

Court of Criminal Appeal
Supreme Court
New South Wales

Case Name: PM v R

Medium Neutral Citation: [2025] NSWCCA 139

Hearing Date(s): 21 July 2025

Date of Orders: 12 September 2025

Decision Date: 12 September 2025

Before: McHugh JA
Hamill J
Yehia J

Decision: (1) Grant leave to appeal under grounds 1 and 2.
(2) Refuse leave to appeal under ground 3.
(3) Dismiss the appeal.

Catchwords: CRIMINAL APPEAL – mixed verdicts – applicant alleged to have sexually assaulted his step-daughter on numerous occasions over a number of years at different locations – where jury returned guilty verdicts on the first three counts, not guilty on four later counts and unable to agree on four other counts – whether verdicts factually inconsistent – test of logic and reasonableness – whether verdicts unreasonable or unable to be supported – relevance of jury being unable to agree – fact specific inquiry – where potent evidence in the form of complaint concerning general allegation of sexual misconduct – where such evidence did not relate to a specific count – whether open to the jury to reach guilty verdicts on some counts but not others – evidence of good character and denials – conflict in evidence of opportunity – whether jury ought to have entertained a doubt – advantages of jury in circumstances of the case manifest and substantial

CRIMINAL LAW – directions to jury – “Markuleski” direction – where direction focused on reliability rather than truthfulness – where jury not directed that it was difficult to see how different verdicts could be returned on different counts – where no objection taken to direction at trial – where issues clear – while “full” direction preferable counsel satisfied direction sufficient – leave to appeal refused but absence of direction taken into account in considering ground asserting inconsistent verdicts

Legislation Cited: Criminal Appeal Act 1912 (NSW), s 5(1)
Criminal Procedure Act 1986 (NSW), Pt 5
Evidence Act 1995 (NSW), s 165B
Supreme Court (Criminal Appeal) Rules 2021 (NSW), r 4.15

Cases Cited: Browne v Dunn (1893) 6 R 67
Dabboul v R (2019) 100 NSWLR 682; [2019] NSWCCA 191
Dansie v The Queen (2022) 274 CLR 651; [2022] HCA 25
Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56
M v The Queen (1994) 181 CLR 487; [1994] HCA 63
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12
R v Jovanovic (1997) 42 NSWLR 520
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290
R v TK (2009) 74 NSWLR 299; [2009] NSWCCA 151
Saunders v R [2022] NSWCCA 273
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13
The King v ZT [2025] HCA 9; (2025) 99 ALJR 676

Texts Cited: N/A

Category: Principal judgment

Parties: PM (Applicant)
Rex (Respondent)

Representation:	Counsel: J Stratton SC and J Hopper (Applicant) H Roberts SC and C Brain (Respondent)
	Solicitors: George Sten & Co (Applicant) Office of the Director of Public Prosecutions (NSW) (Respondent)
File Number(s):	2023/00084621
Publication Restriction:	1. Prohibition pursuant to s 578A of the Crimes Act 1900 (NSW) on the publication of material likely to identify the complainant. 2. Prohibition pursuant to s 15A of the Children (Criminal Proceedings) Act 1987 (NSW) on the publication of material likely to identify the complainant and several witnesses. 3. Pseudonyms adopted to ensure compliance with those provisions.
Decision under appeal:	
Court or Tribunal:	District Court of NSW
Jurisdiction:	Criminal
Citation:	N/A
Date of Decision:	06 November 2024
Before:	Judge K Robinson
File Number(s):	2023/00084621

HEADNOTE

[This headnote is not to be read as part of the judgment]

The applicant stood trial before the District Court sitting in Dubbo in 2024 in relation to 14 offences of a sexual nature committed against his stepdaughter. The offences were allegedly committed in or near Bourke between June 1997 and June 2005. The applicant was found guilty of two counts of indecent

assault on a child under 16 years and one count of sexual intercourse with a child above 10 years and under 16 years. The jury returned verdicts of not guilty on four counts, directed verdicts of not guilty on three counts and were unable to agree on four counts. The applicant was sentenced to an aggregate term of imprisonment of 4 years and 3 months with a non-parole period of 2 years and 3 months. There was no appeal against the sentence.

The applicant sought leave to appeal against the convictions on counts 1, 2 and 3 on the following grounds:

- (1) The jury's verdicts of guilty in relation to counts 1, 2, and 3, are inconsistent with and cannot stand with the jury's verdicts of not guilty to counts 6, 7, 11 and 13, and the failure of the jury to reach a unanimous verdict on counts 4, 5, 12 and 14.
- (2) The verdicts of guilty on counts 1, 2 and 3 are unreasonable and cannot be supported having regard to the evidence.
- (3) Her Honour erred in not directing the jury that:
 - (a) the jury might think that there was nothing to distinguish the evidence of the complainant on one count from her evidence on another count, and
 - (b) if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.

The Court held, granting leave to appeal under grounds 1 and 2, refusing leave to appeal under ground 3, and dismissing the appeal:

As to ground 1

1. There was no suggestion of improper compromise in the verdicts and there were some, albeit subtle, differences in the evidence relating to counts 1-3. The complainant's evidence more generally received some support in the body of complaint evidence. There was a particular aspect of that evidence which strongly supported her credibility. It was open to the jury to find that the complainant was a generally honest and credible witness. It was also open to accept her evidence (beyond reasonable doubt) over the evidence given by her mother and sister. The fact that the jury indicated it could not reach unanimous or majority verdicts on four of the counts demonstrated that it did not reach an impermissible compromise. The applicant did not discharge its onus of

establishing that the verdicts fail the test of logic and reasonableness: [139]-[145].

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, *R v TK* (2009) 74 NSWLR 299; [2009] NSWCCA 151 and *Saunders v R* [2022] NSWCCA 273 applied.

As to ground 2

2. The task to be undertaken where a ground asserts that a jury verdict is unreasonable is well-established. This was a case where the advantages enjoyed by the jury were manifest and substantial. The jury received appropriate directions concerning the use of the applicant's previous good character. It was open to the jury to reject the evidence of TM and BM in circumstances where aspects of their evidence were implausible. The body of complaint evidence also provided support for CC's general allegation that the applicant sexually assaulted her during her childhood. Accordingly, it was open to the jury to distinguish between the counts and to give the applicant the benefit of the doubt on some counts, while convicting on the first three counts. The Court was not left with a reasonable doubt as to the guilt of the applicant having reviewed the whole of the evidence: [146]-[154].

Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12, *Dansie v The Queen* (2022) 274 CLR 651; [2022] HCA 25 and *The King v ZT* [2025] HCA 9; (2025) 99 ALJR 676 applied.

As to ground 3

3. The direction in the present case only addressed the complainant's "reliability" and failed to refer to her truthfulness (or honesty). It may have been preferable for the jury to receive a "full" *Markuleski* direction. However, counsel at trial was plainly satisfied that, in the atmosphere of the trial and in view of the issues before the jury, the direction was sufficient. The Court considered the asserted deficiencies of the direction and accepted that the direction could

have been more detailed and directed, but declined to grant leave to argue this ground alone: [116]-[121], [155]-[157].

R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290 applied.

JUDGMENT

- 1 **THE COURT:** There are statutory prohibitions on the publication of material that might tend to identify the complainant and some of the witnesses in this case. There are criminal sanctions for breaching the prohibitions in those provisions. In these reasons, without meaning disrespect and not intending to depersonalise any of the people involved, the alleged victim is referred to as the complainant or CC, while the applicant and some of the witnesses are referred to by pseudonyms.
- 2 Between 28 October 2024 and 8 November 2024, PM stood trial before the District Court sitting in Dubbo in relation to an indictment charging him with 14 counts alleging that he committed offences of a sexual nature against his stepdaughter. The offences were allegedly committed in or near the small town of Bourke in northwestern New South Wales between June 1997 and June 2005. Two of the 14 counts (counts 12 and 14) were cast in the alternative.
- 3 On 1 November 2024, upon the close of the prosecution case, the trial Judge (Judge Robinson) directed the jury to return verdicts of not guilty in relation to counts 8, 9 and 10. The jury retired to consider its verdicts on the remaining counts at around 3:00pm on Monday 4 November 2024 and at 3:33pm on Wednesday 6 November 2024 returned verdicts of guilty on counts 1, 2 and 3 and verdicts of not guilty on counts 6, 7, 11 and 13. The jury continued to deliberate on the remaining charges and received a majority verdict direction on 7 November 2024. On Friday 8 November 2024 at 10:47am the jury was discharged when it was unable to reach a verdict on counts 4, 5, 12 and 14. The Court was informed that no further proceedings are to be taken in relation to those counts where the jury was unable to agree upon a verdict.
- 4 On 19 December 2024, Judge Robinson sentenced PM to an aggregate term of imprisonment of 4 years and 3 months with a non-parole period of 2 years and 3 months. The sentence commenced on the day it was imposed and PM

will first become eligible for release to parole no earlier than 18 March 2027, that is, at the expiration of the non-parole period.

- 5 There is no appeal against the sentence, but PM seeks to appeal against the convictions on counts 1, 2 and 3 on the following grounds:

“Ground One: the jury’s verdicts of guilty in relation to counts 1, 2, and 3, are inconsistent with and cannot stand with the jury’s verdicts of not guilty to counts 6, 7, 11 and 13, and the failure of the jury to reach a unanimous verdict on counts 4, 5, 12 and 14.

Ground Two: the verdicts of guilty on counts 1, 2 and 3 are unreasonable and cannot be supported having regard to the evidence.

Ground Three: her Honour erred in not directing the jury that:

(a) the jury might think that there was nothing to distinguish the evidence of the complainant on one count from her evidence on another count, and

(b) if the jury has a reasonable doubt about the complainant’s credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.”

- 6 Because grounds 1 and 2 do not raise a question of law alone, and because ground 3 concerns a matter not raised at the trial, PM requires leave to appeal in respect of each of the grounds: *Criminal Appeal Act 1912* (NSW), s 5(1) and *Supreme Court (Criminal Appeal) Rules 2021* (NSW), r 4.15.
- 7 In short, under ground 1, counsel for the applicant submitted that the convictions on counts 1, 2 and 3 cannot, or ought not be allowed, to stand with the acquittals on counts 6, 7, 11 and 13 and the failure to reach a unanimous or majority verdict on counts 4, 5, 12 and 14. It was submitted that the mixed verdicts are factually inconsistent and fail the so-called “test of logic and reasonableness”. Under ground 2, the applicant relies on parts of the record of the trial which he submitted ought to have led the jury to entertain a reasonable doubt as to the applicant’s guilt on counts 1, 2 and 3. This includes the fact of the acquittals, evidence suggesting that the applicant did not have the opportunity to commit the offences charged in counts 1, 2 and 3, the applicant’s unguarded yet firm denial of committing the offences in a covertly recorded telephone conversation, and evidence of the applicant’s previous good character. Counsel acknowledged that, in resolving grounds such as these, the Court must always keep in mind the advantages enjoyed by the jury

and its “constitutional” role as the arbiter of the facts in serious criminal cases. The third ground of appeal raises a complaint about a specific direction provided in the summing up. That direction exhorts a jury to take into account doubts it has about one or more counts, when considering the other counts. Accordingly, it also has some relevance in determining ground 1.

- 8 Counsel for the respondent submitted that the advantages enjoyed by the jury in the present case were significant and that there were particular aspects of the evidence and the conduct of the trial which meant that the jury, acting logically and reasonably, could reach verdicts of guilty on counts 1-3 while entertaining a reasonable doubt on counts 6, 7, 11 and 13 and being unable to agree on the remaining counts. Counsel pointed to directions provided to the jury, particularly those concerning the substantial forensic disadvantage faced by the applicant in respect of the counts of which he was found not guilty, and parts of the evidence which, it was submitted, distinguished certain counts from others. The respondent relied on a substantial body of “complaint” evidence to submit that the jury was entitled to – and did – find the complainant to be a generally honest witness but, at the same time, to have a reasonable doubt about her accuracy and reliability on the counts of which the applicant was not convicted.

