

SUPREME COURT OF QUEENSLAND

CITATION: *R v NAJ* [2026] QCA 182

PARTIES: **R**
v
NAJ
(appellant/applicant)

FILE NO/S: CA No 88 of 2024
DC No 223 of 2022

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Toowoomba: Date of Conviction: 5 April 2024; Date of Sentence: 22 May 2024 (Clare SC DCJ)

DELIVERED ON: 25 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2026

JUDGES: Brown JA, Doyle JA, Kelly J

ORDERS: **1. Appeal against conviction dismissed.**
2. Leave to appeal sentence is refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON DIRECTION where the appellant was convicted of one count of maintaining a sexual relationship with a child, one count of wilfully exposing a videotape to a child, and two counts of rape – where each offence was against his biological daughter who was four and five years old at the time of the offending – where there was some evidence that a man named Bevan committed sexual offences against the complainant during the same period – where an issue arose as to whether the Crown could exclude the hypothesis that the complainant was mistaken as to who committed the offences – where the proposition she had been mistaken had not been put to the complainant – where the complainant was recalled, cross-examined and that evidence was played to the jury – where the appellant contends that the recall, the timing and content of the trial judge’s concomitant directions and the jury being required to review all and not merely parts of the complainant’s evidence gave rise to a miscarriage of justice – whether there has been an irregularity that could realistically have affected the jury’s reasoning to a guilty verdict

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – MISCONDUCT – where a juror commented on the case in a nearby coffee shop during the course of closing addresses – where the tenor of this discussion was that she was a juror in a very sad case – where the trial judge gave a further direction to the jury about insulating their verdicts from outside influences – where the trial judge refused the appellant’s trial counsel’s application to discharge the jury – whether the conduct of the jury member amounted to misconduct

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant contends there are inconsistencies in the complainant’s evidence including discrepancies about the mother’s knowledge of the offending, Bevan’s role, the frequency of the offending, the complainant’s date of birth, the locking of doors, vaginal penetration, the videotapes, the shower offending, and other discrepancies in the details of the offending – where the appellant’s trial counsel addressed the jury as to the effect of the inconsistencies on the complainant’s reliability – where the trial judge addressed the inconsistencies in the summing up – whether there is a significant possibility that an innocent person has been convicted

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON DIRECTION – where the trial judge did not direct the jury on the significant forensic disadvantage to the appellant arising out of the delay in prosecuting the offences – where it is unnecessary to give such direction where there are good reasons not to – where the appellant must identify a significant forensic disadvantage – where the appellant points to the absence of any interview of or evidence from Bevan – whether the trial judge’s decision not to make a direction under s 132BA of the *Evidence Act 1977* (Qld) gives rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to a head sentence of 12 and a half years’ imprisonment – where the appellant urges that the sentence was manifestly excessive having regard to the period of maintaining the sexual relationship, the range put forward by the parties, the range which may be gleaned from comparable cases and the appellant’s personal circumstances, including his

age, criminal history and mental impairment – whether the sentence imposed was manifestly excessive

Criminal Code (Qld), s 668E(1)

Evidence Act 1977 (Qld), s 132BA

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

Brawn v The King (2025) 99 ALJR 872; [2025] HCA 20, applied

Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, applied

HCF v The Queen (2023) 280 CLR 596; [2023] HCA 35, applied

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied

McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, applied

R v BCA [2011] QCA 278, considered

R v BDQ (2022) 298 A Crim R 120; [2022] QCA 71, considered

R v Foley [2000] 1 Qd R 290; [1998] QCA 225, considered

R v King [1998] QCA 108, cited

R v LBC [2023] QCA 178, considered

R v NZ (2005) 63 NSWLR 628; [2005] NSWCCA 278, applied

R v PAK [2010] QCA 187, considered

R v PBO [2024] QCA 238, applied

R v PBU [2026] QCA 32, applied

R v Roberts (2004) 9 VR 295; [2004] VSCA 1, cited

R v SDL (2022) 302 A Crim R 474; [2022] QCA 207, applied

R v ZT (2025) 281 CLR 137; [2025] HCA 9, applied

Thompson v Bella-Lewis [1997] 1 Qd R 429; [1996] QCA 27, cited

COUNSEL: M J Lazinski for the appellant/applicant (pro bono)
N W Needham for the respondent

SOLICITORS: Hofstee Lawyers for the appellant/applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

- [1] **BROWN JA:** I agree with the orders proposed by Doyle JA that the appeal in this matter should be dismissed and the application for leave to appeal against sentence should be refused. The trial was carefully conducted by the learned trial judge and for the reasons stated by Doyle JA none of the grounds of appeal have been established.
- [2] Having the benefit of Doyle JA's detailed reasons, it is only necessary for me to briefly state the reasons for my agreement with his Honour in relation to ground 3, having independently assessed the evidence presented at trial.
- [3] The appellant identifies a number of inconsistencies in the version of events provided by the complainant. As is demonstrated by the reasons of Doyle JA, a number of the

statements of the complainant were made years apart. Inconsistencies, given the gap in time between those statements, and particularly omission of matters in evidence given at a later point in time, is a matter which would be expected. The gap in time between the complainant's initial police statement and the trial of the offences was some 11 years. She was not cross-examined until she was 17. None of the inconsistencies identified by the appellant are of such significance individually or cumulatively that they undermined the credibility or veracity of the complainant such that her evidence could not be accepted by a jury to establish the offences beyond reasonable doubt.

- [4] As to the inconsistencies and potential embellishments of the complainant in her early statements when she was only six years of age, a jury could have readily understood those inconsistencies to be due to a young immature mind and due to her evidence being unreliable. As was said in *R v Allen (a pseudonym)*,¹ and approved by Bond JA in *R v WCH*²:

“...it is well understood and accepted that the factors taken into account to assess the reliability of the evidence of young children are not the same as those affecting the reliability of the evidence of adults. A child may not view events with the understanding of an adult, may be unable to recall important details that would be prominent in an adult's recollection and may lack the linguistic ability to recount events or to explain them. Immaturity may lead a child into avoidance techniques when being questioned. Most importantly, as everyone who has any experience of young children knows, although in common with adults, the recollection of a child will be more accurate close in time to the relevant events, a very young child's memory of events tends to fade very quickly.”

- [5] As pointed out by Doyle JA, the assessment of the inconsistencies was quintessentially a matter where the jury held the advantage, having been present while her evidence was put before them. The evidence of the complainant as to the offending that occurred was generally consistent and compelling, particularly in the description of the offending which occurred when she was of a very young age.
- [6] The inconsistency in the complainant's evidence as to whether her mother saw the offending or not could have been understood as being due to her age when she stated that her mother had observed the offending, or the jury not accepting her mother's evidence.
- [7] As to the reference to offending by Bevan and/or Paddy in her earlier statements, which were omitted in her later evidence, and her lack of recollection of Bevan in her cross-examination, that did not undermine the evidence given by the complainant as to the offending by her father. A jury could be satisfied that, whatever the position may have been with regard to Bevan, her evidence was not confused as to offending by her father as opposed to what may have been separate offending by Bevan. The evidence of the complainant as to the offending by her father was consistent throughout her evidence. Her evidence was resolute in that regard and compelling, consistent with her level of familiarity with her father.

¹ [2020] QCA 233 at [21]-[22].

² [2025] QCA 124 at [10].

- [8] Nor did the jury's delivery of a verdict of guilty on count 1 and not guilty on count 2 suggest that the jury regarded the evidence of the complainant as being unreliable or lacking credibility. As the appellant's counsel properly conceded, the difference in verdicts was rational. The prosecution chose to rely on evidence based on admissions for count 2 rather than oral evidence, such that the jury did not hear evidence from the complainant directly in relation to that count. Given the evidence was by way of admissions rather than based on the complainant's oral evidence, that evidence would not have caused the jury to doubt the complainant's reliability or credibility in relation to the other count.
- [9] Further, the absence of contemporaneous, medical or forensic evidence was explicable by the complainant being told by her father to keep the matter secret. The complainant's mother was not asked in cross-examination whether she observed any injuries being suffered by the complainant during the relevant period. The lack of such evidence is explicable and does not raise any matter which undermines the evidence given by the complainant.
- [10] While the Crown's case relied on the complainant's evidence itself, there was corroboration of some aspects of her evidence such as the presence of a sex doll in the house and the presence of pornography, which she had said she had been shown.
- [11] None of the inconsistencies are of the nature which cause me to consider that the complainant's evidence in terms of credibility and reliability was undermined such that the jury could not, having assessed the evidence as a whole, return the verdicts of guilty which they did or cause me to conclude that there is a significant possibility that an innocent person has been convicted.
- [12] As to the application for leave to appeal against sentence, the sentence imposed was a significant one but not one that bespeaks of error, such that it would cause this court to infer that it was imposed as a result of a misapplication of principle. In this regard I agree with the reasons of Doyle JA.
- [13] All relevant considerations in relation to the sentence were carefully considered by the trial judge, including the mitigating circumstances, which were limited. The psychologist's report that was provided, was, as the trial judge found, of limited weight, containing reference to diagnoses of psychological conditions relayed to her by the appellant. The report was taken into account in terms of greater hardship that may be experienced by the appellant in serving the sentence. It was not submitted that the opinions of the psychologist as to conditions suffered by the appellant reduced his moral culpability, nor is such a link made in the report. The report did not suggest that the present case, which involved serious offending, was not an appropriate vehicle for general deterrence.
- [14] An analysis of sentences in other cases does not demonstrate any inferred error. As was stated in *Barbaro v The Queen*, "other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion".³
- [15] **DOYLE JA:** On 5 April 2024 the appellant was convicted, after a trial, of sexual misconduct in respect of various offences relating to his biological daughter, who at

³ (2014) 253 CLR 58 at [41].

the time of the offences was aged between four and five. The charges of which he was convicted were:

- (a) Count 1: maintaining an unlawful sexual relationship with a child under 16 between 27 January 2010 and 11 August 2010 at Toowoomba;
- (b) Count 3: wilfully exposing a child under 16 to an indecent videotape between 24 March 2009 and 14 November 2011 at Toowoomba;
- (c) Count 4: rape of the same complainant, between the same dates as Count 3 and at Toowoomba;
- (d) Count 5: a further rape of the same complainant between the same dates and at the same place.

