should contribute to a reasonable doubt whether the appellant was guilty of the offences of which he was convicted.

[73] The appellant argued that "the serious anomaly" about the timing relating to counts 10 and 11 could not be explained by confusion arising from delay, because the complainant had been adamant on two occasions when she made disclosures to her mother the night before her police interview that the events charged as counts 10

and 11 occurred on the last occasion being the day of her sister's birthday two weeks before the police interview.

[74] The reference to a "serious anomaly about the timing" concerns an inconsistency between the complainant's evidence and the complainant's mother's evidence about what the complainant had said on the day before the police interview. Upon the complainant's mother's evidence, the complainant said that the most recent time the appellant touched her was on WJ's birthday, when he stuck it in her mouth when they were in the toilet. That coincided with the complainant's evidence about when the last sexual abuse occurred. The difference between their accounts concerned the location and nature of the offending upon the last occasion. According to the complainant's mother, the complainant told her that the last offending occurred in the toilet (counts 10 and 11), whereas the complainant said that the last offending occurred in her bedroom (count 12). In resolving this inconsistency, the jury could take into account that the complainant gave her account in her police interview only two weeks after the day (her sister's birthday) when the complainant said the last offending occurred, and the police interview was on the day after she gave her statement to her mother; whereas, the complainant's mother gave her evidence at the trial, which was about ten months after her conversation with the complainant. The jury could reasonably resolve this inconsistency in favour of the complainant's version. In any event, the jury reasonably could conclude that the inconsistency did not impact adversely upon the general credibility of the complainant or the reliability of her evidence of the offences of which the appellant was convicted.

[75] The complainant argued that a flaw in the evidence concerning count 6 was that in the complainant's police interview she did not complain of count 6 in her initial narrative and mentioned it only later in the interview. The circumstance that a child making disclosures of sexual abuse referred to one aspect of that abuse out of order is a very weak basis for impugning a jury's verdict.

[76] In relation to count 7, the appellant argued that the complainant's evidence-in-chief changed from going into her room and blocking the closed door with bags to packing her clothes up and taking her to her brother's room. The appellant submitted that the video of the police interview showed the complainant to be somewhat confused at the relevant part of the interview. The jury could accept as much whilst also finding that the complainant's evidence that she had meant to say that the events occurred in her brother's room was honest and reliable.

[77] Some of the appellant's wife's evidence was inconsistent with evidence given by the complainant's mother or the complainant, or both of them, particularly the appellant's wife's evidence to the effect that: she and the appellant never visited the complainant's house before any soccer game in which WZ played (count 7); the bedroom in the shed at the back of her house did not lock from the inside (contrary to evidence the complainant gave about counts 3 and 4); on Christmas Eve 2012 the complainant slept in the middle of the bed between PY and WJ (count 1); she would have seen if the appellant had walked out of their house alone with the complainant or encouraged her to leave by using a lolly and that did not occur (count 8); and when the complainant's family visited her house the appellant would nearly always be with her and others. The appellant's wife gave other evidence also tending to exculpate the appellant.

[78] In summing up to the jury, the trial judge referred to a submission by the prosecutor that the jury would not find the appellant's wife's evidence compelling, the jury's view might be that she had sided with the appellant, her evidence was slanted to favour him, and she might be untruthful or at the least unreliable. The prosecutor referred to the fact that she was still in a relationship with the appellant and she might believe that he was innocent. The trial judge referred to the prosecutor having made a number of points in support of those submissions. The jury must have decided that, to the extent that the appellant's wife's evidence was inconsistent with the appellant's guilt of any of the offences upon which he was convicted, they preferred the evidence of the complainant and the complainant's mother and did not consider that the appellant's wife's evidence gave rise to any reasonable doubt about his guilt. Such an approach was not unreasonable upon the whole of the evidence.

[79] The convictions are supported by the complainant's evidence. The manner in which the complainant participated in the police interview and in which she gave her pre-recorded evidence might have had a very material contribution to the jury's decision to accept that her evidence was both honest and reliable upon the counts of which the appellant was convicted. She gave a clear and apparently persuasive account of that offending. Her account also included a great deal of detail which a jury could regard as compelling. The complainant had access to the internet at home and at school, but there was no evidence that she acquired knowledge about the kind of sexual acts of which she gave evidence by internet searches. The complainant repeatedly denied suggestions in cross-examination to the effect that she had done so and she had made up her evidence of sexual offending. Upon the evidence of the complainant's mother, which the jury could accept despite some contrary evidence by the appellant's wife, the appellant had the opportunity to commit the offences of which he was convicted. There was in each case a risk that the appellant would be detected in committing those offences, and that risk may be regarded as a substantial one in relation to counts 10 and 11. But it does not follow that it was unreasonable for the jury to be persuaded of the appellant's guilt on counts 10 and 11, or upon any of the other counts of which he was convicted.

[80] In *R v Clapham*,[2] I summarised what I understand to be the principles applicable in determining whether a verdict of a jury is unreasonable or cannot be supported having regard to the evidence:

> "[4] The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the "starting point … is that the jury is the body entrusted with

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2 [2017] QCA 99 at [4]-[5]. (Footnotes omitted)

the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

[5] In *R v Baden-Clay* the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact" and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."

[81] Bearing in mind the jury's advantage in seeing and hearing those witnesses who gave evidence at the trial, the individual and cumulative effect of the appellant's arguments, and my own review of the whole of the evidence, does not leave me with a reasonable doubt about the appellant's guilt. I conclude that it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted.

Proposed order

[82] I would dismiss the appeal.

[83] **PHILIPPIDES JA:** I agree for the reasons given by Fraser JA that the appeal should be dismissed.

[84] **McMURDO JA:** For the reasons given by Fraser JA in his thorough consideration of each of the arguments for the appellant, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offences of which he was convicted. I agree that the appeal should be dismissed.