An overview of some relevant legal principles

- 9 In *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35 Gaudron, Gummow and Kirby JJ said at 365-8 (with footnotes and citations omitted and some more significant passages highlighted):

“Faced with submissions of inconsistency between jury verdicts, courts must reconcile their commitment to conflicting objectives. On the one hand, there is the **respect due to the jury as the ‘constitutional’ tribunal for resolving disputed factual questions**. This principle is reinforced by the determination of the courts not to permit interrogation of juries as to their grounds for decision. The verdict, accepted in open court, is sufficient. Of its nature, it cannot and does not expose the reasoning of the jury. For reasons of history, institutional integrity and finality of trials, courts have long been reluctant to undermine jury verdicts or to infer from them that the jurors, drawn from the community, have done otherwise than their duty as committed to them by law.

On the other hand, whilst ordinarily a jury is as inscrutable as the Sphinx, sometimes, by a series of verdicts or, where permitted, answers to questions posed by the judge, there is placed on the public record an insight into the jury’s thinking. This does not arise unlawfully or irregularly. **If the result of this insight is to cast doubt upon the verdict under consideration, because**

logically it cannot stand together with another verdict, the court is then confronted by a problem of justice. The high respect paid to jury verdicts is reinforced by a general appreciation of their usual correctness. However, where, in a particular case, doubt is cast upon the verdict, an appellate court, invited to do so, must determine whether it should intervene. In a criminal appeal, it must decide whether the conviction based upon the verdict which is impugned is unsafe or unsatisfactory.

From a review of the cases, a number of general propositions can be stated:

1. A distinction must be drawn between cases of legal or technical inconsistency and cases of suggested factual inconsistency. The former will generally be easier to resolve. On the face of the court's record there will be two verdicts which, in law, cannot stand together. Examples include the case where the accused was convicted both of an attempt to commit an offence and the completed offence or of being, in respect of the same property and occasion, both the thief and the receiver. There are other like cases. Where technical or legal inconsistency is established, it must be inferred that the jury misunderstood the judge's directions on the law; compromised disputes amongst themselves; or otherwise fell into an unidentifiable error. The impugned verdict or verdicts must be set aside and appropriate consequential orders made.

2. Suggestions of factual inconsistency have arisen both as between different verdicts affecting the same accused and different verdicts affecting co-accused or persons tried separately in relation to connected events. The last-mentioned problem is an inevitable risk of the trial system where accused offenders are tried separately. Thus in *R v Rowley* the appellant was convicted after a plea of guilty. The principals in the offence were later acquitted after a trial. The appellant gained an order quashing his conviction. Yet it was pointed out that apparently inconsistent verdicts in such circumstances might be no more than the result of 'differences in the evidence presented at the two trials' or 'the different views which the juries separately take of the witnesses.'

3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:

'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'

4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, **if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted.** If there is some evidence to support the verdict said to be inconsistent, **it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury.** In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider

separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries. The early history of New South Wales was affected by English juries which, in the face of clear evidence, declined to find the value of goods stolen sufficient to attract the punishment of death, thereby affording to the offender the alternative punishment of transportation. Australian decisions have acknowledged that the role of the jury continues to be ameliorative in this respect. In *R v Kirkman*, in the Supreme Court of South Australia, King CJ (with the concurrence of Olsson and O'Loughlin JJ) observed:

'[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty.'

We agree with these practical and sensible remarks.

5. Nevertheless, **a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case'.**"

- 10 The following year, in *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56 Gaudron, McHugh and Gummow JJ said at 453:

"The jury's finding of not guilty on the second count damaged the credibility of the complainant with respect to all counts in the indictment.

Implicit in the appellant's acquittal on the second count was a rejection of the complainant's account of the events which were said to give rise to that count. The jury may have acquitted because the unshaken evidence of the appellant's wife and daughter with respect to the absence of opportunity engendered a reasonable doubt about the appellant's guilt on the second count. They may possibly have acquitted because they were of the view that the complainant had fabricated the circumstances giving rise to the second count. Having regard to the convictions on the first and third counts, the latter alternative seems an unlikely explanation of the verdict on the second count. Whatever the explanation may be, however, the jury's rejection of the complainant's account on the second count diminished her overall credibility. The only reasonable conclusion is that the jury were not satisfied beyond reasonable doubt of the truth of her evidence concerning the incident the subject of the second count. Having regard to the terms of the second count, we do not think that the complainant's confusion about whether the offence took place on a Thursday or a Saturday could explain the acquittal on that count. If that was the reason the jury rejected her evidence, they would also have acquitted the appellant on the first count.

It is difficult then to see how it was open to the jury to be convinced beyond a reasonable doubt of the guilt of the appellant with respect to the first and third counts. There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count."

- 11 On the other hand, in *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 Gleeson CJ, Hayne and Callinan JJ emphasised the importance of jury directions and the fact that acquittals do not necessarily indicate that a complainant was disbelieved. Their Honours said at [34]:

"Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in *MacKenzie*. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. **In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt.** The criminal trial procedure is designed to reinforce, in jurors, a sense of the

seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. **A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others.**

Thirdly, there is the consideration stated by King CJ in *R v Kirkman*, and referred to in later cases: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed."

- 12 McHugh, Gummow and Kirby JJ held that this Court had erred in its approach to the case but considered the underlying ground afresh. Their Honours held at [89] that *Jones v The Queen* was a "very fact-specific case" and that "[i]ndeed all such cases are highly fact-specific". At [85]-[86], their Honours reiterated the fundamental principles stated in *MacKenzie v The Queen*:

"The principles in *MacKenzie* apply to the present case. This is not an instance of 'legal or technical inconsistency', whereby the jury have returned two or more verdicts which, in law, cannot stand together. Nor is it a case where 'logic and reasonableness' necessarily dictated a common approach to the several verdicts concerned. In judging suggested inconsistency, this Court said in *MacKenzie* that 'if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted'. The Court cited with approval the remarks of King CJ in *R v Kirkman* to the effect that juries may not always act 'in accordance with strictly logical considerations' or even 'in accordance with the strict principles of the law which are explained to them'. Juries sometimes give effect to 'their innate sense of fairness and justice' as well as to their sense of proportion and compassion.

Nevertheless, cases do arise where different verdicts returned by a jury represent 'an affront to logic and commonsense' and suggest a compromise in the performance of the jury's duty. Such a conclusion 'depends upon the facts of the case'. **There can be no 'hard and fast rules' except that the obligation to demonstrate inconsistency in jury verdicts rests upon the person making the submission."**

- 13 The applicant submitted he has discharged that obligation in the present case. To determine whether he has done so, given the focus in each of those High Court authorities on the "facts of the case", it is necessary to consider closely the evidence adduced at the trial, the differences in the evidence between the counts, the content and adequacy of the directions provided by the trial Judge and the verdicts themselves. In dealing with the grounds of appeal, we will

return to the authorities and refer to some intermediate appellate decisions where these principles have been applied and to the decision in *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290 where a five member bench of this Court considered the appropriate judicial directions in a case where a jury entertains a doubt about one or more counts on a multi-count indictment.

The 14 counts and associated particulars

- 14 The following table is based substantially on a table annexed to the respondent's submissions and a document styled "amended charge matrix" which was marked for identification at the trial (MFI 22). An earlier version of MFI 22 (MFI 1) was provided to the jury for a short period on the first day of the trial. The table below sets out briefly the particulars of each count and the outcome of that count at the trial.

	Charge	Allegation	Particulars	O u t c o m e
	Between June 1997 and June 1998: Indecent assault on child under 16 years, namely 10 years	Touching the outside of her vagina underneath her clothing with his left hand while his right hand was on his penis masturbating	The "first incident" which was said to have taken place at the Anson Street house when the complainant was in year 4	G u i l t y
	Counts 2	Putting his hand	This incident	G

	<i>and 3 related to a single incident</i> Between June 1997 and January 2000: Sexual intercourse with child above 10 years and under 16 years, namely 10, 11 or 12 years, while under authority	underneath her clothing and into her vagina	occurred at the Anson Street house sometime after count 4 when the complainant was in primary school	u i l t y
	Indecent assault on child under 16 years, namely 10, 11 or 12 years	At the same time, using his hand to put her right hand around his penis and physically guiding it up and down until he ejaculated		G u i l t y
	Between June 1997 and	Spitting on his fingers, inserting his left hand into her vagina while	This occurred at the Anson Street house	J u r

	January 2000: Sexual intercourse with child above 10 years and under 16 years, namely, 10, 11 or 12 years, while under authority	masturbating with his right hand	when the complainant was in year 6	y u n a b l e t o a g r e e
	Between January 1999 and January 2000: Sexual intercourse with child above 10 years and under 16 years, namely, 11 or 12 years, while under	Moving her underwear to the side and inserting his penis into her vagina	This occurred at the Anson Street house when the complainant was in year 6	J u r y u n a b l e t o

	authority			a g r e e
	<i>Counts 6 and 7 related to a single incident</i> Between June 1999 and June 2002: Sexual intercourse with child between 10 and 16 years, namely, 12, 13 or 14 years, while under authority	Pulling her underwear to the side and inserting his tongue on and in her vagina	This occurred at Barrakee Station when the complainant was in high school	N o t g u i l t y
	Sexual intercourse with child above 10 years and under 16	Shortly after, moving the complainant on top of him and putting his penis in her vagina		N o t g u i

	years, namely, 12, 13 or 14 years, while under authority			I t y
	<i>Counts 8 and 9 related to a single incident</i> Between January 2000 and December 2000: Incite person under 16 years, namely, 12 or 13 years, to commit an act of indecent while under authority	Telling the complainant to rub the outside of her vagina in a circular motion which she did	This occurred at the Anson Street house when the complainant was in year 7	N o t g u i l t y b y d i r e c t i o n
	Sexual intercourse with child above 10	While doing so, putting his penis into her mouth, holding the back of her head,		N o t g

	years and under 16 years, namely, 12 or 13 years, while under authority	making her gag and masturbating to the point of ejaculation		u i l t y b y d i r e c t i o n
	Between January 2000 and December 2000: Sexual intercourse with child above 10 years and under 16 years, namely, 12 or 13 years,	Rubbing her vagina with his finger, sitting on his penis, instructing her to move up and down while rubbing her vagina with her fingers causing her to orgasm while he ejaculated	This occurred at the Anson Street house in 2000	N o t g u i l t y b y d

	while under authority			i r e c t i o n
	<i>Counts 11 to 14 related to a single incident</i> Between May 2004 and June 2004: Sexual intercourse with person under special care, above 16 years and under 17 years	Sticking his tongue into the complainant's mouth then putting his tongue on and into her vagina	This occurred at the Anson Street house about 4-6 weeks after the complainant left Red Bend Catholic College in May 2004	N o t g u i l t y
	<i>In the alternative to count 11</i> Sexual			U n a b

	intercourse with person under special care, above 17 years and under 18 years			l e t o a g r e e
	Sexual intercourse with person under special care, above 16 years and under 17 years			N o t g u i l t y
	<i>In the alternative to count 13</i> Sexual intercourse with person under special care, above 17 years and under	Following that (counts 11-12), placing his penis into her vagina and ejaculating inside of her		U n a b l e t o a g

	18 years			r e e
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The evidence of the complainant

15 CC gave evidence on Tuesday 29 October and Wednesday 30 October 2024. As both parties to the appeal acknowledged, the evidence did not emerge in a strictly chronological order and not in the order of the counts on the indictment. This created some confusion and the trial Judge raised a concern about the “matrix” document (MFI 1, see above at [14]) at the first break after the complainant began to give evidence. It was retrieved from the jury by the court officers during the luncheon adjournment. Further, in addition to the counts on the indictment, the complainant also gave evidence of other sexual offences which were not charged.