[16] He had been charged with a further count (Count 2) of maintaining an unlawful sexual relationship with the same child between 20 April 2010 and 14 November 2011 at Toowoomba but was acquitted of that charge.

[17] In respect of those counts for which he was found guilty he was sentenced: for Count 1 to 12.5 years' imprisonment; Count 3 for 18 months' imprisonment; and for Counts 4 and 5, to 9 and 10 years' imprisonment respectively, to be served concurrently.

Ground of Appeal

[18] The appellant appeals against his convictions and seeks leave to appeal against sentence on the following grounds:

“Ground 1:

A miscarriage of justice was occasioned by the recall of the complainant on 27 March 2024 to put a proposition concerning the identity of the offender, and by the directions in the summing-up given in consequence of that recall.

Ground 2:

A miscarriage of justice was occasioned by the failure of the trial judge to discharge the jury after two jurors discussed the case with a member of the public at a coffee shop on day 2 of the trial.

Ground 3:

The verdicts of guilty on counts 1, 3, 4 and 5 are unreasonable and cannot be supported having regard to the evidence.

Ground 4:

A miscarriage of justice was occasioned by the failure of the trial judge to direct the jury on the significant forensic disadvantage suffered by the Appellant as a result of the delay in prosecuting the offences.

Ground 5:

The sentence of 12 years and 6 months' imprisonment imposed on count 1 was manifestly excessive.”

Background

- [19] The Crown case relied on the evidence of the complainant. She had taken part in recorded interviews on 1 May 2012 (May 2012 Statement) and 14 June 2012 (June 2012 Statement) when she was six years old, and on 16 February 2019 (2019 Statement) when she was thirteen years old. Her pre-recorded evidence was given on 30 October 2023, when she was seventeen years old and a further recording of her evidence was made on 27 March 2024 (the recall evidence).
- [20] Apart from her evidence there was evidence also given by her mother, the investigating police officer and a lay witness. However, the Crown case depended upon the reliability and credibility of the complainant.
- [21] It is significant to note at the outset, however, that the appellant's case at trial and on appeal is not that the complainant had not been subjected to sexual misconduct by someone. Rather, as will appear below, part of the defence's contention has been that the complainant was not a reliable witness of the offending party being her father as distinct from being someone identified as "Bevan" and or possibly, albeit less likely, "Paddy" (sometimes identified as Patty).

Ground 1 – Recalling of the complainant

- [22] Later in these reasons, when dealing with ground 3, I will outline in more detail the evidence as given at the trial. What is presently of direct significance is that in the closing address to the jury, counsel then appearing for the appellant, in a number of places referred to the significance of the evidence given by the complainant with respect to Bevan. Importantly he said:

"... what actual evidence can you rely upon beyond a – that's [proof] beyond a reasonable doubt that [the appellant] did it in circumstances where you've got other evidence led in this trial that another man by the name of Bevan committed sexual offences at the same time or at that period of time in which [the appellant] is accused of doing these things? What evidence is led by the prosecution as to the investigations or inquiries made by police into Bevan?"

- [23] A little further on the address, counsel for the appellant said:

"... That there might be an investigation made into him? He's a man who exists. He was Sam's partner at the time. I didn't count how many police officers were present, I wish I had, but it's probably five or six different police officers who were present at the first interview, the second interview and the third of interview, but yet not a scrap of evidence before you that there were any inquiries made that he was even spoken to, no evidence at all. Someone else that is not just in the house, someone that is in the house and is said by [the complainant] to have committed serious sexual offences against her.

That in itself will cause you significant concern. As I said, it's easier to sit back and look at a person who's accused of these offences and quickly jump to guilt but your duty is much greater than that. It's to assess the evidence, look at it, consider it objectively, dispassionately. Could, for example, [the complainant] be mistaken and this was Bevan

who committed these offences? She was only five at the time. Could that explain why we have these significant variations in the versions of events that have been placed before you over a period of six or so years?”

- [24] Subsequently, and in the absence of the jury, the primary judge raised with counsel his suggestion that there would be a concern with the absence of any investigation into Bevan and Paddy. When asked where that goes, counsel replied:

“... I suppose the fact in issue that whether Bevan may be liable for the offending... that’s one of the arguments effectively that I place before the jury.”

- [25] Counsel continued:

“... So it’s relevant, in my respectful submission... to that fact in issue ... whether the Crown can exclude on their evidence that it wasn’t Bevan that committed these offences and there’s been some mix-up in her mind as to... whether it was her father or whether it was Bevan.”

- [26] That proposition, that the complainant had been mistaken, had not been put to her at any stage. The primary judge suggested as a matter of a fairness, that the jury ought to be told that that proposition was not put to the child for her to answer and invited any submissions in respect of that. After some further submissions, counsel then suggested that the position could be “remedied” if, with the trial judge’s leave, the complainant was recalled.

- [27] The prosecutor took a neutral position and after some further submissions, the complainant was recalled. She was video recorded during very brief cross-examination where this exchange took place:

“...what I need to do now is to suggest to you that the person who committed the acts that you allege against your... father was in fact Bevan and not your father?---No. It was my father.”

- [28] There was no further cross-examination and re-examination.

- [29] Before playing the recording of the recall evidence to the jury the trial judge said:

“And ladies and gentlemen, you might recall in Mr Wilson’s closing address – the defence counsel’s closing address, he put the hypothesis that [the complainant] may have mistaken Bevan for her father – mistaken her father for Bevan and so to give Mr Wilson the opportunity to put that to the witness and to allow [the complainant] the opportunity to respond to it, she was recalled on last Thursday. So we’ll play that now. So this forms the last part of her evidence.”

- [30] The recall of the complainant occurred after the conclusion of the addresses by each of the prosecutor and counsel for the appellant. Neither thereafter sought to further address the jury on the significance of that evidence. No point is taken about that by the appellant in the Notice of Appeal. In any event after the recall evidence was played to the jury the primary judge asked both counsel whether there was anything further and no one raised anything further. The primary judge then summed up to the jury.

[31] In the summing up the trial judge said:

“Mr Wilson argued that [the complainant] was too inconsistent for you to believe her evidence and he argued that there was a reasonable possibility she just mixed up who had done these things to her. That she mistook her father for Bevan or Paddy or someone else. If it was reasonably possible that [the complainant] had mistaken another man for her father, obviously you would have to find him not guilty. Unless you are satisfied beyond reasonable doubt that [the complainant] correctly recognised her father, you could not convict him. And when you consider that matter, you take into account the circumstances. The Defence have emphasised [the complainant’s] version that she had previously been assaulted by Bevan. The argument seems to be, or the hypothesis seems to be, that as Bevan had touched her previously, he might be the one who was raping her over this time, or the man Paddy might be the man who was doing this, and [the complainant] just got it wrong.”

[32] By s 668E(1) of the *Criminal Code* (the Code) an appeal is to be allowed if the Court is of the opinion that the verdict of the jury should be set aside, inter alia, “on any ground whatsoever there was a miscarriage of justice...”.

[33] The appellant urges that this is the case in respect of the first ground of appeal.

[34] The way this was advanced in submissions on the appeal was to converge a number of things to suggest they constituted a miscarriage. They were: (i) the fact of the recall; (ii) the nature and timing of the trial judge’s directions to the jury about the evidence given as the recall evidence; (iii) requiring the jury, when it asked to be played other parts of the complainant’s evidence, to be given and, to view all her evidence including the recall evidence; and (iv) not merely directing the jury in the terms suggested in *R v Foley* [2000] 1 Qd R 290 at 290-1.

[35] I will start with *R v Foley*. In that case counsel for the accused did not put some essential matters to the Crown witnesses in cross-examination. The course the case then took on its particular facts is not directly relevant. However, this Court observed at 290-291 (after referring to *Browne v Dunn*) that:

“The essence of the professional rule is that a cross-examiner should put to an opponent’s witness matters that are inconsistent with what the witness says and which are intended to be asserted in due course. It is generally necessary to give a witness who might be in a position to contradict the cross-examiner’s case the opportunity to do so. Countermeasures become necessary when failure to observe the rule deprives the court of the opportunity of hearing relevant responses from the witness, or when unfair statements are made about a witness or the witness’ evidence, or when it may give unfair advantage to a party who lies by and belatedly produces a version tailored to meet the evidence.

...

While variations in circumstances of particular cases may call for different responses, it is now generally recognised in criminal trials

that in summing up on this issue, the judge should simply point out to the jury that the particular matter was not put to the relevant witness; that it should have been put so that the witness could have the opportunity of dealing with the suggestion; and that the witness has been deprived of the opportunity to give that evidence and that the court has similarly been deprived of receiving it.” (citations omitted).