16 Because of the nature of the grounds of appeal, the main focus in the following summary is on those counts on which the jury returned verdicts. The summary will be, more or less, in the order in which the evidence emerged.

The evidence in chief

17 The complainant gave evidence of the various members of her family, that her biological parents are RM and TM and that she was very young when they separated, something she learned about “in later life”. Her earliest memories included that her mother was in a relationship with the applicant who had a daughter from another marriage who is older than her (RB). The applicant and the complainant’s mother lived in different houses but at some stage – she thought in 1995 or 1996 – they moved in together. Her mother had a daughter to the applicant (BM) and the family eventually moved into the house in Anson Street. At that stage she was attending school and believed she was about 10 years old and in year 4. She provided some diagrams of the house (Ex 2), gave evidence setting out the layout of the house, and identified some photographs of the Anson Street home (Ex 3).

Count 1 (verdict of guilty)

- 18 The complainant then gave evidence of the incident that gave rise to the first count on the indictment:

“Q. I want you to focus in on the first incident that you recall occurring at [redacted] Anson Street. First of all, how old were you?

A. At [redacted] Anson Street?

Q. Yes.

A. I was between eight to ten years of age.

Q. What year were you in at school?

A. Year 4.

Q. Is there any reason you remember it being year 4 that you were in?

A. I think about some of the excursions that we went on when I was in year 4, 5 and 6.

Q. What school were you attending at that stage?

A. St Ignatius Primary School.

Q. You weren't always at St Ignatius Primary School were you?

A. No, I was at Bourke Primary School for kindergarten, year 1 and year 2 before I was then transferred to St Ignatius.

Q. How long after the family moved into Anson Street did this first incident that you're about to describe take place?

A. I can't be quite sure.

Q. Was it the same year or a different year?

A. It was a different year, from--

Q. And--

A. I can't be quite sure.

Q. The first time that this happened was it a school day or not a school day?

A. It was a school day.

Q. What time of day did the incident take place?

A. It was in the afternoon between 3pm and 4.30pm.

Q. Who was home?

A. Myself and the accused.

Q. Where was [BM], if you know?

A. I would assume that she was next door playing with the neighbours.

Q. I take it from that you're not sure where she was?

A. I'm not sure.

Q. Where was your mother, if you know?

A. I'm assuming that she was at work but she was not at home.

Q. Can you explain for the jury what happened?

A. I had gotten home from school. I had put my bag down. I had walked up to the hallway and - sorry. Would you like me to call him 'the accused' or--

Q. You call him whatever you're comfortable with calling him.

A. Okay. I'd gotten home from school and my stepdad, who I referred to as dad my life, had called me up to the end of the hallway to the bedroom and he

called me like he always did, 'Hi [CC], how's your day? Come in here.' From that, I remember I was standing talking to him at the end of the bed. He asked me to come over. I was standing next to him.

Q. Where was he?

A. He was on the bed.

Q. Was he sitting up or lying down or something else?

A. He was not slumped but not lying back, so propped, propped up on the end of the bed.

Q. Which bedroom was he in?

A. The bedroom that I refer to as the main bedroom. His bedroom.

Q. When you went over to the bed what happened next?

A. [PM] put his hand on my genital area.

Q. Was that under your clothing or over the top of your clothing?

A. The first incident that I recall was over my clothing. He then told me to come and sit next to him.

Q. How long did he have his hand on your genital area for?

A. For a few moments. It felt like a lot longer but a few moments.

Q. What did he say next?

A. He said to come and sit next to him.

Q. Did you?

A. Yes.

Q. What happened after you sat next to him?

A. [PM] put his, he put his hand to the side. He put my underwear to the side and put his hand--

Q. Where did he put his hand, [CC]?

A. He put his hand underneath my underwear on the top of my vagina.

Q. Was this with his left hand or his right hand, if you remember?

A. This was with his left hand.

Q. What was his left hand doing?

A. It was touching the top of my vagina.

Q. Was it moving or not moving?

A. It was moving, slightly moving. It was slightly moving on the outside of my vagina.

Q. Did he say anything to you while this was happening?

A. I don't recall whilst he was doing that, no.

Q. Did you say anything to him while this was happening?

A. Not that I recall.

Q. You said he was doing that with his left hand. Where was his other hand, his right hand?

A. His right hand was underneath his trousers.

Q. What was it doing, if you could see?

A. His right hand was on his penis.

Q. Was it moving or not moving?

A. It was moving.

Q. How was it moving? Can you describe that motion?

A. In an up and downward motion.

Q. How long did this continue on for?

A. For a few moments.

Q. While he was doing that underneath his pants was he still touching your vagina on the outside?

A. Yes.

Q. What brought it to an end, that incident?

A. I don't recall."

Count 5 (jury unable to reach a verdict)

- 19 The complainant was asked to "focus in on the next incident that [she could] remember". She then provided evidence in relation to the offence charged in count 5. She said this incident occurred when she was 12 years of age and in year 6 at St Ignatius Primary School. She said she came home from school and did not know the whereabouts of her mother or BM but "it would've been between 3 and 3.30pm, or 3.30 and 4pm." The incident occurred in the bedroom at Anson Street. The applicant was on the bed. He picked her up and she "was propped up onto [PM's] hips." He removed her underpants and "there had been vaginal penetration" with "his penis." She said there was a "sharp stinging pain ... that burning, stinging on the outside of your skin feeling". He said "it won't hurt for long" but she "squirmed off" and went to the bathroom where she noticed there was blood in her underpants. The stinging pain lasted "for the rest of the afternoon into the evening". She did not tell her mother because "[she] was made to believe that [her] mother would not believe [her] and that [her] dad would get in trouble and get sent to gaol." That is what the applicant allegedly told her from when she was "very young".

Count 4 (jury unable to reach a verdict)

- 20 The complainant was then asked about "any other ... specific incidents occurring at [redacted] Anson Street." She gave evidence of an incident on a school day when she was in year 6. She got home between 3:00pm and 4:00pm. She didn't know where her sister or mother were, but the applicant was on the bed in the main bedroom. She described their respective positions and recalled that he spat on his fingers and inserted them into her vagina. She could not recall if he said anything and the incident lasted for a few moments. She said he inserted fingers from his left hand while his right hand was on his

penis. The incident came to an end when BM arrived home and was talking to them from the hallway. She said that BM was standing at the doorway while the applicant still had his fingers in her vagina. She said, "there was a blanket covering his hand so that you couldn't see his hand."

Counts 2 and 3 (verdicts of guilty)

- 21 After an adjournment, the evidence recommenced with the complainant being asked to mark Ex 2 (the diagram of the Anson Street house) to show where the bathroom was. She said the toilet was separate and in the laundry. The evidence relating to counts 2 and 3 was then elicited as follows:

"Q. Before the break, [CC], you were describing an incident where the accused put his fingers into your vagina. That particular conduct, did it happen once or more than once?

A. More than once.

Q. Are you able to recall another specific incident where that occurred?

A. Yes, I am.

Q. What year were you in at school?

A. Year 6. It was before, it was before I was 12.

Q. Before you were 12, in year 6?

A. Yes.

Q. Still at St Ignatius Primary?

A. Still at St Ignatius, yes.

Q. Was it a school day or not a school day?

A. It was a school day.

Q. What time did you get home from school?

A. Between 3 and 4pm.

Q. Who was home?

A. Myself and I'm not sure where [BM] was, I'm not sure where [TM] was, but [PM] was also home.

Q. Was the regular routine that the accused would be home when you got home from school?

A. Generally, yes.

Q. Did you have any other caretakers in your life after school?

A. No.

Q. What time usually did your mother get home from wherever she was?

A. Between 4.30 and 5.30.

Q. This particular incident that you're about to describe, where in the house did it take place?

A. In the bedroom, in the main bedroom.

Q. Where in the main bedroom?

A. In the bed.

Q. What happened?

A. I had returned home from school. I had been called into the bedroom.

Q. Who called you in?

A. [PM].

Q. What did he say?

A. He said, 'Come lay here.' He had called me into the bedroom. He had directed me to sit next to him on the bed. I was laying next to him on the left to him on the bed as in the second picture of the exhibit 2, and during that occasion [PM] had spat onto his fingers and had then touched my vagina with those fingers.

Q. Were his fingers on the outside or the inside of your vagina?

A. Both.

Q. Earlier in your evidence you described an incident where the accused spat on his fingers and then put them into your vagina. Is this a separate incident or the same incident that you described earlier?

A. The same but there was more than one of those incidences.

Q. Focusing in now on the incident that you're talking about, that's the same incident as before?

A. Correct."

Uncharged sexual acts

- 22 A body of evidence relating to uncharged sexual and indecent acts was then adduced which the prosecution relied on to put the incidents alleged in the counts on the indictment in context. Some of the evidence was quite specific and there was an allegation that the applicant masturbated during the incident until he ejaculated, "cleaned himself up with a hankie" and would put Vaseline on her vagina which she was told to get from the second draw in the bathroom. The complainant said she was wearing her primary school summer dress and it was a school day. She described feeling sick afterwards.

Counts 6 and 7 (verdicts of not guilty)

- 23 CC was then asked about properties that the applicant worked on. She remembered one was Rossmore Station and the other one was Barrakee Station. She said she visited Barrakee with her mother, stepfather and sister. She described the property and the house in which the family stayed. She identified drawings of the layout of the house (Ex 5) and said that this was the only house on the station. She described the mattress on which she and BM slept.
- 24 She then gave evidence relating to counts 6 and 7:

“Q. I want you to focus in on that incident now for us. Are you able to say whether you were in high school or primary school at that time?

A. High school.

Q. What age were you?

A. I would have been between 12 and 14.

Q. What makes you think you were in high school?

A. We used to have horses growing up. I - I loved horse riding. I - I rode horses from a very young age and there's an incident that I recall that occurred at Barrakee Station and then once I had returned following that incident I mean a couple of my peers had noted a change in--

HOPPER: Objection.

CROWN PROSECUTOR: Yes. I might ask a different question.

Q. The incident that you're talking about does that relate to the sexual allegation you were referring to earlier in your evidence or is it a different sort of incident altogether?

A. Sorry, I'm not sure what you mean.

Q. The incident where you were going on to describe something about your friends noticing something, that incident, is it the sexual--

A. It is this incident. So I was just saying after that incident I didn't return to Barrakee Station as often. I chose not to go out there and that's how I anchor that time line.

Q. What is it about you not returning to the property that makes you think you were in high school at that time?

A. I was old enough to speak up and say that I wanted to stay with my nan.

Q. The incident that took place at Barrakee who was there at the time of that incident?

A. There was myself and [PM].

Q. Where was [BM] if you know?

A. I'm not sure.

Q. And where was your mother if you know?

A. I'm not sure.

Q. What happened?

A. I went into the bedroom for some reason. [PM] was in the bedroom. He was on the bed. I had gone over. He had performed oral sex on me and then physical sex.

Q. Why did you go into the bedroom in the first place?

A. I'm not sure. That's - that's where all of our things were kept, that's where we slept, that was our room when we were at the station.

Q. When you went into the bedroom where was the accused?

A. On the mattress on the floor.

Q. Can you remember whether he was wearing clothes or not?

A. I cannot clearly recall. I don't recall him being unclothed.

Q. You said that he performed oral sex on you. How did that come about?

A. I was standing next to him and he pulled my underwear to the side and inserted his tongue around and in my vagina area.

Q. This sort of incident, that is, him putting his tongue around and in your vagina, did that happen once or more than once?