- [36] In the present case the trial judge’s first inclination was to give the direction suggested in that last extracted passage. Her Honour however acceded to the appellant counsel’s request to be given leave to have the complainant recalled to put the propositions he wished to put to her. Which of these two courses to pursue was a forensic decision which trial counsel made. The cross-examination of her which then took place did not prove fruitful, but the nature of that cross-examination is also trial counsel’s decision. Accordingly, the first and fourth of the converged points mentioned above do not assist the appellant. There is no miscarriage of justice merely because it is later contended something better or different could have been done at trial. Our adversarial system of criminal justice affords counsel a wide discretion as to the conduct of trials and that is not to be lightly overridden: *R v PBU* [2026] QCA 32 at [110]-[113].
- [37] The appellant suggests that the ‘miscarriage was compounded’ when the recall evidence was played to the jury and not simply other parts the jury had asked to have replayed.⁴ The trial judge directed the jury be replayed the whole of the complainant’s evidence and gave a direction reinforcing the need to have regard to the whole of the evidence. The grounds of appeal do not contend the direction was erroneous or indeed that it was improper to direct all the complainant’s evidence be replayed including the recall evidence. In any event no complaint can be made of the trial judge’s decision to require the jury to review the complainant’s evidence as a whole and not merely to replay selected parts of it. To do otherwise runs the risk of the selected parts playing a disproportionate role in the jury’s deliberations without appropriate directions from the trial judge.⁵
- [38] The directions given by the primary judge to the jury were entirely appropriate in my view. Her Honour told them why the recall evidence was being provided for them to view and then in the summing up addressed its significance in the case advanced for the appellant. The timing of it (as the last piece of evidence heard by the jury) is a product of the request for leave to have the complainant recalled, and the decision made not to further address the jury with respect to it. Finally, the tone of the summing up is criticised because the trial judge observed, when outlining the appellant’s case that the argument was that the complainant “just got it wrong” and that it was Bevan or Paddy all along.⁶
- [39] As observed in *McKell v The Queen* (2019) 264 CLR 307 at [35]:

“A trial judge must sum up for the jury the case presented by each of the prosecution and the accused after each side has addressed the jury. In *Domican v The Queen*, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ observed that ‘the requirement of fairness

⁴ Appellant’s submissions at 28.

⁵ *R v NZ* (2005) 63 NSWLR 628 at [10]; *R v SDL* (2022) 302 A Crim R 474 and *R v PBO* [2024] QCA 238 at [75]-[77].

⁶ Appellant’s outline of argument at [16].

means that ordinarily the respective cases for the prosecution and the accused must be accurately and fairly put to the jury'. In carrying out this task, it is no part of the trial judge's role, to 'don[] the mantle of prosecution or defence counsel'. As Gibbs CJ said in *Cleland v The Queen*, '[i]t is clear in principle that a trial judge, when directing a jury in a criminal trial, must hold an even balance between the cases of the prosecution and the accused'." (citations omitted).

- [40] In my view the trial judge's summing up did not offend this requirement of fairness. The words employed ("just got it wrong") are no doubt a brief summary of the appellant's case, namely that the complainant was mistaken. But that was the contention being advanced. The inclusion of the word 'just' or to describe the complainant as 'wrong' (rather than mistaken) does not make an otherwise fair summary unfair. The summing up went on to identify the factual matters to which the jury might have regard in assessing that proposition. They included considering the complainant's opportunity to observe the man offending against her, how she came to be alone with that man, how long she was with him, did she have an opportunity to see and speak to him and many other matters. These are all proper matters for the trial judge to include in a summing up.
- [41] The difficulty with the appellant's contention, in my view, is not that the summing up was unfair, but that the proposition being advanced at trial for the appellant was itself attended with great difficulty because the person about whom she was suggested to have been mistaken was her father. I am reinforced in that view by the circumstance that counsel did not ask the trial judge to make any re-direction to the jury in the course of the trial.
- [42] In relation to this ground of appeal, the test to be applied is that stated in *Brawn v The King* (2025) 99 ALJR 872 at [10]. What must be demonstrated is an error or irregularity in the conduct of the trial which are material "in the sense that the error or irregularity could realistically have affected the reasoning of the jury to a verdict of guilty...": see [10]. The expression "could" in this context is taken to mean having the capacity to do so as distinct from something from which is fanciful or improbable.
- [43] In my view, there was no error or irregularity in the conduct of the trial and plainly none which would satisfy that test. This ground of appeal fails.

Ground 2

- [44] In the course of the closing addresses, and before counsel for the appellant had completed his address, an issue arose concerning the conduct of two jurors outside the court.
- [45] The prosecutor announced that there was something "that caused us a sense of alarm. It may be nothing" which he then identified in these terms:

"MR WILSON: It was just information that was received by my instructing solicitor that two of the – I think it's **two of the elderly lady jurors** were discussing the matter in the café across the road where everyone could hear, and the statement that's been conveyed was that this is the saddest thing they've ever heard. I haven't come across this before. They're not, of course, held together at the moment. Your Honour wouldn't – hasn't given them the direction yet, but it caused me concern when I heard it that they're discussing things in the public sphere. But it's a bit different to some instances - - -

HER HONOUR: They weren't talking to anybody else?

MR WILSON: Well, not that we know.

HER HONOUR: Well, what you saw were two people talking together; is that right?

MR WILSON: Excuse me.

HER HONOUR: Two jurors.

MR WILSON: Sorry. More specifics. **One of the ladies remarked to one of the staff members at the coffee shop that it was the saddest case – saddest thing they've ever seen.** The line of communication with the coffee shop is the café is in fact owned by my instructing solicitor's business partner and his wife, so that – that's the café just up the road. So - - -

HER HONOUR: So what was – can I just ask what was actually conveyed? Did the jury say, 'I'm in a trial and the trial is the saddest thing I've ever heard,' or the - - -

MR WILSON: It seems that is the effect. Indicated she was a juror, your Honour, and it was the saddest thing she's ever heard.

HER HONOUR: Right. I told them that they shouldn't discuss it with anybody - - -

MR WILSON: Well, that's – yes. It's a - - -

HER HONOUR: - - - to avoid any possibility of being influenced by another person." (emphasis added).

- [46] It is apparent that the concern which was then discussed between her Honour and counsel was that some members of the jury had not followed her Honour's earlier instructions. That is a reference to an instruction which the primary judge had given on the first day of the trial. It was in the following terms:

"You need to be very careful to insulate your verdicts against any outside influence. So for that reason, you must not discuss this case with anyone who is not a member of the jury. When the 12 of you are alone in the jury room, you can talk about it as much as you like throughout the trial, but you cannot discuss it with anybody else. You can't, for example, go home and talk about it or talk to the Bailiff about what's happening in court because even if you didn't mean to, you could subconsciously be affected by the reaction of the other person. You are the only people who have sworn or affirmed to deliver an honest verdict based on the evidence, and you are the only – you are the 12 people who will hear all of the evidence. So it is your opinion and no one else's that matters in relation to the decision on the facts."

- [47] After the revelations of the words spoken by the juror in the coffee shop, the primary judge delivered a further direction to the jury as follows:

"There's another matter that I want to raise with you. It's just been brought to my attention that a couple of jurors were overheard making a comment about the trial to someone outside of court in a coffee shop.

Now, when we first met I gave you directions about insulating your verdict from outside influences. Number 1, do not discuss this case with anyone who's not a member of the jury. Number 2, do not look for answers outside of the trial. It is important that each and every one of you follow the directions of law that I give you. Those directions are part of that instruction but you must follow every instruction I give you on the law. That is the only way that your verdict can be in accordance with the law. And I explained yesterday the reasons for that precaution about speaking about the case with someone else because you don't want to open yourself up to outside influences."

[48] The appellant contends that the generic direction given to the jury as a whole was not sufficient in the absence of the primary judge further enquiring of the jurors individually as to their involvement and ability to continue to discharge their oath.

[49] Trial counsel for the appellant applied for the primary judge to discharge the jury on the basis that there was a risk or concern that one of the jurors may not follow her Honour's directions. That was refused. Her Honour stated in exchanges with counsel that:

"HER HONOUR: But further, they didn't go so far as to discuss the case. Simply to make a comment about it. And whilst that is regrettable, it seems to me that it doesn't go so far as a blatant defiance of the instruction that I gave them. Speaking to them now just reinforced to me that they are a conscientious jury. I mean, I don't know if you were watching them but they seemed aghast that that could be - - -

MR WILSON: It looked like - - -

HER HONOUR: - - - a problem.

MR WILSON: It did look that way, your Honour, yes.

HER HONOUR: And I think that – if anything, they will now be more conscientious and more focused on doing the right thing, rather than perhaps straying outside of what I tell them."

[50] The test whether the conduct of the jury members amounted to misconduct which ought to have caused them at least to be excluded and probably the jury as a whole discharged is that stated in *HCF v The Queen* (2023) 280 CLR 596 at [6] as follows:

"...that the test should be understood in terms of whether a fair-minded lay observer might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of deciding an accused's guilt according to law (which includes but is not limited to the requirement of impartiality), on the evidence, and in accordance with the directions of the judge. The 'double might' test was confirmed as the test for reasonable apprehension of bias (including on the part of a jury or juror) in *Ebner v Official Trustee in Bankruptcy*." (citations omitted).

[51] The juror volunteered she was a juror in a very sad case. The latter aspect can hardly be doubted. There was nothing to suggest it was a dialogue between the juror and the

coffee shop worker or that any reaction was made by the worker. It is, in my view, right to take account of the likely impact (from the point of view of the lay observer) of the direction then to be given by the trial judge. I do not believe it could be said that a fair-minded lay observer aware of those facts (and of the direction the trial judge had in mind to give and then gave) might reasonably apprehend that the jurors might not discharge their function of deciding an accused's guilt according to law on the evidence, and in accordance with the directions of the judge.

[52] In my view this ground is not made out.