A. That occasion?

Q. Over the course of time?

A. It had happened - it had happened more than once over the course of time.

Q. Is this the first time it happened or a different time?

A. This is the first time that I recall - this is the first time that I recall.

Q. How long did that go on for?

A. I don't recall.

Q. What happened after he put his tongue in and around your vagina?

A. He moved - he moved me on top of him, my underwear still to the side and inserted his penis into my vagina.

Q. How long did he do that for?

A. A few minutes.

Q. What could you feel when his penis went into your vagina?

A. Pressure and pain.

Q. Did you say anything to him?

A. Not that I recall.

Q. Did he say anything to you?

A. He told me don't tell my mother.

Q. Did he say why?

A. Because she wouldn't believe me and if she did he'd get sent to gaol.

Q. Do you recall what brought the incident to an end?

A. I do not.

Q. Did you see your mother at some other point during that day?

A. Yes.

Q. Did you tell her what had happened?

A. No.

Q. Why not?

A. Because I had witnessed [PM] assault my mother and I was scared, I was always scared, I was scared and I was told not to."

Uncharged acts during high school

- 25 The complainant was then asked about other incidents that happened at Anson Street when she was in high school. She described briefly something like four incidents and there was some confusion as to whether they had already been covered and when they occurred. She described an occasion which "involved [her] masturbating him while he masturbated [her]" and another incident of sexual penetration that occurred in the bedroom. She said there was a "separate incident entirely ... that occurred on the lounge".

Counts 11, 12, 13 and 14 (verdicts of not guilty on counts 11 and 13)

- 26 The complainant was then asked whether the “lounge” incident occurred after she attended Red Bend Catholic College and she said that it did. She then gave the evidence that was subject to counts 11, 12, 13 and 14:

“Q. What happened?

A. I was sitting on the lounge. It was pink. When you walk into the home at Anson Street he was directly to the right when you walk in. The wooden door entry is blue. The lounge faces along the wall. The door opens that way so the door is - it blocks the view of the lounge. I was sitting there. [PM] came into the room. We were talking. He asked me if I had a boyfriend. I said that I did not. He asked me if I knew how to kiss. I said I did not, did not want to learn. He said he would show me. He proceeded to stick his tongue into my mouth and I recall feeling dizzy. It was hot. He swirled his tongue around in my mouth and I held back vomit following that. After he had said, ‘I’ll show you what to do, it’s easy,’ there was a moment of oral sex that he performed. He then sat upright on the couch and put me in front of him and guided me backwards onto his penis so that I was facing away from him.

Q. Can I take you back--

A. Yeah.

Q. --to the oral sex. Oral sex: can you describe what he actually did?

A. He put - I was laid sideways on the couch. He placed his tongue onto the opening of my vagina and then he stuck his tongue inside. Sorry, sorry.

Q. That’s all right. Take your time. How long did that go on for?

A. For a few minutes. Maybe ten. It, it’s hard to recall exactly how long.

Q. You described his penis going into your vagina after that?

A. Yes.

Q. How long did that go on for?

A. About five to ten minutes.

Q. What brought--

A. He ejaculated.

Q. Where did he ejaculate?

A. He ejaculated inside of me.

Q. During the incident did he say anything to you?

A. He said that, ‘That’s what you need to do,’ and then he told me to go and clean myself up.

Q. What did you do, if you recall, after the incident?

A. I went and had a shower, continued my day as normal.

Q. This incident, it happened after you left Red Bend College. Is that your evidence?

A. Yes.

Q. Roughly how long after you left the college was this incident?

A. Within the first four to six weeks.

Q. The first four to six weeks did you say?

A. Correct.

Q. Red Bend College was a place that you went to school for not quite two years. Is that right?

A. Correct.

Q. You ended up going on to be expelled from that college. Is that right?

A. Yes.

Q. After your expulsion, who is it that - did you go straight back and live with your mother and the accused or did you live with someone else?

A. I stayed with my aunt for a week and then I went straight back to live with my family.

Q. When you say your 'family' who do you mean?

A. My mum, my dad and my sister.

Q. When you say your 'dad' who are you referring to?

A. [PM].

Q. Why is it that when you were growing up you thought of him as your dad?

A. Because when I was really little we lived at [redacted] Anson Street and he said to me in the hallway, '[CC], I'm not your dad but I love you like a dad so you can call me 'dad' or you can call me '[PM]'. I threw my arms around him and I said, 'I'll call you 'dad', and I did for up until not a very long time ago.

Q. After this incident on the lounge did you remain living at [redacted] Anson Street?

A. Not for very long.

Q. Where did you go after that?

A. After that I moved out to live with my biological father for a short period of time. I also lived with my maternal grandparents for a short period of time before I officially moved out and lived with my partner."

Complaint and fall out in the family

- 27 The complainant was then asked about the people she had told about the alleged abuse. She gave evidence of conversations she had over the years, starting with a boyfriend she dated when she was 16 or 17 years old (Russell Tiffen), a school friend (AL), a university friend (Kerrie-Anne Maunder) and her "then fiancé" (Nick Sanders). She also told her "longtime best friend" (EM). She said she did not provide many details but told these people she had been sexually abused by her stepfather (or named him). A text message exchange with her sister (BM) was tendered as Ex 6. The complainant said those text messages were the first time she told BM that the abuse was at the hands of the applicant. She told her stepmother (CM) about the sexual assaults in 2020.
- 28 The complainant said she called the applicant and spoke to him for about an hour. He said she should go to the police and that he would sue her for defamation. She then wrote a letter to her mother apologising for hurting her

and recounting the conversation she had with the applicant. She never sent the letter and it was tendered, without objection, as Ex 7 and read onto the record:

“Dear Mum, I am sorry that I am hurting you. It was never my intention to hurt you but I know in all of this you are being caused pain and for that I am sorry. I’ve been thinking about everything a lot lately and I’ve realised I told my truths to the wrong person for the right reasons because I didn’t want to put it on you to confront [the applicant] for what I was saying. But I now realise I shouldn’t have assumed how you would react and cope with my story, and I shouldn’t have expected him to tell you the truth about what I have said to him. So let me tell you now exactly how that phone call went and what it is I am saying.

I have accused him of sexually assaulting me over many years until I was a teenager. I confronted him over the phone and told him I had suppressed memories coming back and the perpetrator was him. His response was to go to the police and make a statement, which I said I wasn’t going to do. He said he needed to tell you what I was saying. I told him that’s his decision. I wasn’t talking to you about it, I was taking it up with him, as that’s where my issues are.

He then threatened to sue me for defamation of character and I told him to go for it, that my story hasn’t ever changed. My memories are just more frequent and I can now timeline them. I never said I don’t know why you don’t love me. I never told everyone about this. At the end of the day I love you, you’re my mother, and I hate not being close with you, but I hate him. [BM] and I have had many fights over this and we have managed to have a solid relationship with boundaries in place now. I don’t know if she believes me or not. It doesn’t matter really. I know what’s real.

Like I said I’m sorry that this is causing you pain. I just wanted you to hear this from me. You don’t need to believe me, that is your choice. I just need to get this off my chest and give you the choice to do what you want with the information I have given you. Regardless of what happens, this has nothing to do with you and the kids and I won’t stop you having a relationship with them and I love you. Always, [CC].”

- 29 Some notes the complainant made to try to record a timeline were marked as MFI 7. Once CC told the police about the accusations, she made a second telephone call to the applicant. This was covertly recorded and the recording was tendered as Ex 8. The applicant made no admissions and denied the allegations. We will set out the full text of the conversation when we summarise the police investigation. The complainant made a police statement but said this was not the first time she had “gone into any specific detail about the incidents that had happened during [her] childhood.” She said she had done that on another occasion.

Cross-examination

- 30 The complainant was cross-examined on 30 October 2024. Based only on a close reading of the transcript, she was an articulate and at times combative

witness who volunteered information beyond the scope of the question. Those remarks must be considered in light of an observation by the trial Judge at the first break that the “tone” of the cross-examination was “disdainful” and the questions and remarks “on occasions” bordered on sarcastic.

- 31 The complainant was first asked about the family relationships, her schooling, how she and her sister travelled to and from school, and her parents’ jobs and hours of work. She said she often walked to and from school, played when she got home sometimes with her neighbours and, between years 3 and 6, would “often” travel on the bus to and from St Ignatius. She confirmed that “quite often” the applicant and her sister would be home with her after school. She said her mother tended to get home a little later. She agreed that the three would sometimes go to see “the horses”. She agreed that she and BM had chores to do almost every afternoon which were allocated by her mother. When asked who would be at home when she got home from Bourke High School, she said “typically, [the applicant]”.
- 32 She was asked about the stations outside of Bourke where she said the applicant worked as a “station hand”. She refuted the proposition that her parents “owned” Barrakee Station but agreed “they” just worked there. She said Bill Stalley owned Barrakee (which was later confirmed by other witnesses). She agreed they went to Barrakee as a family, but she didn’t like it much and would stay with her grandmother.
- 33 She agreed she went to Hopelands Station with her biological father before she headed to university because she “wanted to go out there to say goodbye” to the applicant.
- 34 She disagreed that she and BM were “inseparable” during childhood but said she “idolised” her older half-sister (RB). She was asked about visits to see RB and her family but did not recall staying with her for a number of weeks. She no longer has contact with RB. Apart from what we infer was a conversation at the Court around the time of the trial, they had not had contact for a number of years. The complainant tried to speak to RB “when [the applicant] was diagnosed with cancer” and last spoke to her when she (the complainant) was “over 21”.

- 35 It was suggested she would be excited when the applicant took them to see the horses but she could not recall, although she agreed she loved horses.
- 36 She said the applicant would leave for work “by 5am” and be home again “by 2pm”. She was unable to say how she knew that because she did not get home until later. Even so, she was firm that he was home from work when she got home and said the work on the stations was hot and so the work was done in the morning and early afternoon. She said it was “possibly” the case that there were times when she was in bed before the applicant got home from work but denied that was “the norm”.
- 37 She said her parents were quite strict and did not approve of her boyfriend Russell Tiffen who she met after she was expelled from Red Bend Catholic College. She agreed she moved to her biological father’s place “because of the friction that had been created by [her] decision to have a relationship with [Mr Tiffen]” but she could not recall the words that were exchanged.
- 38 There was a somewhat tortured exchange about whether her mother and the applicant supported her financially but she agreed they had lent her between \$4,000 and \$7,000 and at some point declined to lend or advance her money.
- 39 The complainant agreed that, at 17 years of age, she told Mr Tiffen that she hated the applicant but denied that she has hated him ever since that time. She denied that she hated “him now, today”.
- 40 She agreed that she had brought her own children to meet “this man [who] sexually abused [her] a number of times”. She could not remember the number of times and at precisely what ages her children had met with the applicant but agreed on one occasion it was at Hopelands Station (but not Barrakee). She facilitated other contact, telephone and video calls, between her kids and the applicant. She also agreed that the applicant attended her wedding and that she asked him to “give her away” but the applicant suggested her biological father undertake that role.
- 41 The complainant was cross-examined about the people she told about the offences and, generally, agreed she did not provide many details although she told her stepmother (CM) some details over the years. She said she “would

have told her” that there were occasions where the sexual abuse was with PM’s fingers and others where it was with his penis. She was challenged on the use of the phrase “would have” and the complainant said, “I would have told her what had happened, the truth.”

42 She was challenged about attempts she made to tell her mother (TM) “that [the applicant] had done this horrific sexual abuse to [her] over a number of years” and asserted that she attempted to tell her mother more than once, by email and over the telephone. These attempts occurred before and after the complaint was made to the police. She also said she proposed to meet with her mother “and talk about all of this”. The complainant agreed it was suggested they might meet at the Bourke Bakery or at the park, but said that meeting was to allow her mother to see the children. The complainant was asked whether her mother said “if you’re going to make those allegations about [the applicant] you need to look me in the eye and say it” but said she could not “recall those words.”

43 There was a seemingly combative exchange about money that had been advanced by TM and the applicant. The complainant denied she needed money for her mortgage but they had helped her out with her car registration. This exchange culminated in the complainant saying:

“I can’t be certain the last time a conversation occurred with [TM] about money. But I can be certain that these allegations did not come up as a result of me not being provided any financial assistance from neither [her mother nor the applicant].”

44 After a short adjournment, Ms Hopper cross-examined the complainant about her knowledge of the applicant’s other children and disputes that she had with one of them and Mr Tiffen’s ex-fiancé. She accepted she had hit both of those women and said she did not know which of the named people were actually the applicant’s children because, on her version of events, he had denied that they were. She was asked about an occasion when both she and the applicant were involved in separate accidents on the same day and were flown, coincidentally, together by air ambulance to Dubbo Hospital. She said she did not remember her accident or what happened and did not remember calling out for the applicant while they were in the hospital.

- 45 After an adjournment during which an application to amend the indictment and an objection was resolved, CC was asked for more details about punching the two women in the incidents referred to in the preceding paragraph and asked more questions about the people to whom she had complained.
- 46 It was put to the complainant that she had never seen the applicant hit her mother and that the couple were affectionate. She did not agree with these propositions although she acknowledged that her “interpretation of affection may not be the same as [theirs].”
- 47 Towards the end of the cross-examination, counsel complied with the rule in *Browne v Dunn* (1893) 6 R 67. The complainant rebuffed a series of propositions including that the applicant did not sexually assault her, kiss her, speak to her about sex or have sexual intercourse with her.

Amendment of the indictment, identification of parts of the evidence as “context evidence” and other evidence adduced by the Prosecutor

- 48 During the complainant’s evidence, the Prosecutor indicated the evidence had not fallen precisely as expected and made an application to amend the indictment. The application was opposed but the Prosecutor was permitted to amend the indictment. There is no complaint on appeal as to that decision. The Prosecutor also identified, by way of example and to assist the trial Judge in drafting the directions on the “context” evidence, certain parts of the evidence which disclosed offences but which were not charged in the indictment. This included the allegations where the applicant allegedly used Vaseline in committing the offences.
- 49 While the prosecution case rested substantially on the evidence of the complainant, other evidence was adduced in the prosecution case. Much of this evidence concerned things the complainant told other people after the incidents occurred. The Prosecutor also elicited evidence aimed at establishing that the applicant had the opportunity to commit the offences in the periods averred in the indictment. This included evidence of where the applicant was working and where the family was living. There was also evidence of other aspects of the police investigation such as the use of listening devices calculated to obtain admissions from the applicant.

Complaint evidence

- 50 **AL** is around the same age as the complainant. They attended school together and were part of the same circle of friends. AL gave evidence of a conversation she had with the complainant while AL was housesitting for a friend in Anson Street. She could not be “100% sure” when this was, but by reference to her leaving school in 2004, thought it was “somewhere around 2007, early 2007”. AL gave the following evidence:

“...We had been having a conversation about other things, and she said – again, I can’t remember the exact words, but she said something similar to she felt that she had trust issues because her stepfather used to touch her when she was a kid.”

- 51 When asked whether the complainant had told her anything else, AL said:

“I questioned was she talking about [the applicant], and she said, ‘Yes’. She – I asked her if it was just one time or more than once; she said, ‘More than once’. She said that it – he used to come into her bedroom at night in their house, but she didn’t give any other detail.”

- 52 **Russell Tiffen** started dating the complainant when he was around 20 years old and she was 17 years old. They moved in together after around 8-12 months and the relationship lasted for about 2 years. Mr Tiffen gave evidence that about 8 or 10 months into the relationship they had a conversation at the back of The Port of Bourke Hotel:

“She just said that when she was younger that she was sexually abused by [the applicant].”

- 53 Mr Tiffen said the complainant did not say how old she was at the time of the abuse, or how many times the abuse had happened, and did not provide any detail about where the abuse occurred. She did not raise the subject matter again.

- 54 **Nicholas Sanders** met the complainant in Armidale in 2008. Within a few months of meeting the two began a relationship which lasted approximately 2 years. Mr Sanders gave evidence that:

“She told me after an argument one evening that she was touched inappropriately as a child and went on to say that [the applicant] abused her as a child.”

- 55 Mr Sanders said that he and the complainant had many conversations after that night where they spoke about having children together and where Mr

Sanders raised concerns about having a man like the applicant around his children. However, the complainant did not provide any further details about the abuse.

- 56 **EM** first met the complainant at Bourke High School in around year 7 or 8 and remained close friends with her. She said the complainant had spoken to her about the applicant more than once and that the first such conversation took place in 2011 on the front step of the veranda at her house in Hope Street:

“She told me that, and I’m not sure if she said ‘[the applicant]’ or ‘my stepdad’, but that person had sexually assaulted her for a long time.”

- 57 EM said the complainant did not, at that time, say when the sexual assault occurred. Shortly after that first conversation, EM and the complainant had a further discussion over the ‘phone. EM gave evidence that the complainant told her about an incident that occurred when the complainant was attending Red Bend Catholic College in Forbes:

“...she had come home, I’m not sure for a holiday or if it was finished school, and she had said that she had told [the applicant] that she was seeing a boy from there. He then asked her if she even knew how to kiss and then proceeded to kiss her, and so she would’ve only been young then. But I don’t know when she told me.

...

I think she had, like, a flashback or something, and she’d said she remembers the pink lounge, they were sitting on the pink lounge in the lounge room. She told me the boy’s name and that she had been seeing him, and that she’d told [the applicant], and he said ‘Do you know how to kiss?’ and she’d said no, and then he kissed her.”

- 58 EM also gave evidence about a comment that the complainant made to her sometime after 2018 during “a face-to-face conversation”:

“I just, there wasn’t a conversation, more of – or it might’ve been a conversation. But there was a comment before that he had used Vaseline on her, to assault her.”

- 59 The Prosecutor returned to the subject of the use of Vaseline a short time later:

“Q. And then separately, there’s an incident where you’re aware that she had to put Vaseline on her son. Is that right?

A. Yep.

Q. How do you know she had to put Vaseline on her son?

A. Because I was at the doctors with her and I’d seen her having to do it. What she needed to do it for really hurt her son.

Q. What did she need to do with the Vaseline?

A. He had to have an emergency circumcision, and when he screamed 'It's hurting me', she was visibly a lot more upset when the doctor advised that 'You use the Vaseline.' It had immediate, an immediate reaction with her.

Q. When you say 'Immediate reaction', what did you see of [CC]?

A. She got really upset. She was in tears and said 'I can't do this. I can't do this.' Yeah, it was at, when we, so 20 - a couple of weeks after that, we were camping and she had to use it on her son again, and when he'd said 'You're really hurting me', she left for about three hours and sat in the car and cried."

60 EM said she was present at the doctors and the complainant left and went to sit in the car by herself.

61 **AH** is the complainant's cousin. They spent time together as children, mostly at their grandmother's house. As adults, AH and the complainant reconnected when the complainant moved to Tamworth in around 2018. In early 2019, AH and the complainant had a conversation at Sonny's Bakery in Tamworth:

"We said – she said 'There's some things that I need to work through, and to do that, you know, I need support and I need to address things properly.' Meaning telling people that were close to her, and not hiding it, and getting proper, you know, psychiatric help.

...

These are things she told me, and then after I said 'Okay, so what is it? What's going on?', and she said, 'Well, when I was growing up, [the applicant] was abusing me.'

...

And I said, and then I looked at her and I said 'sexually?', and she said, you know, nodded her head."

62 When asked if the complainant provided details of the sexual abuse, AH said that they had discussed it in other conversations, but did not give evidence of what the complainant had said.

63 **Kerrie-Anne Maunder** met the complainant in 2007 when they did a bridging course together at the Oorala Centre at the University of New England. Ms Maunder gave evidence that she and the complainant had had a conversation regarding childhood trauma, during which the complainant said, "One day they will hate me for bringing this up". The complainant did not provide any further details at that time.

64 Ms Maunder said that she and the complainant had a further conversation the following week:

"I, I remember [the complainant], throughout the course of the conversation saying that she'd never told anyone before. She spoke about her stepfather had sexually assaulted her also on more than one occasion.

...

She said that she was too young to realise how wrong it was. She also spoke about being too scared as a child to tell anyone. She also spoke about being told not to tell anyone about the events. She also said..(not transcribable)..same day she thought she only realised how long it was until she sort of became a teenager and started to really fathom what was happening."

- 65 When asked whether the complainant had provided details of the sexual assaults, Ms Maunder said:

"She mentioned little bits and pieces about it being her sibling or siblings being in the room at - on one occasion, and the need to feel silent during that period of time. Her - it's - it's quite difficult to sort of remember all the bits and pieces, but the, the more the conversation happened, [the complainant] would focus a lot more on not exactly into detail about the incidents, but more very concerned about how her family would feel if she brought this up."

- 66 **CM** is in a relationship with the complainant's biological father. In 2020, CM stayed overnight at the complainant's house in Tamworth. She recalled a conversation they had during the visit:

"It was in, like, in [the complainant's] house in her dining, lounge room area, like, we'd just finished dinner and the boys had gone to look at a motor bike they were buying for my boys, and she told me that, we were just talking about the kids and stuff, and she told me that - she got upset, she started to get upset, and she told me that she'd bee[n] messed around with, by [the applicant], which I then asked, like, what did she mean because I was a bit shocked, and she said she was molested. And then I asked her if he'd actually had sex with her, and she said yes."

- 67 CM said that the complainant "didn't go into" the details of the abuse. When she asked the complainant when the abuse began, the complainant "said that she couldn't pinpoint when it started. But she told [CM] it finished when she moved in with [CM and RM]".

- 68 **RC** is the complainant's husband. He gave evidence about a face-to-face conversation he had with the complainant in Bourke before they moved to Tamworth at the end of 2017:

"She said that stuff come up that, that related to her work, and then it, yeah, said that it happened in her childhood type of thing, yeah."

- 69 The complainant did not provide any further details at that time.

70 RC initially said the topic was never raised again. However, he was shown his police statement to refresh his memory and then gave evidence of a further conversation in August or September 2019 in their backyard. He said the complainant disclosed that it was the applicant who was responsible for what happened in her past. However, he said the complainant never provided him with specific details about what happened to her.

Opportunity evidence

71 One of the issues at the trial concerned whether the applicant had the opportunity to commit the offences alleged against him. Both parties called evidence relevant to this issue and there was also evidence that records, which may have been relevant, were unable to be located.

72 **Denise Stalley** and her husband Bill used to own a sheep station called Barrakee which is situated on Wanaaring Road about 115 kilometres from Bourke. The couple also owned a station called Rossmore where they lived. The applicant worked on their properties over many years doing “sheep work and repairs and maintenance, [he] did a lot of cementing ... for different things, troughs and fencing and whatever”. He was mainly working full-time. Without being critical, the Prosecutor asked Mrs Stalley a leading question as to whether the applicant worked on the properties full-time or part-time “between 1991 and 2004” but the evidence of surrounding events, the passage of time and the unavailability of relevant records made it difficult to establish a precise period of his employment with the Stalleys. Mrs Stalley said the applicant generally worked from 7am until 4pm or 5pm, although he occasionally finished work at around 3pm. She said that Rossmore was about a 20-minute drive (27 km) from Bourke and Barrakee was about 1 to 1.5 hours from Bourke. Mrs Stalley agreed that her husband and the applicant would sometimes spend time together outside of work hours, and that the applicant worked some weekends. She also agreed there was a house on Barrakee where the applicant and his family, including the complainant, could (and did) stay on weekends.