Ground 3

[53] The appellant contends the convictions on Counts 1, 3, 4 and 5 are unreasonable and cannot be supported having regard to the evidence: s 668E(1) of the Code. The applicable principles are set out by the High Court in *R v ZT* (2025) 281 CLR 137 drawing upon the reasons in *M v The Queen* (1994) 181 CLR 487. The approach of an appellate court can be summarised as follows:

- (a) An appellate court is to independently assess the sufficiency and quality of the whole of the evidence adduced at trial.⁷
- (b) Having done that, if there are aspects of the evidence that cause the court to have doubts as to the verdict, the appellate court must nonetheless not interfere if the advantages of the jury are capable of resolving that doubt.
- (c) The advantages of the jury vary depending on the case, the form of the evidence and the nature of the issues at trial, but broadly inhere in their “seeing and hearing the evidence as it unfolds when evaluating factual matters, especially witness credibility”,⁸ applying as part of this assessment their “collective wisdom and experience of ordinary affairs.”⁹
- (d) The jury’s advantages in assessing the evidence extend to all evidence, including witness testimony, recorded conversations and recorded interviews¹⁰ about which the jury “possessing a breadth of understanding of how different people speak and behave in such circumstances that a judge may not have”, considers a range of matters such as the witness’s tone and manner when speaking and conducting themselves, maturity, emotional state and intelligence, and manner of interaction with others.¹¹
- (e) The advantages of the jury and their central role as arbiters of fact as the body entrusted with the primary responsibility of determining guilt or innocence was re-emphasised in *R v ZT*.
- (f) But if, having undertaken that exercise, and making full allowance for the advantages the jury enjoys, the court concludes “there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence”: *M v The Queen* (1994) 181 CLR 487 at 494-495.

⁷ *R v ZT* (2025) 281 CLR 137 at [11]-[12]; *M v The Queen* (1994) 181 CLR 487 at 494-95.

⁸ *R v ZT* (2025) 281 CLR 137 at [9]; *M v The Queen* (1994) 181 CLR 487 at 495.

⁹ *R v ZT* (2025) 281 CLR 137 at [9]; *Doney v The Queen* (1990) 171 CLR 207 at 214.

¹⁰ *R v ZT* (2025) 281 CLR 137 at [10].

¹¹ *R v ZT* (2025) 281 CLR 137 at [10].

- [54] The evidence given by the complainant, consisting mostly of her verifying the truth of the statements she had previously given, supported the counts charged. There was evidence to support each count, and it is not submitted for the appellant on appeal that there was any count for which there was no proof. The focus on appeal was on inconsistencies in the various statements which it was urged ought to have led to the jury harbouring a reasonable doubt as to guilt.

Count 1: Maintaining a sexual relationship with a child

- [55] Count 1 encompasses sexual acts occurring between 27 January 2010 and 11 August 2010. Such sexual contact is said to be made up of the appellant vaginally penetrating the complainant, putting his penis in her mouth, anally penetrating her, digitally penetrating her anus, and kissing her.
- [56] The complainant gave evidence of repeated sexual offending every time her mother left the house. In the May 2012 Statement, the complainant made statements such as the appellant “done sex at any time when Mummy was... away”¹² and “every day and every night him done sex with me.”¹³ Similarly in June 2012 Statement, the complainant suggested that the appellant “done it every time when [she] was with him.”¹⁴ She went on to say that the appellant put his penis in her vagina and anus “[e]very time when [her] mum went to [the] shops.”¹⁵ The 2019 Statement also refers to repeated sexual acts taking place, the complainant estimating it went on for a year and “probably happened every week.”¹⁶ The complainant stated that “it kept going on every time that Mum left and [the appellant] told [her] to not tell Mum about it.”¹⁷ The appellant would tell the complainant that it was their “little secret.”¹⁸ He would also threaten to hurt her mother if the complainant did not stay home when her mother left the house.¹⁹

Evidence about Oral Sex

- [57] In her May 2012 Statement, the complainant recounted an occasion during which the appellant put his penis in her mouth. Initially, the complainant stated that she “didn’t do it.” This may be understood as the complainant suggesting that the appellant carried out the act. She continued: “Daddy just grabbed me and opened my mouth and just put [his] penis in my mouth and I said what? That’s [di]gusting... It was so bad.” Her mother had gone shopping and the kids (presumably a reference to her siblings) were asleep. The complainant removed his hand and moved away from the appellant.²⁰
- [58] The complainant referred to similar offending in her June 2012 Statement. This occurred in the lounge room before the appellant played a pornographic video.²¹ Similar to the complainant’s suggestion in the May 2012 Statement that she “didn’t do it”, the complainant stated in the June 2012 Statement that she “didn’t suck it.”

¹² May 2012 Statement at p 9.

¹³ May 2012 Statement at p 9.

¹⁴ June 2012 Statement at p 12.

¹⁵ June 2012 Statement at p 13.

¹⁶ 2019 Statement at p 22.

¹⁷ 2019 Statement at p 11.

¹⁸ 2019 Statement at p 12.

¹⁹ 2019 Statement at p 11.

²⁰ May 2012 Statement at p 6.

²¹ June 2012 Statement at p 28.

Rather, the appellant “pulled [her] mouth on his [penis]. And it taste[d] really awful.” The complainant made reference to there being “white stuff” coming from the appellant’s penis into her mouth and then washing her mouth out after.²² She reiterated twice more that she did not suck his penis.²³ She maintained that she pushed him away. He then came back.

- [59] The complainant explained that she “was really annoyed” and then locked the appellant out of the house.²⁴ The complainant suggested that her mother asked the appellant why he was locked out of the house and the complainant said the appellant responded “I had sex with her. With [the complainant].”²⁵ It was later stated that her mother did not return home straight after but rather, after two other sexual acts occurred, one in the lounge room and another in the shower, as discussed further below.²⁶
- [60] The timing of this seemingly changed in her 2019 Statement. The complainant recounted that the appellant put his penis in her mouth about a week after the incident involving anal penetration following the playing of a pornographic video (that offending being the subject of Count 4).²⁷ The appellant went into the complainant’s room and pulled her by the arm into the lounge room. He told the complainant to get on her knees. He then used his hands to open her mouth and ‘shove’ his penis into her mouth.²⁸ This offending is the subject of Count 5.

Evidence about Sex: Lounge Room

- [61] In her May 2012 Statement, the complainant gave evidence that the appellant “done sex with [her].”²⁹ This was when they were in the loungeroom watching the pornographic video. A man named Bevan was also there.³⁰ She suggested that both Bevan and the appellant had “done sex with” her.³¹
- [62] She suggested that the appellant had sex with her every day. He took her clothes off and bent her down. The complainant was scared. She explained it was the appellant who did it and that she “didn’t do it to him.”³²
- [63] She also gave evidence in her June 2012 statement that the appellant had sex with her at her mother’s house, which she said was next to the hospital.³³ When asked about sex, she identified that the appellant did it to her vagina and anus.³⁴ During penetration, the appellant would tell the complainant “I love you.”³⁵
- [64] The complainant’s evidence in the June 2012 Statement was that the appellant did “it every time” they were together.³⁶ As with her May 2012 account, the complainant

²² June 2012 Statement at p 14, 27 to 28.

²³ June 2012 Statement at p 14.

²⁴ June 2012 Statement at p 27.

²⁵ June 2012 Statement at p 27.

²⁶ June 2012 Statement at p 29.

²⁷ 2019 Statement at p 11 and 15.

²⁸ 2019 Statement at p 15.

²⁹ May 2012 Statement at p 15, 18 to 19.

³⁰ May 2012 Statement at p 15, 18 to 19.

³¹ May 2012 Statement at p 19.

³² May 2012 Statement at p 11 to 12.

³³ June 2012 Statement at p 10.

³⁴ June 2012 Statement at p 11.

³⁵ June 2012 Statement at p 15.

³⁶ June 2012 Statement at p 12.

urged that she “wasn’t doing it.” The appellant took off the complainant’s clothes. She would put them back on, but the appellant would then take them off again.³⁷ She said she told her mother who “disciplined” the appellant by biting him.³⁸ However, her May 2012 Statement identified a similar response by the mother (i.e. biting the appellant) in the context of a different sexual act, namely sex in the complainant’s bedroom.

- [65] Notwithstanding, the suggestion that her mother intervened in any of these acts is inconsistent with what was said earlier in the complainant’s June 2012 Statement that “Mummy didn’t know he done sex with me.”³⁹
- [66] When asked about watching the video in the loungeroom (Count 3), the complainant initially stated that she “didn’t do it, and then [the appellant] pushed [her] away. And he was practicing it all by himself.”⁴⁰ This happened after the offending in the shower, outlined below.⁴¹ Her mother then returned home, knocking on the door.⁴² However, the complainant later confirmed that the appellant had sex with her on the occasion when “the movie was on.”⁴³ The appellant took off the complainant’s underwear.⁴⁴ He pulled the complainant and bent her over on the lounge.⁴⁵ The appellant first put his penis in her anus. He then rolled her over and put his penis in her vagina.⁴⁶ The appellant tried to kiss the complainant.⁴⁷ The complainant told her mother what happened and “she was really cross with [the appellant].”⁴⁸
- [67] Despite giving evidence of vaginal and anal penile penetration, the complainant later described the offending as being limited to vaginal penetration. The complainant recounted that the appellant touched the complainant’s anus to “check if there was no poos.” She gave evidence that “it really hurt.”⁴⁹ The appellant put his whole finger in her anus. He asked the complainant if it hurt. She responded yes and the appellant gave the complainant “a little break.”⁵⁰ The appellant then put his penis in the complainant’s vagina.⁵¹
- [68] When asked about vaginal penetration, as recorded in the 2019 Statement, the complainant thought the appellant might have “once” put his penis in her vagina and that this occurred on the couch.⁵² The complainant could not remember much about this incident. She recalled that it was painful.⁵³ It stung, describing the feeling as similar to having “a massive cut.”⁵⁴

³⁷ June 2012 Statement at p 12.
³⁸ June 2012 Statement at p 12.
³⁹ June 2012 Statement at p 9.
⁴⁰ June 2012 Statement at p 11.
⁴¹ June 2012 Statement at p 30.
⁴² June 2012 Statement at p 32.
⁴³ June 2012 Statement at p 12.
⁴⁴ June 2012 Statement at p 13.
⁴⁵ June 2012 Statement at p 16 to 17.
⁴⁶ June 2012 Statement at p 13, 16 to 18.
⁴⁷ June 2012 Statement at p 17 to 18.
⁴⁸ June 2012 Statement at p 23.
⁴⁹ June 2012 Statement at p 25.
⁵⁰ June 2012 Statement at p 26.
⁵¹ June 2012 Statement at p 26.
⁵² 2019 Statement at p 25 to 26.
⁵³ 2019 Statement at p 25 to 26.
⁵⁴ 2019 Statement at p 26.

- [69] However, when discussing the occasion in the lounge room with the pornographic video, the complainant gave evidence of anal penetration, discussed further below in respect of Count 4. Contrary to what was said in the June 2012 Statement about her mother getting angry, the complainant indicated that nothing happened once her mother returned home.⁵⁵ She did not tell her mother because she was “too scared”, afraid that the appellant would hurt her mother.⁵⁶ The complainant suggested that her mother eventually found out “on the very last time” because the appellant forgot to lock the door. She could not recall any detail of that incident.⁵⁷
- [70] While not directly relevant to the charged Count, another aspect of her June 2012 Statement is that it referred to her father having a plastic lady (a blow up sex doll) on which in her presence he simulated sex (both vaginal and anal) in the loungeroom. This is said to be a circumstance supported by other evidence to which I shall refer later.

Evidence about Sex: Shower

- [71] Her evidence in the June 2012 Statement referred to the appellant trying to have sex with the complainant in the shower.⁵⁸ This occurred after the anal penetration in the loungeroom when the pornographic video was played. The appellant took the complainant’s clothes off, put her in the shower and tried to have sex with her.⁵⁹ The complainant repeatedly and loudly said no.⁶⁰ The appellant bent the complainant onto her hands and knees.⁶¹ This hurt her arm. The appellant then put his penis in her anus “again”.⁶² The complainant screamed at the top of her voice. She shouted for help, but no one heard her because the windows and blinds were closed.⁶³ The appellant told the complainant he loved her.⁶⁴ The complainant’s mother came home at around 8.30. The complainant said she knew the time because she had her “special watch” on.⁶⁵ It was waterproof. They then got dressed.⁶⁶ The appellant told the complainant’s mother he was tickling the complainant.⁶⁷ However, the complainant also suggested that she told her mother what happened, and that the mother in turn “was really cross with [the appellant].”⁶⁸
- [72] The 2019 Statement also recounted the appellant making the complainant have showers with him.⁶⁹ The complainant would already be in the shower. The appellant would then take off his clothes and come in when the water was on. The appellant pegged the complainant up against the wall. His hands were on hers.⁷⁰ The appellant would then penetrate the complainant’s anus with his penis.⁷¹

⁵⁵ 2019 Statement at p 10.

⁵⁶ 2019 Statement at p 12 to 13.

⁵⁷ 2019 Statement at p 21.

⁵⁸ June 2012 Statement at p 16.

⁵⁹ June 2012 Statement at p 18.

⁶⁰ June 2012 Statement at p 16.

⁶¹ June 2012 Statement at p 19.

⁶² June 2012 Statement at p 19.

⁶³ June 2012 Statement at p 20.

⁶⁴ June 2012 Statement at p 20.

⁶⁵ June 2012 Statement at p 21.

⁶⁶ June 2012 Statement at p 22.

⁶⁷ June 2012 Statement at p 21.

⁶⁸ June 2012 Statement at p 23.

⁶⁹ 2019 Statement at p 23.

⁷⁰ 2019 Statement at p 24.

⁷¹ 2019 Statement at p 24 to 25.

- [73] There is no mention of a shower in the complainant's May 2012 Statement.

Evidence about Sex: Bedroom

- [74] The complainant described an occasion in her May 2012 Statement where the appellant took off her clothes and made her bend down. The appellant pushed her down and held her arm tightly. The complainant stated that the appellant "put a rope on [her], tied it up so tight and [she] said ow and all the blood went out of [her]." The appellant bent the complainant down and took her clothes off. She was "really scared."⁷² The offending occurred at her mother's house while the mother was out shopping.⁷³ She described the house as being a "really bright white house."⁷⁴
- [75] When giving this statement in May 2012, the complainant also spoke about a party and she told the appellant "please don't do sex." The complainant stated that the appellant did not listen to her.⁷⁵ The appellant ran into the complainant's room, locked the door and had sex with her. The complainant suggested her mother unlocked the door and saw this happening.⁷⁶ The complainant said, "can you stop Daddy?" and her mother approached the appellant and bit his back.⁷⁷ The appellant then ran out of the house.
- [76] The complainant gave evidence at the trial of the appellant having sex with her in her bedroom when she was at a party. She did not have an independent memory of her mum coming into the room but recalled it only from watching her May 2012 Statement.

Evidence about Sex: Party

- [77] She also gave evidence in her June 2012 Statement about a party. However, this account differs in various respects and does not directly relate to any offending by the appellant. The complainant recalled a "special party" at night for her fifth birthday. The appellant's friend Bevan was there. The complainant's parents had shut the door. Bevan came in at bedtime just before they were asleep. Bevan pulled down the complainant's pants and underwear and touched her vagina with his hand during bedtime. The complainant screamed out for her mother. She entered the room and slapped Bevan.⁷⁸

Count 3: Indecent treatment – exposure to indecent videotape

- [78] Count 3 concerns the appellant exposing the complainant to an indecent videotape which depicted a man and woman at a pool having sex.⁷⁹
- [79] In the May 2012 Statement, the complainant suggested that she did not watch the videotape. She pushed the appellant off and went to her room, locking the doors.⁸⁰ She later explained that she was in the lounge room with the appellant. He had closed

⁷² May 2012 Statement at p 11.

⁷³ May 2012 Statement at p 12.

⁷⁴ May 2012 Statement at p 8 to 9 and 12.

⁷⁵ May 2012 Statement at p 12.

⁷⁶ May 2012 Statement at p 13.

⁷⁷ May 2012 Statement at p 12.

⁷⁸ June 2012 Statement at 36 to 38.

⁷⁹ 2019 Statement at 9.

⁸⁰ May 2012 Statement at p 10.

- the curtains so no one could see in. The complainant again stated she did not watch the video.⁸¹ The complainant suggested it was both day and night when this occurred.⁸²
- [80] Her evidence initially was that no one else was there, “just Daddy.”⁸³ When asked again who was there, the complainant later said that a man named Bevan was also in the lounge room. She stated that the appellant asked Bevan if he wanted to have sex with the complainant (which she said then occurred).⁸⁴ The appellant took the complainant’s clothes off and told her she had to have sex.⁸⁵
- [81] In her June 2012 Statement, the complainant described the appellant showing her the “sex movie” and then “following the [in]structions for the sex.”⁸⁶ Her evidence that the appellant closed the blinds and played the pornographic movie in the lounge room remained consistent in her June 2012 Statement.⁸⁷ She said her mother’s house was near the hospital.⁸⁸ The complainant repeatedly exclaimed no at the top of her voice.⁸⁹ The appellant put the movie on the TV and then on a laptop (which the complainant identifies as her own “real laptop”).⁹⁰ This is the only mention of a laptop. The complainant maintained that she did not watch the video.⁹¹ It was clarified that this meant she covered her eyes while it played.⁹²
- [82] However, contrary to what was said in the May 2012 Statement the complainant maintained that no one else was home.⁹³ The “others were driving.”⁹⁴ Her mother later returned, and the appellant turned the video off. The appellant told the complainant’s mother he was just tickling her. The appellant told the complainant “to keep it a secret because it’s only daughters and dads thing.”⁹⁵
- [83] This evidence did not change in the complainant’s 2019 Statement. The appellant and complainant were in the lounge room. Consistent with the first two accounts, the complainant explained that the appellant showed her a pornographic video on the TV.⁹⁶ She estimated that they were watching pornography for around 20 minutes.⁹⁷ The video was of a man ripping a hole in a woman’s pants and having sex with her at a pool.⁹⁸
- [84] The complainant made reference to an additional video in her 2019 Statement. She stated that the appellant made her watch videos on his phone of her mother and him having sex.⁹⁹ The appellant told her that “that’s what fathers do with their children” and she believed him.¹⁰⁰ This second video falls outside Count 3.

⁸¹ May 2012 Statement at p 20.

⁸² May 2012 Statement at p 20.

⁸³ May 2012 Statement at p 14.

⁸⁴ May 2012 Statement at p 15.

⁸⁵ May 2012 Statement at p 14.

⁸⁶ June 2012 Statement at p 9.

⁸⁷ June 2012 Statement at p 9 to 11.

⁸⁸ June 2012 Statement at p 10.

⁸⁹ June 2012 Statement at p 11.

⁹⁰ June 2012 Statement at p 24 to 25.

⁹¹ June 2012 Statement at p 24 to 25.

⁹² June 2012 Statement at p 25.

⁹³ June 2012 Statement at p 11.

⁹⁴ June 2012 Statement at p 12.

⁹⁵ June 2012 Statement at p 11.

⁹⁶ 2019 Statement at p 9 to 10, 14.

⁹⁷ 2019 Statement at p 10.

⁹⁸ 2019 Statement at p 9.

⁹⁹ 2019 Statement at p 4, 14.

¹⁰⁰ 2019 Statement at p 4.