73 **RB** is one of the applicant’s daughters. The Prosecutor called her, asked her name and relationship with the applicant, and asked no further questions.

Ultimately, the prosecution case was that RB's evidence should not be accepted. The substance of the evidence was elicited in cross-examination. In the late 1990s, RB would visit the applicant's home at Anson Street every week after work at around 4pm or 5pm. She gave evidence that the applicant was never at home when she arrived, and that he did not get there until after dinner which was around 6pm or 7pm, and sometimes 8pm:

“Q. Sorry, to their home. When you got to their home would [the applicant] be there?

A. No. He would be there later like after dinner.

Q. What time would they have dinner ordinarily? Or was it different times?

A. Yeah, no, they used to eat about 7 o'clock, 6 or 7 o'clock, sometimes 8 o'clock, yeah.

Q. Did you ever get there to the house and [the applicant] was there of a weekday, of an afternoon after the kids were at school?

A. No, not - not during the week, no.

Q. You're quite sure about that?

A. Yes, I'm sure about that.”

- 74 In re-examination, the Prosecutor asked if RB attended the Anson Street home “randomly” and put to her that “we are now talking about some 20 years ago odd?”. RB agreed with both of those propositions.
- 75 **BM** is another of the applicant's daughters. She lived with the complainant, TM and the applicant as the two girls were growing up. She was a few years younger than the complainant and was the couple's biological daughter. She gave evidence that in 1997 she and the complainant would finish primary school a little after 3pm and would either catch the bus home or be picked up by their mother. She was asked who would be at the Anson Street home after school and she said either her and the complainant, or the two of them and “mum”. Her father did not get home before the complainant and BM, and when asked directly “never?” she said “no”. When the complainant attended Bourke High School from year 7 to 9, BM said that she and the complainant would meet up after school and go home together. Her evidence was that she and the complainant were always the first to arrive home, and that they always arrived together. She said that the applicant was “never home before us”.
- 76 BM initially denied that the complainant told her that she had been sexually abused by the applicant. However, she was shown an exchange of text

messages between her and the complainant (Ex 6) in which BM had written “Because you once told me you were sexually abused”. However, BM maintained that although the complainant told her that something had happened to her as a child, “she has never named my father as the sexual abuser”.

- 77 The Prosecutor was granted leave to cross-examine BM and she conceded that she asked the complainant (by text message) if her disclosure had “anything to do with dad?”. The complainant had confirmed that it did. While BM acknowledged that the complainant “used the word ‘dad’” she maintained that it was unclear whether this was a reference to the applicant because the complainant “referred to both her fathers as dad”, that being the applicant and her biological father.
- 78 BM also gave evidence that the applicant would leave for work before the sun came up. She said she would have coffee with him before he left “every morning”. However, when pressed by the Prosecutor, she conceded that there were “very rare” occasions when her father was up but she was not.
- 79 The Prosecutor confirmed at the end of cross-examination that the effect of BM’s evidence was that “there was no opportunity for the accused of being home, before [TM] got home.” BM was pressed about the passage of time – 20 years – and it was put to her that she could not have a “categorical memory of every single day, 20 years ago” and she replied:
- “A. I’m not saying I have a categorical memory. I’m telling you the best of my ability what I remember, and that’s my family moments.
- Q. And you must accept as a possibility that there were times where the accused was home, where you weren’t?
- A. As I said, I was a child, and I have racked my brains out thinking back of everything I can, everything. I love my dad. I love my sister, but I do not have a memory of us being apart.
- Q. Can you rule it out as a possibility?
- A. In my head, I can rule it out. [The complainant] and I were inseparable. She was my best friend. I do love my sister and she did look after me as a child. We were always together.”
- 80 Ms Hopper, counsel for the applicant, cross-examined BM about the time spent at Barrakee. This included eliciting evidence about the layout and facilities in the house on Barrakee and the fact that the applicant also worked at

Hopelands, a station on the same road, which she said the family also visited when her father was working there. BM said the complainant stopped going to the station(s) at some point which she estimated to be “probably around when she was 11, ten maybe.” Over objection, BM was cross-examined to establish that the complainant had four children and she had brought them to the Anson Street house where the applicant was living.

- 81 Counsel also asked questions about whether BM “loved” her sister, something she had asserted in cross-examination by the Prosecutor. This provoked re-examination about text messages between the sisters after the complainant raised her allegations against the applicant. In those messages, BM wrote:

“I fucking hate you. I fucking hate you. Don’t you ever fucking contact me again ever. I fucking hate you.”

- 82 These messages were “after 2019” but “before 2023” and BM said “emotions were very high between us.”

Police investigation

- 83 Detective Senior Constable Whatler gave evidence that she took charge of the investigation in August 2022 and the complainant made a police statement on 15 August 2022. She approached the applicant’s wife (TM) who did not provide a statement and said she had little memory of dates. DSC Whatler confirmed she arranged to lawfully record a conversation between the complainant and the applicant. This “pretext call” was made on 7 December 2022 when the applicant was unaware of police involvement and did not know the call was being recorded. The recording was played and tendered during the complainant’s evidence. The transcript was MFI 8 and in the following terms:

“The applicant: Hello

The complainant: Hi dad its [the complainant] how are you going, [the applicant]

The applicant: Hello

The complainant: Hello, it’s [the complainant]

The applicant: Beg your pardon

The complainant: It’s [the complainant]

The applicant: Oh [the complainant], how ya going

The complainant: Good how are you

The applicant: Arh battling along mate, not doing that good but ya

The complainant: I um I just called because after our last conversation it was a bit, it didn't end very well

The applicant: What was that you'll have to speak up I'm a bit deaf.

The complainant: I said I just called cause after our last conversation it didn't end very well and I just wanted to, I just wanted to I guess put things behind me just talk

The applicant: Yeah

The complainant: Yeah

The applicant: Are you going alright?

The complainant: Um yes and no

The applicant: Yeah

The complainant: Um I spoke to I spoke to my therapist a few weeks ago and she said to would be a good idea to ring you and talk about forgiveness

The applicant: Ah right

The complainant: After um I don't know if you have been talking to mum about it but um after our last call when youse said when I made those accusations that you know you had touched me when I was little I talked to mum arh um and she said that you know I need to let it go um which I am I'm letting it go I just, I just wanted to talk to you about it before I guess I can make peace with myself um and you know move on with my life really um my biggest thing I guess is I remember you teaching me how to kiss and looking back on it now, maybe you did that out of love and not as an abuse thing and I just wanted to clear the air with you before I just let it go and I've told mum that i was going to talk to you about it because she's obviously told me that she doesn't believe me and that's fine the only thing I wanted to talk to, I just wanted to talk to you about it

The applicant: Oh we already spoke about it I can't I can't recall anything like that happening, but we can't I can't recall that like I said I didn't know where you were coming from before you know and I'm still saying you know, why you saying these things for or what's happening but yep

The complainant: I just remember, I just remember lying on the bed and you I remember lying on the bed with you and you rubbing me in circles and asking me if it felt good and I remember that it did and I said was it my fault that

The applicant: When you when you first told me about all this I said have you spoke to your mother and I said you said no I said you better tell her you said no I said no ill tell her and I went and told her all about this bad story

The complainant: Yea yep

The applicant: And um

The complainant: And I talked to her about it I told her

The applicant: Mm but I think arh I know it never happened but you got ya mother she doesn't know where she is or where she is going she loves ya and she don't know what's going on or nuffen and I don't know is if you're falling out with your mother too over nothing

The complainant: But I remember things dad I remember I remember having sex with you I remember you

The applicant: Ah [the complainant] don't go saying that things mate don't go saying that, that's wrong

The complainant: But it's not

The applicant: It is it is [the complainant], you know it's wrong, I don't know what's going on I don't know what's going there with you, but I told you before these things aint never happened but you keep saying the same thing. why?

The complainant: Because it did happen, I remember it happening

The applicant: No I hadn't, no It hadn't, I don't know if you've got yourself events or something just don't know its arh, I tried to figure out what its all over but I don't know what it is I just don't know where your coming from all the time you say these things.

The complainant: I'm not crazy though I remember it happening

The applicant: Well, you got it in your mind and I aint trying to convince ya

The complainant: I remember that pink lounge

The applicant: Yep

The complainant: In that lounge room I remember that sitting there and you saying to me do you know how to kiss its easy ill show you

The applicant: Ah we better end this conversation this I don't know this just getting worse and worsen

The complainant: I'm not crazy though

The applicant: Nah I think we better end it [the complainant] cause I don't like the way you been speaking here about bout this here trying to accuse me of touching you and that never happen. Only time you fell off a push bike and you hurt your private and you wanted to show me and I said no you ring your mother. Yea that's the only thing I can recall about all this and I never I never tried to look at or nothing like that. I said ring your mother

The complainant: What about when I would come home from school, and you would be in grey track suit pants and I saw your I saw your penis you showed me your penis you use to have

The applicant: I'm going to have to end this [the complainant] I'm going to end this this filthy, filthy talk.

The complainant: What if I ask [BM] what she remembers I told her when I was a kid

The applicant: nah oh well you ring [BM] and I'm going to end this now and I'll talk to and I'll probably be talking to you shortly.

The complainant: Do you wanna do you want to talk to me about this

The applicant: No no not about not about something I have never ever done and I'm not going to I'm not going to listen here and hear you talk like that alright I'm going to end it now. ill talk to you one day [the complainant] when you alright, but not no I don't want to talk to you about this bloody filth and saying I touched this, and I done that and its been going on for years your

saying these things I don't know if you hate me or what's what's going on or your trying to get back at me.

The complainant: For what

The applicant: I'm ending it now [the complainant] nah I'm ending it

The complainant: For what you raised me you raised me

The applicant: no, no, I'm ending this call mate bye."

- 84 The officer also confirmed that the applicant had never been charged with offences of a sexual nature.

Directed verdicts of not guilty

- 85 On 1 November 2024, following the close of the prosecution case, Ms Hopper made an application that the jury be directed to return verdicts of not guilty in respect of counts 8, 9 and 10. The Prosecutor did not oppose that application and asked to put on the record her reasons for taking that position in respect of each count. Put briefly, those reasons were:

- Count 8 was an allegation of inciting an act of indecency. It was accepted that there was no evidence that the applicant urged or encouraged the complainant to touch herself on the outside of her vagina.
- Count 9 was "an allegation of penile/oral penetration". The Prosecutor conceded that she was bound by "the type of intercourse" particularised in her opening address and that there was no evidence to support this allegation.
- Count 10 was an allegation of sexual intercourse. The particulars of the intercourse were described by the Prosecutor as "penile/vaginal intercourse with the complainant and she orgasmed". It was acknowledged "that the orgasm in those circumstances they're simply particulars" but the Prosecutor conceded there were several acts of penile/vaginal intercourse described and it was unclear which of those might relate to count 10. It was possible:

"... they simply could be a conflation of the earlier incident relating to count 5, and the jury couldn't [be] satisfied that she has gone onto describe a separate offence that could ground count 10."

- 86 The trial Judge accepted these concessions, and observed that "there's a real danger in the jury trying to find evidence that might support a particular count". Her Honour provided brief reasons for accepting that there was insufficient evidence capable of establishing beyond reasonable doubt the allegations in counts 8, 9 and 10. Her Honour noted the fact that the prosecution relied on "effectively, ongoing uncharged sexual misconduct" and "opened its case on the basis of a number of specific incidents" each attaching to a particular count on the indictment. Her Honour found that the complainant's evidence "did not

appear to address all of the counts, and in fact, did not provide all particulars consistent with the way the [Prosecutor] had opened.” Her Honour recounted the particulars by reference to the opening and the “matrix” document which had, by then, been withdrawn from the jury. Her Honour concluded there was “no prima facie case in support” of counts 8, 9 and 10.