Count 4: Rape

- [85] Count 4 involves the first incident of rape which the complainant “described as after the video when [the appellant] put her on her hands and knees and put his penis in her anus.”
- [86] Her May 2012 Statement refers repeatedly to occasions of sex with the appellant.¹⁰¹ One such occasion occurred when she was in the lounge room with the appellant and seemingly also Bevan watching the videotape the subject of Count 3.¹⁰²
- [87] Her June 2012 Statement also recounted on multiple occasions of penile penetration. This was said to occur “[e]very time when [her] mum went to [the] shops.”¹⁰³ Her evidence on Count 4 was that the appellant tried to have sex with her. The blinds were closed and no one else was home.¹⁰⁴ They were watching the videotape in the lounge room.¹⁰⁵ The complainant refused and the appellant pushed her away and began masturbating.¹⁰⁶ At some stage when the video was playing, the appellant took off the complainant’s underwear.¹⁰⁷ He then bent her over on the lounge¹⁰⁸ and put his penis in her anus.¹⁰⁹ Contrary to other accounts, the complainant suggested that this also included vaginal penetration.¹¹⁰ After the anal penetration, the appellant then rolled the complainant over and put his penis in her vagina.¹¹¹
- [88] Later in the June 2012 Statement, her evidence shifted. The interviewing officer asked her to tell him everything the appellant was doing “when the movie was on.” The complainant explained that he touched her bum and vagina while they were in the lounge room. He digitally penetrated her anus with his whole finger, which “really hurt” the complainant.¹¹² The appellant asked her if it hurt and she replied yes, so the appellant gave her “a little break.”¹¹³ The complainant then stated that the appellant “took his finger out. He didn’t put his doodle... in my bum. Just in my fanny.”¹¹⁴
- [89] In her 2019 Statement, the complainant stated that the appellant undressed the complainant and pegged her down.¹¹⁵ The appellant pulled the complainant’s clothes off.¹¹⁶ The appellant grabbed the complainant’s hands and legs and pushed them down.¹¹⁷ He made her go on all fours against the window.¹¹⁸ The appellant “would then hump her” putting his penis in her anus.¹¹⁹ The complainant expressed that it

¹⁰¹ May 2012 Statement at p 18 to 19.
¹⁰² May 2012 Statement at p 14 to 15 and 18.
¹⁰³ June 2012 Statement at p 13.
¹⁰⁴ June 2012 Statement at p 11 to 12.
¹⁰⁵ June 2012 Statement at p 11 to 12.
¹⁰⁶ June 2012 Statement at p 11.
¹⁰⁷ June 2012 Statement at p 13.
¹⁰⁸ June 2012 Statement at p 16 to 17.
¹⁰⁹ June 2012 Statement at p 13, 16 to 18.
¹¹⁰ June 2012 Statement at p 18.
¹¹¹ June 2012 Statement at p 18.
¹¹² June 2012 Statement at p 25.
¹¹³ June 2012 Statement at p 26.
¹¹⁴ June 2012 Statement at p 26.
¹¹⁵ 2019 Statement at p 4.
¹¹⁶ 2019 Statement at p 8.
¹¹⁷ 2019 Statement at p 14.
¹¹⁸ 2019 Statement at p 8.
¹¹⁹ 2019 Statement at p 8, 10 and 12.

“felt weird.”¹²⁰ She estimated this occurred for around 30 minutes. Her mother then returned home and the appellant told her to go to her room.¹²¹ Her evidence was that this occurred in the lounge room in her mother’s white house next to the hospital.¹²² The appellant told her it was their “little secret.”¹²³ The complainant was afraid because the appellant had told her he would hurt her mother if she told her.¹²⁴

Count 5: Rape

- [90] Count 5 is particularised as the appellant putting his penis in the complainant’s mouth.
- [91] As discussed above, her May 2012 Statement was that the appellant grabbed the complainant and put his penis in her mouth while her mother was out shopping and siblings were sleeping.¹²⁵ She described this as “really bad” and “[di]sgusting.” Similarly, her June 2012 Statement involved the appellant putting his penis in her mouth.¹²⁶ In this account, the appellant ejaculated in her mouth,¹²⁷ the complainant describing the taste as “really awful”¹²⁸ and “terrible.”¹²⁹ This occurred in the loungeroom after they watched the videotape.¹³⁰ Consistently with her May 2012 Statement, her mother was not home on this occasion. However, at some stage her mother returned home. The complainant stated she got annoyed and locked the appellant out.¹³¹ Her mother asked the appellant why he was locked out.¹³² This exchange may have occurred when she returned home from the shops.
- [92] In her 2019 Statement, the complainant recounted that this occurred on a different occasion about a week after the anal penetration the subject of count 4.¹³³ Her mother had left the house.¹³⁴ Her mother had asked the complainant if she wanted to come. The appellant looked at the complainant. She then told her mother she would stay home with the appellant. The appellant locked the door.¹³⁵ The complainant was in her room. The appellant then pulled her into the lounge room by her arm.¹³⁶ He told the complainant to suck on his penis. The appellant pulled his jeans down.¹³⁷ He “opened [the complainant’s] mouth with his hands” and “shoved... his penis down [her] throat.”¹³⁸ The complainant was kneeling, facing towards the fold out couch.¹³⁹ She felt scared and sick to her stomach.¹⁴⁰ Her mother knocked on the door around 15 minutes later. The appellant told the complainant to go to her room and not to tell her mother.¹⁴¹ He zipped his pants up and walked to the door.¹⁴²

¹²⁰ 2019 Statement at p 9.

¹²¹ 2019 Statement at p 9 to 10.

¹²² 2019 Statement at p 5.

¹²³ 2019 Statement at p 12.

¹²⁴ 2019 Statement at p 13.

¹²⁵ May 2012 Statement at p 6.

¹²⁶ June 2012 Statement at p 14, 27 to 28.

¹²⁷ June 2012 Statement at p 14, 27 to 28.

¹²⁸ June 2012 Statement at p 14.

¹²⁹ June 2012 Statement at p 27.

¹³⁰ June 2012 Statement at p 15 to 16.

¹³¹ June 2012 Statement at p 27.

¹³² June 2012 Statement at p 27.

¹³³ 2019 Statement at p 11 and 15.

¹³⁴ 2019 Statement at p 15 to 16.

¹³⁵ 2019 Statement at p 15 to 16.

¹³⁶ 2019 Statement at p 16.

¹³⁷ 2019 Statement at p 17.

¹³⁸ 2019 Statement at p 16.

¹³⁹ 2019 Statement at p 17.

¹⁴⁰ 2019 Statement at p 21.

¹⁴¹ 2019 Statement at p 17 to 18.

¹⁴² 2019 Statement at p 18.

Other Evidence

- [93] There was some other evidence which supported (albeit insubstantially) the complainant's evidence in that there were pornographic DVDs and a sex doll in the house.¹⁴³ The mother did not support the complainant's statements to the effect of her knowing of any offending by or of her biting the appellant.

The Inconsistencies

- [94] Counsel for the appellant on the appeal, who did not appear below, (and who appeared pro bono) helpfully produced a schedule of the discrepancies relied on for the foundation of the submission that the jury ought to have harboured reasonable doubt as to the appellant's guilt.
- [95] The inconsistencies or discrepancies pointed to by the appellant are as follows.
- [96] *First*, it is submitted that a "core component" of the May 2012 Statement, was that her mother saw the offending, intervened, and called police, which is contradicted by the June 2012 Statement to the effect that her mother did not know. The later statements are to the effect that the complainant could not recall her mother witnessing any offending.
- [97] Similarly, it is submitted that there are: "[t]hree different versions of what happened when the mother arrived: (i) saw and bit the appellant; (ii) the appellant lied that he was tickling the complainant; (iii) the appellant told the complainant not to tell mother. By 2023, no recollection of any such event."
- [98] I have set out above the contents of the May and June 2012 Statements and their divergence on this issue. But it is a misstatement to call the issue of whether the mother witnessed the offending a "core component". Rather the core component was the offending itself as to which the complainant was both clear and (within the confines of her being only six years of age when narrating events) consistent.
- [99] *Second*, a number of points were made about the role of Bevan. In 2012 the complainant stated that Bevan also committed sexual acts on her, including in the lounge room together with the appellant. Within the one Statement, the May 2012 Statement) the complainant referred both to Bevan touching her "penis" (which is plainly a mistaken description by a young female complainant) and to a rash on her "fanny" from Bevan touching her. Bevan was known to the appellant. Her June 2012 Statement refers to Bevan touching her on her "fanny" (which she elsewhere explained referred to her vagina) before he was confronted by her mother and told to leave the house. The 2019 Statement does not identify Bevan as an offender and by 2023 the complainant had no independent memory of Bevan. Bevan was the then partner of a witness called. He had since suffered brain damage and was not available to give evidence.
- [100] *Third*, the complainant's recollection of the frequency of offending varied. The May 2012 Statement records that the appellant had sex with the complainant: "[e]very day and every night"; the June 2012 Statement recorded it was "every time when [the complainant] was with him". The 2019 Statement puts it as every week and the 2023 pre-recorded evidence is that it was probably every week. Again, the essential

¹⁴³ Per the mother at T2-9 lines 41 to 45; per the former partner of Bevan at T2-12 lines 25 to 26.

complaint of frequent sexual offending is consistent though the estimates of frequency have diminished over time.

- [101] *Fourth*, there is what seems quite a trifling inconsistency relied on concerning the complainant's birthdate. In the May 2012 Statement, the complainant said her birthday was in December or on 1 December. In the June 2012 Statement at one point she said her birthday was 1 July. That was also the date she gave as the date the shower offending occurred. However, when first asked her birthdate in that interview she correctly gave it as 18 December. In her pre-recorded evidence in 2023 she gave her birthday as 18 December 2005.
- [102] *Fifth*, in the May 2012 Statement the complainant stated it was the appellant who locked the complainant's door. In her June 2012 Statement it is the complainant who locks the door (with her family inside) and on a different occasion locks her father out of the house. By 2023 she had no independent memory of the locking out incident.
- [103] *Sixth*, and perhaps more significantly, it is submitted for the appellant that "[t]he only express allegation of vaginal penetration is in the second 93A interview on 14 June 2012. It is not repeated in the third 93A [interview] or the s 21AK pre-recording, which both focus on anal penetration." However:
- (a) The May 2012 Statement contains multiple references to the appellant having sex with the complainant. On some occasions she seems to refer to anal sex but not necessarily on each occasion.¹⁴⁴
 - (b) The pre-recorded evidence on 30 October 2023 does contain like references to the appellant having sex with the complainant.¹⁴⁵ When giving this evidence she was 17 years of age. And she confirmed he had vaginal sex with her in her pre-recorded evidence at the trial.¹⁴⁶
- [104] *Seventh*, it was submitted that the two specific videos (or DVDs) (the mother having sex with the appellant and the pool sex video) were first described in the 2019 Statement, when the complainant was 13 and not in either 2012 Statement. However, in the 2012 Statements the complainant did refer to pornographic videos albeit not the specific subject matter of them.
- [105] *Eighth*, it is urged that "[s]hower offending first appears in the 14 June 2012 interview, with details (including position) further developed in 16 February 2019. There is no mention in the [May 2012 Statement], although the same offending against the same complainant is being described."
- [106] *Ninth*, there are a series of inconsistencies of detail relied on, submitted by the appellant in these terms:
- (a) "Bent over a fold-out lounge in the lounge room (June 2012) becomes 'on all fours' facing a window or wall (February 2019). The further specificity in 2019 is what the complainant herself attributed to being older."
 - (b) "A specific injury — a rope tied tightly on the wrist, causing bleeding — appears only in the 1 May 2012 account and is not repeated in any later account."

¹⁴⁴ May 2012 Statement at p 11 to 12, 13, and 19 (referring to fannies and bottoms).

¹⁴⁵ 30 October 2023 Pre-recording at T1-15 lines 35 to 36.

¹⁴⁶ Trial at T1-20 line 24.

- (c) “Paddy is mentioned for the first time in the s 21AK pre-recording in 2023. The complainant’s memory is acknowledged to come from her brother Blake, not from her own recollection.”

- [107] Counsel at trial addressed the jury at some length in the closing address on various inconsistencies on the complainant’s statements prefaced with the observation that these would show her evidence to not be reliable.¹⁴⁷ Most of counsel’s address was directed to the issue of inconsistencies, albeit with sensitivity to the need to draw a balance between identifying material disparity and reinforcing the gravamen of the complaints made by repeating the substance of them in an address. The trial judge summed up to the jury concerning the inconsistencies and no issue is taken with the summing up.¹⁴⁸
- [108] The assessment of the reliability of the complainant on the essential aspects of the evidence concerning the charged counts was something for the jury and where the jury’s advantages are most pronounced. As is apparent from the discussion of the inconsistencies pointed to, many are peripheral to the essential complaints. Some are more troubling (for example the knowledge and reaction of the complainant’s mother). But this was entirely a matter for the jury to assess.
- [109] There are a number of additional features of the case to note.
- [110] The May and June 2012 Statements were made when the complainant was six years of age. The events perhaps were then fresh in her mind, though her ability to recall them all in sequence and with precision must be qualified by her age. Moreover, it is accepted that some details may only be recalled at a later time and that does not of itself suggest it is not a reliable recollection. What is significant (and starkly so) is the level of knowledge she displayed as to sexual activity which would normally be outside the experience of a child of that age. This is a pointer which the jury would be likely to have had regard to in assessing whether this six year old had been exposed to the sexual conduct she was then describing.
- [111] The 2019 Statement was given when she was 13 and later evidence when she was 17 or older. Many years had passed. By the time of the trial more than a decade had passed since she first was interviewed about these allegations. It is to be expected that matters recalled in 2012 could not be recalled in 2019 and less so in 2023 or 2024. This she readily acknowledged and again that is something the jury would likely have taken into account.
- [112] Despite the inconsistencies adverted to by the appellant in this appeal, the complainant was persistent in her complaints that she was sexually abused by her father, over time and repeatedly, including in ways amounting to rape.
- [113] The nature of the case as run also needs again to be mentioned. When counsel for the appellant at trial first addressed the jury, he outlined the nature of the case he was going to put to them. He said that he was not going to suggest to them that the complainant had lied. Nor was he going to suggest to them that “some of these things – all these things didn’t happen at all”.¹⁴⁹ I would read that not as accepting they all happened, but as accepting that some of them did. Counsel then proceeded to discuss

¹⁴⁷ Addresses at T2-27 lines 2 to 3.

¹⁴⁸ Summing up at T1-13 line 35 to T1-14 line 21.

¹⁴⁹ Addresses at T2-26 line 45 to T2-25.

factors that would bear upon the complainant's reliability as a witness, a matter now taken up on appeal.

[114] Moreover, as already mentioned, a feature of the closing address for the appellant's case was to suggest that the complainant was mistaken as to the offender being her father, rather than Bevan. As to that suggestion:

- (a) The evidence the complainant gave when recalled was dogmatic that the offender was the appellant.
- (b) Her earlier statements (in 2012) where she referred to Bevan being present were or at least included references to occasions where Bevan was present with her father. For the complainant to have been mistaken (as the appellant suggests) she needed both to have made a mistake in not recalling Bevan was the offender, while at the same time recalling that he was present with her father (or being mistaken about that as well).
- (c) One might think it inherently unlikely that a six year child could recall the offending, but be mistaken about her own father's involvement in it.

[115] These things are important because of the acceptance that the complainant had been sexually abused and at least in part the controversy was as to the identity of the offender being someone other than her father.

[116] Having reviewed the evidence and allowing for the advantages enjoyed by the jury and their central role in our criminal justice system I am not satisfied there is a significant possibility that an innocent person has been convicted.

[117] This ground is not made out.

Ground 4

[118] This ground of appeal is that a miscarriage of justice was occasioned by the failure of the trial judge to direct the jury on the significant forensic disadvantage suffered by the appellant as a result of the delay in prosecuting the offences.

[119] The appellant submitted the Court should conclude that the verdict of the jury should be set aside, *inter alia*, "on any ground whatsoever there was a miscarriage of justice...": s 668E(1) of *Code*; *Brawn v The King* (2025) 99 ALJR 872 at [10].

[120] The offending the subject of the charges occurred up to November 2011. The complainant first gave a statement to police in May 2012. The indictment was presented over 10 years later. In the interim the complainant had been interviewed on two further occasions. In her first interview she referred to sexual offending by Bevan (again referring to Bevan in the June 2012 Statement; but there was no reference to him in the 2019 Statement).

[121] In the interim Bevan suffered some brain damage and was not available at the trial. Exactly when this occurred is not clear. His former partner gave evidence that she had been in a relationship with him "for some years" but "in more recent years he's been in a motorcycle accident" and that he had "now acquired a brain injury."

[122] Section 132BA(2) of the *Evidence Act 1977* (Qld) provides that in criminal proceedings before a jury "[t]he judge may, on the judge's own initiative or on the

application of a party to the proceeding, give the jury a direction under this section if the judge is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence the subject of the proceeding.” The direction if given is governed by s 132BA(4) namely that it:

- “(a) must inform the jury of—
 - (i) the nature of the disadvantage; and
 - (ii) the need to take the disadvantage into account when considering the evidence; but
- (b) must not warn or in any way suggest to the jury that—
 - (i) it would be dangerous or unsafe to convict the defendant; or
 - (ii) the complainant’s evidence should be scrutinised with great care.”

[123] The judge need not give the direction if there are good reasons not to: s 132BA(5). A significant forensic disadvantage is not established by mere delay in prosecuting the offence: s 132BA(3). While one should not substitute different language for that used by Parliament, the requirement for a significant forensic disadvantage has been said to involve a need that the disadvantage is real and identifiable as well as such that it can be said to be significant: *R v PBO* [2024] QCA 238 at [97] per Doyle AJA (Bowskill CJ and Boddice JA agreeing as to this aspect). It has to be identifiable at least to enable the trial judge to comply with s 132BA(4)(a)(i) and (ii).

[124] The appellant here has not identified such a disadvantage. Such impact as there was, was identified as being attributable to Bevan no longer being able to be called to give evidence. But that is not shown to be either a disadvantage or a significant one. Exactly when he suffered his injury is not established. The expression “in more recent years” is vague and assumes a comparator without any established measure.

[125] In any event, if Bevan had been available to be interviewed and called to give evidence, it is mere speculation that it might have been advantageous to the appellant.

- (a) He might have declined to give evidence at all.
- (b) If compelled to give evidence, it was a distinct probability that he would deny any wrongdoing with little if anything available to the appellant to prove otherwise. Such a course would be likely to have cut across the way the appellant’s counsel had outlined the case to the jury (of the complainant having been sexually abused but mistaken as to it being her father who was the offender).
- (c) It is possible, if called, Bevan would admit the offending but there is simply no foundation for assuming this was a realistic (non-fanciful) possibility.
- (d) A perhaps more likely scenario than the last is that he might have claimed privilege against self-incrimination. If that occurred, then the jury might be told that it was open to them to draw an inference adverse to Bevan. In this State there is some doubt about whether this direction could be given to the jury. This was not a matter canvassed before us on this appeal. My present view is that a direction of that kind could be given if the claim of privilege

against self-incrimination was made in response to a question specific enough as to permit logically the drawing of some inference adverse to the credit of the witness: *Thompson v Bella-Lewis* [1997] 1 Qd R 429 per Davies JA at 436-437, per McPherson JA contra at 454; Fitzgerald P at 434 not deciding but expressing doubt as to the refusal to permit drawing of inferences; *R v King* [1998] QCA 108 at [11]; cf *R v Roberts* (2004) 9 VR 295 at [83]. I shall proceed on the basis that such a direction could be given, which is the approach most favourable to this appellant.