87 Accordingly, at her Honour’s direction, the jury returned a verdict of not guilty to counts 8, 9 and 10 on Friday 1 November 2024 at 10:10am.

88 We note in passing that, because of the bases upon which these verdicts were directed, those verdicts do not inform to any great extent a proper consideration of the grounds of appeal advanced.

The applicant’s case at trial and the evidence of his wife

89 The applicant’s case, as put in the cross-examination of the complainant, comprised a complete denial of any sexual wrongdoing towards the complainant. This was reflected in his responses to the complainant in an earlier telephone conversation and in the pretext call (MFI 8). He relied on these responses and did not give evidence at the trial. However, his wife gave evidence which raised questions about whether the applicant had the opportunity to commit the offences, and which highlighted the forensic difficulties her husband faced in defending himself against allegations relating to events so long ago. She was cross-examined robustly and the Prosecutor questioned her impartiality and emphasised the implausibility that, 20 years after the events, she could rule out the possibility that the applicant and the complainant were alone together at the time of the alleged offences.

TM’s evidence

90 **TM** is the applicant’s wife and the complainant’s biological mother. She was the only witness called by the applicant and her evidence traversed several topics.

91 TM confirmed that the complainant was born in 1987 and that her relationship with the complainant’s biological father, RM ended in August or September 1988. Soon thereafter she commenced a relationship with the applicant and their daughter, BM, was born in 1990. She said they lived in various houses (including another house in Anson Street) before purchasing the house in Anson Street (where many of the offences allegedly occurred) in 1997.

- 92 The complainant commenced kindergarten in 1992 at Bourke Public School, moved to St Ignatius Primary School in 1995 (year 2) and attended Bourke High School in 2000 (year 7). She was at Bourke High School for years 7, 8 and 9 and then went to Red Bend Catholic College where she boarded in 2003 (year 10). She was expelled in year 11, and returned home until she moved out to live “with [RM] a few months later”. She returned to Bourke High School in year 12 but only completed the first term.
- 93 TM gave evidence of her employment and that of her husband during the relevant period. The applicant worked as a “contract musterer” at various properties outside of Bourke and left home very early to start work at 7:00am; “he was gone dark time because he had to travel”. He rarely got home before dark and when he finished work he went for a drink. TM worked in childcare in Bourke up until the year 2000 when she took a job with the Bourke Mobile Children’s Service where she worked for 2½ years before taking a position at the Exhibition Centre (presumably in Bourke). She gave evidence that she moved out to Hopelands at (or near) Wanaaring in 2006.
- 94 In effect, TM’s evidence was that the applicant was not alone with the complainant during the relevant periods because of his work hours and because she would collect the children from school and be with them before the applicant returned from work. She also said the complainant and BM were very close and always together and would walk home from school together. Otherwise, TM’s parents would look after the children. TM was asked if she “ever” came home to find the applicant at home with BM and the complainant and she said “no”.
- 95 She also gave evidence relevant to the relationship of the complainant and the applicant after the offending but before the complaint was made to police. For example, she identified the applicant with the complainant or her children in photographs taken around Christmas of 2015 (Ex 9-12) and spoke of the complainant’s wedding when she asked the applicant to “give [the complainant] away”. She said she and the applicant saw the grandkids “every week” until they moved away in 2017. She testified to a fall or accident the complainant had in Bourke which resulted in her admission to hospital and being “airlifted to

Dubbo Base Hospital". The applicant also had an accident on that day and the pair were airlifted on the same 'plane. When TM visited the pair in Dubbo, the complainant asked her "how dad was".

- 96 TM gave evidence about the deterioration of her relationship with her daughter. She said there were problems with money which the complainant did not pay back and TM subsequently refused to lend her more money. When it emerged that the complainant was making allegations against somebody in the family, TM demanded "if you're making allegations about anyone in this household you need to say it to me, to my face." According to TM, they were to meet at the Bourke Bakery but the complainant did not attend the meeting. TM and the complainant last spoke in November 2022.
- 97 TM also gave evidence of her attempts to obtain employment records for her husband to establish where he was working and his hours of work during the relevant periods.

The cross-examination of TM

- 98 The Prosecutor cross-examined TM forcefully but relatively briefly. TM was challenged as to her truthfulness and it was suggested, at least implicitly, that her evidence was biased in favour of her husband.
- 99 TM agreed her husband was "very good to the kids" and there was no reason that he would not be alone with the complainant. It was put to her that "you don't have a memory of every single day between 1997 and 1999". TM agreed with this proposition. However, she maintained that she was "overprotective" and that had the applicant been alone with the complainant she "would've known."
- 100 There was cross-examination about how the children got home from school and why they could not just walk given the school was just across the road from home. The witness maintained she would pick them up and walk with them or, if she was not available, her parents would do so. This part of the cross-examination included the following exchange:

"Q. Do you accept that in those circumstances, the period between school finishing and when you got home at 4.30, you weren't around [CC] at that point in time?

A. I've already said that I wasn't. If I'm at work, no.

Q. What happened in that period of time, you don't have direct knowledge of, do you?

A. I do. If they're at my parents', I do.

Q. Only because of, what, conversations with your parents?

A. Yes.

Q. And you're saying that every single day between 1997 and 1999, when you weren't there to cross the road to St Ignatius school and walk [CC] home, that they came and picked [CC] up from school?

A. Yes. My parents are good like that.

Q. Every single day between 1997 and 1999?

A. Yes.

Q. Do you have an encyclopaedic memory of that period of time?

A. No, but I know the sort of parent that I was."

- 101 There was then cross-examination about the period when TM was working with the Mobile Children's Service and required at times to drive 200km out of town, arriving home much later, and the period between 2000 and 2002 when the complainant had started high school. Again, the exchanges became testy:

"Q. Do you have a memory of every single time you had to go out of town from the year 2000?

A. I don't think anyone would, but if you want to call on my ex-employer, you can certainly do that and verify it with her.

...

Q. Not once did she catch the school bus?

A. Not when she was 14.

Q. Are you sure about that?

A. Not to home.

Q. Could you be wrong about that, bearing in mind that this is 20 years ago?

A. Fine. If you want me to be wrong, I'll be wrong. But no, to my knowledge, she only walked, because there's a block and a half to the school, and she would often walk with [BM]."

- 102 These passages are reasonably representative of a terse cross-examination of a somewhat argumentative and dogmatic witness. At one point, the trial Judge disallowed questions about the witness declining to make a police statement and her subjective opinion about whether her evidence was important.
- 103 TM's evidence assumed some importance on the appeal because the applicant relied on it with respect to ground 2 and the respondent submitted in addressing grounds 1 and 2 that it was open to the jury to reject TM's evidence as implausible. It was also important more generally because it informed the jury directions concerning the "significant forensic disadvantage" suffered by

the applicant in defending himself against allegations concerning events dating back some 25 years.

Relevant jury directions

- 104 The authorities emphasise that in evaluating submissions like those raised under grounds 1 and 2, the appellate court must consider the directions the jury received. In this case, with one important exception which is the basis of ground 3, no criticism was made on appeal of the directions provided either in writing or in the summing up. It is not necessary to set out in full many of the directions, most of which were orthodox or in accordance with relevant statutory provisions. It is also unnecessary for the most part to repeat her Honour's explanation of the elements of the offences.

Standard of proof and elements of the offences

- 105 The trial Judge gave the jury standard but firm directions as to the onus and standard of proof. These were repeated on a number of occasions. Her Honour reminded the jury on something like 30 occasions that the charges and the elements of the offences had to be established "beyond reasonable doubt". This was both in the context of the general directions on the onus of proof and in explaining the elements of the individual offences.
- 106 As to the elements of the offences, the trial Judge provided the jury with written directions (MFI 23) which set out both the elements of each of the offences and related concepts such as "assault" and "indecent".

Separate consideration of each count

- 107 Her Honour told the jury that each count on the indictment needed to be proved beyond reasonable doubt and that each count was to be considered separately. Given the content of the arguments under ground 1, it is worth setting out the whole of the relevant direction:

"As I mentioned to you at the start of the trial, and as you will now understand, the charges against the accused are being tried together principally as a matter of convenience. You must not be prejudiced against the accused because of the number of charges he faces. Although the evidence relating to the charges has all been heard together, it is important that you understand that you will need to consider each charge separately. You will be required to return a verdict in relation to each separate count at the end of the trial. That verdict must be based only on the evidence that relates to each count. Giving separate consideration to the individual counts means that you are entitled to

bring in verdicts of guilty on some counts and not guilty on some other counts, if there is a logical reason for that outcome.”

108 MFI 23 commenced with the words, emboldened, **“You must consider each count and the evidence available to support it separately.”**

Markuleski direction: taking into account acquittals in consideration of other counts

109 Her Honour followed that “separate consideration” direction with a direction that has come to be known in New South Wales as a “*Markuleski* direction”: *R v Markuleski* at [185]-[191]. This is the direction of which complaint was made under ground 3 and was as follows:

“If you were to find the accused not guilty on any count, particularly if that was because you had doubts about the reliability of the complainant’s evidence, you would have to consider how that conclusion affected your consideration of the remaining counts.”

Motive to lie

110 The trial Judge reminded the jury of the motive(s) in the complainant to lie that were advanced by the applicant but explained that an accused person is not required to establish a motive to lie in a witness or complainant. Her Honour directed the jury in accordance with the important judgment of Sperling J in the case of *R v Jovanovic* (1997) 42 NSWLR 520 at 542. The trial Judge explained:

“It would be wrong to conclude that the complainant is telling the truth because there is no apparent reason, in your view, for her to lie. People lie for all sorts of reasons; sometimes it is apparent, sometimes it is not; sometimes the reason is discovered, sometimes it is not. You cannot be satisfied that the complainant is telling the truth merely because there is no apparent reason for the complainant to have made up the allegations. There might be a reason for her to be untruthful that nobody knows about. Your task does not include speculating about whether there is some reason why the complainant would lie. Just because it has been alleged that the complainant has lied, it does not mean that the onus of proving a lie, or a motive for her to lie, shifts to the accused. The accused does not have to prove that the complainant lied, or that she had a motive to lie, or what that motive might be.”

Directions required by statute concerning evidence given by complainants in sexual assault cases¹

111 There were several directions required by statute which explained to the jury that the credibility of the complainant was not necessarily diminished by the delay in complaint or because her conduct after the assaults might be

¹ See for example, Criminal Procedure Act 1986 (NSW), Pt 5.

considered at first blush to be counter-intuitive (our phrase). These included things quite properly advanced by Ms Hopper at the trial such as the complainant maintaining contact with the applicant, facilitating contact between the alleged perpetrator and her own children, and inviting him to attend her wedding.

- 112 Her Honour explained that inconsistency in account and inability to recall specific details may not impact on the credibility of the complainant. She explained that “trauma may affect people differently and may affect how they recall events”. That direction was balanced by a direction that it was for the jury to decide whether any differences in the complainant’s account were important “in assessing her truthfulness and reliability.”

Significant forensic disadvantage²

- 113 A direction which had some prominence on the hearing of the appeal was the direction relating to the applicant suffering a forensic disadvantage in defending himself so long after the events said to give rise to the allegations. That direction was subject to discussion at the trial and was given in the following terms:

“There is a further direction I must now give you relating to the issue of delay in complaint being made by the complainant. It is most important that you appreciate fully the effects of delay on the ability of the accused to defend himself by testing the prosecution evidence, and to establish a reasonable doubt about his guilt. In this regard, I refer specifically to the delay in instituting the prosecution, which meant that the business records relating to the accused’s work have been destroyed. These difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence or in bringing forward evidence himself to establish a reasonable doubt about his guilt or both. The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.