[126] However, because of this range of possibilities (the second of them being potentially damaging for the appellant) whether there was any disadvantage to the appellant remains a matter of speculation. The trial counsel for the appellant did not ask her Honour to make a direction under this section. It was not apparently thought that the absence of Bevan was in any respect a disadvantage to the appellant or at least a sufficient one to seek the direction. The thing which the appellant now advances as a disadvantage, in my view, is not the unavailability of Bevan because of delay, but the want of a direction suggesting his absence was a disadvantage to the appellant, without any such disadvantage being made out.

[127] For completeness I should add that it is difficult in any event to conclude that if it was an irregularity not to have made a direction under s 132BA on the court's own motion, it is not material. The effect of the direction, if given, would have identified as the disadvantage to the appellant that Bevan was not available to be interviewed and called to give evidence at the trial in circumstances where what he might say was wholly unknown. It would also involve a direction to the jury to take that into account when considering the evidence. It is difficult to conclude that might have made any material impact.

[128] This ground of appeal fails.

Ground 5 – Manifestly Excessive Sentence

[129] Finally, leave is sought to appeal from the sentences imposed as set out above, with a head sentence of 12 years and 6 months' imprisonment said to be manifestly excessive.

[130] The appellant points in particular to four matters as relevant to take into account.

[131] *First*, that the period of maintaining the sexual relationship was submitted to be brief (seven months) compared to what are said to be comparable cases. I will deal with the 'comparable cases' below, but it is broadly right that this period of maintaining was shorter than in those comparable cases. The age of the child, the relationship between the complainant and offender and the frequency of the conduct are also relevant. I should not be taken to be accepting that a period of abuse of a four or five year old child which lasted seven months is fairly described as brief.

[132] *Second*, that at trial the Crown urged the court to impose "at least 10 years and up to 12 years' imprisonment", which is lower than the sentence imposed by the trial judge. While accepting that the judge is not bound to adopt the range the parties urge, the appellant points to this as some support for the period imposed being excessive.

[133] The sentencing function falls to be exercised by the trial judge. It is no basis to suggest that the sentencing discretion miscarried merely because the judge took a view different from that suggested by the prosecution.

- [134] *Third*, the comparable cases, it is said, do not support the term of 12 years 6 months.
- [135] In *R v LBC* [2023] QCA 178 this Court rejected an application for leave to appeal from a sentence of 10 years' imprisonment for a father convicted of maintaining an unlawful sexual relationship with his daughter aged 10 to 12 years over a period of two years seven months with increasing seriousness over that time. Significantly in that case the accused pleaded guilty and the hearing at sentencing proceeded on an agreed statement of facts. The guilty plea is a factor applied in reducing what otherwise would have been the sentence imposed. The Court held that the sentence imposed was not unreasonable or plainly unjust. A sentence of 10 years' imprisonment on a guilty plea provides real support for the sentence under consideration in this application for leave.
- [136] In *R v BDQ* [2022] QCA 71 the offender was convicted after trial of counts including of maintaining an unlawful sexual relationship with his daughter aged 12 to 14 years old for a period of 2 years. There were features of the offending with some similarities to those in the present appeal. The sentence imposed was 12 years' imprisonment. After a review of other decisions Brown J (as her Honour then was) said at [47]-[48]:
- “[47] While a sentence of 10 years was open in the present case and the sentence of 12 years was at the upper end of what might be regarded as appropriate in the circumstances for this type of offending, it has not been demonstrated to be manifestly excessive and outside of the sentencing discretion.
- [48] The above analysis of the cases demonstrates that it was within the sentencing discretion to impose the sentence of 12 years. The offending involved the aggravating features of regular penile intercourse of the complainant over a protracted period where the applicant was the complainant's father and carer, with little by way of mitigation. The offending had a severe impact upon the complainant. The offences were also domestic violence offences which is an aggravating feature enshrined in statute.”
- [137] The appellant, of course, points to these statements as identifying the applicable range. The reference to the upper end of the range is not central to the decisions, it being sufficient that the imposed term was within the permissible range. But in any event, it ought not be read as identifying the limit of the upper end to be precisely 12 years, as distinct from 12 years being within a range at the upper end. In that case the duration of the maintaining was longer than in the present case, but against an older complainant. There is no form of calculus which enables comparisons between sexual offending for a longer period against a child, albeit an older child. I do not think it is helpful to seek to do so.
- [138] It cannot be doubted in the present case the offending had a defining and prejudicial impact on the complainant. The victim statement she provided makes that clear. She describes her trauma, PTSD, self-hate and self-harming, stress and seizures. Her innocence and childhood were stolen. It is not possible, in my view, to characterise the offending against a four or five year daughter as other than grotesque. I would conclude that a sentence of 12 and a half years for that offending is in the same “ball park” as the sentence imposed in *R v BDQ*, so as to be considered comparable.

- [139] The decision of *R v PAK* [2010] QCA 187 is of no real assistance. The offences (which occurred in the period 1991 to 1999) included maintaining a sexual relationship with the accused's stepdaughter when she was aged seven to 15 years for which a term of imprisonment of seven and a half years was imposed. The application for leave to appeal that sentence failed as it was not found to be a manifestly excessive sentence. That conclusion offers little guidance as to whether the subject sentence is manifestly excessive.
- [140] In *R v BCA* [2011] QCA 278 the accused was convicted of a range of offences including maintaining a sexual relationship with his daughter for a period of around eight and a half years (when she was aged six or seven to 15). He was sentenced of a term of 10 years' imprisonment on that count and indeed to a like concurrent term on other sexual offences against his daughter. The offending was described as "especially serious" (at [43]) without "much that [could] be said in favour of mitigating the sentence" (at [44]). It was said that in those circumstances the sentence should be "no less severe than the sentence of 10 years imprisonment imposed": at [48]; [51]; [53]-[54]. This Court (having disturbed the sentences in relation to all offences for reasons not presently relevant) imposed for the maintaining count a term of imprisonment of 10 years.
- [141] While this provides some support for the appellant's application, it reflects a sentence imposed which, despite the seriousness of the offending, was below that adopted more recently in *R v BDQ* [2022] QCA 71 (of the same duration but for a plea of guilty). It must be acknowledged that community concerns with the persistence of sexual offending against children make comparisons from decisions 15 or 16 years ago of reduced significance.
- [142] None of these cases in my view leads to the conclusion that the sentencing judge erred in the exercise of her sentencing discretion.
- [143] *Fourth*, the personal circumstances of the appellant are said to warrant the conclusion that the sentencing judge must have made some error in selecting the sentence her Honour imposed. They are that:
- (a) While the sentencing judge identified that the appellant was "relatively young", it is urged that the judge did not identify how this impacted the head sentence.
 - (b) The appellant had limited criminal history and there was no likelihood of reoffending against children.
 - (c) A report of Dr Barclay-Timmis was relied on as identifying the appellant as suffering from mental impairment. It is now urged that the mental impairment was relevant to the appellant's "moral culpability and [to] reduce the weight to be given to general deterrence."¹⁵⁰
- [144] The *Penalties and Sentences Act 1992* (Qld) contains sentencing guidelines in s 9. The age of the offender is something to which the Court must have regard: s 9(2)(f). In this case the sentencing judge stated:
- "These offences were committed when you were relatively young. ...
You were about 23 when you began raping the child."
- [145] It is accordingly clear the sentencing judge had regard to the appellant's age. The process of sentencing does not require or perhaps even permit of identification of the

¹⁵⁰ Appellant's outline of argument at [69].

specific adjustment, if any, attributable to a factor such as the offender's age. The remarks just extracted were made by the sentencing judge immediately after reciting the appellant's criminal history. This included violence against the complainant's mother and an incident of exposing himself to a woman in the street. Her Honour continued in her sentencing remarks to observe "given the perverted nature of these crimes that, some years later, you remain a risk of further offending. That risk must be seen as significant." The sentencing judge did not find that there was no likelihood of reoffending against children.

- [146] Finally, her Honour had regard to the psychological report but found it of limited assistance. It was written after a video interview with the appellant after he was convicted. There is nothing in the report to hint at remorse, indeed in it the appellant is reported as maintaining his innocence and asserting the complainant fabricated her story out of hatred. The view of the author was that there was "a moderate risk of recidivism."¹⁵¹
- [147] It also records the appellant advising that he had been diagnosed with ADHD and Autism Spectrum Disorder. There is no suggestion in the report that these disorders were such as to reduce his moral culpability for the offending. Neither is said to have affected his view of his offending so as to reduce its otherwise obvious malignancy. Nor does the report support the notion that any impact on his moral culpability might reduce the weight to be given general deterrence. The static and dynamic factors said to influence the likelihood of further offending are mentioned in the report. The 'static' factors are enduring and are said to include gender, race/ethnicity, age, marital status, criminal record, victim relationship and parental stability. The 'dynamic' factors include substance misuse history, antisocial tendencies, poor financial management, poor quality of social relationships, the presence of psychopathology (including ASD and social anxiety) and poor social skills generally. These factors are so diverse and, at least as so described, commonplace in our society. This in my view highlights the need for general deterrence so as to seek to affect the conduct of the wide range of persons who may exhibit or be subjected to those kinds of factors.
- [148] I agree with the sentencing judge's observations as to the limited assistance afforded by this report.
- [149] In the end it has not been established that the sentence imposed was manifestly excessive.

Conclusion

- [150] For these reasons in my view the appropriate orders are:
1. Appeal against conviction dismissed;
 2. Leave to appeal sentence is refused.
- [151] **KELLY J:** I have made my own assessment of the evidence as a whole. I have had regard to the features of the evidence emphasised by the appellant's arguments. I agree with the reasons and conclusion of Doyle JA in relation to ground 3. In allowing for the advantages enjoyed by the jury, I am not satisfied that there is a significant possibility that an innocent person has been convicted. I also agree with his Honour's reasons as they concern the other grounds of appeal and with the orders proposed by his Honour.

¹⁵¹ Report of Dr Barclay-Timmis at p 6.