An aspect of the accused’s disadvantage is that had he learnt of the allegations at a much earlier time, the accused may have been able to find items of evidence that might have either contradicted the complainant or supported his case, or both. The defence, on behalf of the accused, may have been able to produce evidence of where the accused was at particular times and on particular dates, and to have produced evidence to support this. For example, any work document relating to his start and finishing times when he was working at Barrakee Station during the period 1997 through to 1999. In that regard, you will recall the evidence of [TM] that following her inquiry, those

² Evidence Act 1995 (NSW), s 165B.

records were destroyed by Wright accounting after ten years, and are therefore no longer available.

Because the accused has been put into this situation of significant disadvantage, he has been prejudiced in the conduct of his defence. As a result, I direct you that before you can convict the accused you must give the prosecution case the most careful scrutiny. In carrying out that scrutiny, you must bear in mind the matters that I have just been speaking about; the fact that the complainant's evidence has not been tested to the extent that it otherwise could have been, and the inability of the accused to bring forward evidence to challenge it or to support the accused's defence."

Consideration: the grounds of appeal and the reasonableness of the verdicts

114 While the applicant's grounds of appeal raise discrete issues, there is a connexion between them. Ground 1 (the asserted factual inconsistency in the verdicts) is a species of a general ground that the guilty verdicts on counts 1, 2 and 3 were unreasonable. Further, in developing the argument under ground 2, the applicant relies on the not guilty verdicts on counts 6, 7, 11 and 13 and the failure of the jury to agree on its verdicts on counts 4, 5, 12 and 14. Ground 3, the complaint about the failure to give a "full" *Markuleski* direction is relevant to a consideration of ground 1. As Spigelman CJ said in *R v Markuleski* at [185]-[186]:

"[185] It may appear to be obvious that a reasonable doubt about one aspect of a complainant's evidence ought to be taken into account when assessing that witness's evidence on other matters. However, there have been a significant number of cases in which courts of criminal appeal have acted on the basis that the jury may have failed to do so.

[186] In the light of the number of cases it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count."

115 In reaching a conclusion as to grounds 1 and 2, each member of the Court has undertaken their own independent assessment of the whole of the record of the trial in accordance with well established High Court authority.

Ground 3 as a stand-alone ground

116 We have set out the direction provided by the trial Judge at [109]. Following the passage from *R v Markuleski* set out above at [114], Spigelman CJ went on to provide some guidance as to the kinds of directions that may be appropriate depending on the circumstances of the case:

“[187] Some form of direction assisting the jury in this respect should be given, to employ the terminology found in *Kilby* and *Davies* ‘as a general rule’. Its absence is not necessarily fatal (as it was not in *Davies* itself). Furthermore, as the joint judgment in *Crofts* affirmed, the ‘general rule’ does not apply ‘where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness’ (at 451).

[188] It is not necessary to specify any precise words for such a direction. That will depend on the circumstances of the case. It will often be appropriate to direct a jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant’s evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant’s evidence generally.

[189] On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.

[190] Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant’s credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.

[191] The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant’s evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant’s evidence with respect to other counts.”

- 117 It will be seen that at [188] his Honour referred to “the truthfulness **or** reliability” (our emphasis) of a complainant’s evidence, thus distinguishing between those matters. It was also posited that it may be appropriate to direct the jury that it might conclude that there was nothing to distinguish the evidence of the complainant on one count from the evidence she gave on the other counts.
- 118 The direction in the present case only addressed the complainant’s “reliability” and failed to refer to her truthfulness or honesty. Given the complainant’s truthfulness was put in issue in relation to several matters, it would have been preferable to emphasise that matter rather than focusing exclusively on “reliability”. However, in the way the case was conducted, and given the addresses and the balance of the summing up, the jury would have understood clearly that any doubt it felt about the complainant’s honesty in relation to one allegation would have to be considered in relation to its findings on the other counts.

- 119 Similarly, it may have been preferable to direct the jury in accordance with Spigelman CJ's suggested direction at [189] although that direction would require modification to reflect the circumstances of the case because there were some distinctions in the evidence relating to the various counts. Similarly, the direction following on from that – a modified form of the suggested direction in [190] – would have emphasised the need to apply consistent reasoning across all counts given the similarities in the evidence relating to each.
- 120 However, counsel at trial was plainly satisfied that, in the atmosphere of the trial and in view of the issues before the jury, the direction was sufficient. Spigelman CJ made it clear in *R v Markuleski* that the kinds of directions his Honour suggested were not prescriptive and that the form and terms of the direction would turn on the facts and circumstances of the case. While accepting that the direction could have been more detailed and directed, we would not grant leave to appeal on ground 3 alone.
- 121 However, the substance and terms of the direction remains relevant to a determination of grounds 1 and 2.

Focus on the acquittals and the relevance of the counts where the jury could not agree

- 122 In *R v TK* (2009) 74 NSWLR 299; [2009] NSWCCA 151, Simpson J said at [128]:

“In determining whether convictions are unreasonable, in these circumstances, the focus of the inquiry is upon any explanation, not for the convictions, but for the acquittals. If such an explanation can be found, without resort to doubts about the complainant's credibility, the verdicts of guilty may not be unreasonable, at least not on that basis.”

- 123 However, in *Saunders v R* [2022] NSWCCA 273 Hamill J emphasised “this generally is the correct approach. However, it is not an absolute rule. Nor is it the end of the inquiry.” Simpson JA herself at [107] and Ierace J at [133] agreed with those additional observations.
- 124 Simpson J also stressed in *R v TK* that the inquiry is not limited to the evidence itself and “may also permit examination of circumstances that give ‘insight’ (*Mackenzie*), to the extent that is permissible, into the jury's thinking.” *R v TK*

involved a jury which was far from “as inscrutable as the Sphynx”,³ and the inquiry on appeal into the mixture of verdicts included consideration of the many notes and communications concerning the deliberations which emanated from the jury room.

125 Insight may also be gained from the fact that the jury was unable to reach a unanimous or majority verdict in relation to a number of other counts: see, for example, *Dabboul v R* (2019) 100 NSWLR 682; [2019] NSWCCA 191 at [226]-[230] (Bathurst CJ) and [316]-[319] (Hamill J). However, as the judgments in *Dabboul v R* show, considering the failure of a jury to reach unanimity is a task to be undertaken with considerable care. In the present case it provides some insight into the fact that the jury appears not to have reached compromise by a kind of impermissible horse-trading as to the counts on which it would convict or acquit.

126 Whatever insight might be gleaned from material outside of the evidence itself and the directions provided in the summing up, it is not permissible for an intermediate appellate court to engage in speculation: *Dabboul v R* at [315].

The acquittals on counts 11 and 13 and the inability of the jury to agree on the alternative counts 12 and 14

127 The only difference between the terms of count 11 and those of the alternative count 12 was the age of the complainant. Count 11 required the jury to be satisfied beyond reasonable doubt that the complainant was aged 16 years, while count 12 required that she be aged 17 years. The same distinction applied to counts 13 and 14. When the inability to reach verdicts on the alternative counts (count 12 and 14) is taken into account, it is very likely that the acquittals on counts 11 and 13 resulted from the jury reaching the unanimous conclusion that the evidence did not establish that the complainant was under 17 at the time of the relevant events. The discharge of the jury without verdicts on counts 12 and 14 establishes no more than that an unknown number of jurors (more than 1) had a reasonable doubt about the proof of one or more of the elements of the offence(s).

³ MacKenzie v The Queen (1996) 190 CLR 348 at 365; [1996] HCA 35.

128 In short, little insight can be gained from the outcomes on counts 11, 12, 13 and 14. On this, the parties seemed to be in general agreement.

The directed verdicts of not guilty on counts 8, 9 and 10

129 Similarly, but for different reasons, little insight can be gained from the verdicts on counts 8, 9 and 10 which were delivered on the trial Judge's direction following her Honour's acceptance of the joint submission of the parties that the evidence was not capable of establishing the elements of those offences beyond reasonable doubt.

130 The reason that the prosecution case failed on those counts was because of the possibility that the evidence (if there was any) relating to the specific allegations concerning counts 8, 9 and 10 was conflated with the evidence of uncharged acts. It was impossible for the evidence to be disentangled. This did not reflect on the honesty of the complainant but resulted from her giving evidence of what she alleged was an ongoing course of sexual misconduct going back many years.

The acquittals on counts 6 and 7, convictions on counts 1, 2 and 3 and failure to reach verdicts on counts on counts 4 and 5

131 Counts 6 and 7 related to events alleged to have taken place at Barrakee Station whereas counts 1-5 allegedly occurred at the Anson Street house.

132 It cannot be said that there was any discernible difference in the detail and specificity of the complainant's evidence as to what occurred in counts 1-3 as compared to counts 6 and 7 and she did not show any particular "uncertainty as to matters of detail" when she testified to the events in counts 6 and 7: *cf MFA v The Queen* at [34]. Nor, on a reading of the transcript, did the complainant demonstrate "uncertainty as to matters of detail" or "a faulty recollection" when she gave evidence about the events underlying counts 6 and 7: *ibid*.

133 On the other hand, there were differences of substance in the evidence of opportunity as between the alleged offences at Anson Street and those arising from visits to Barrakee.

- 134 The evidentiary dispute concerning when the applicant arrived home from work during the period of counts 1-3 was stark. The complainant was steadfast in saying that there were many occasions when the applicant arrived home by the time she got home from school. Her mother's evidence, and that of BM, was equally firm. Each of these three witnesses was cross-examined forcefully about their evidence on this subject. It was open to the jury to find the strident nature of the evidence given by the complainant's mother and sister to be somewhat implausible. Each provided absolute testimony that the applicant *never* arrived home before the complainant or that the two young girls were *a/ways* together after school. We accept the respondent's submission that some of this evidence was so unqualified that the jury was entitled to reject it. By contrast, the complainant made concessions that there were occasions when the applicant would leave before dawn and not return until after she had gone to bed.
- 135 The evidence going to the applicant's opportunity to commit the offences at Barrakee Station was somewhat more nuanced. It included the mother's evidence and that of the complainant, each of whom was somewhat tendentious in their evidence and each of whom was cross-examined vigorously. However, there was also evidence from the owner of the station (Mrs Stalley) which appeared to be provided from a position of disinterest. While her evidence about visits from the family, including the complainant and the applicant, allowed for the opportunity to commit the offences, those opportunities were less frequent and the direction concerning forensic disadvantage somewhat more pertinent to those counts.
- 136 The failure of the jury to reach verdicts on counts 4 and 5 is more difficult to explain in the light of the convictions on counts 1, 2 and 3 but the jury may have considered the evidence in relation to those latter counts to be somewhat bereft of detail and that it was given non-sequentially, if not chaotically. In the circumstances of this case, it would not be appropriate to make too much of the failure of the jury to reach unanimous or majority verdicts. To do so would be to engage in inappropriate speculation.

137 The final thing that should be observed is that the guilty verdicts related to the first three counts on the indictment and related to the offences which occurred in the early stages. This may suggest that the jury found the complainant's evidence on those counts to be more convincing and certain and less likely to be affected by the vagaries of memory of the kind that led to the directed verdicts on counts 8, 9 and 10.

Absence of evidence of improper compromise

138 There is nothing in the record of the trial that suggests the jury compromised or reached some improper deal to convict on some counts but not on others when, in fact, it was unable to reach a unanimous verdict. As we have said, the failure to reach either unanimous or majority verdicts on a number of counts suggests that the contrary is true. Where unanimity could not be reached, the jury indicated as much and did not return verdicts.

Resolution of ground 1: were the verdicts factually inconsistent?

139 We cannot say that ground 1 is easy to resolve. This is not a case where there is an obvious or compelling reason for the mixed verdicts.

140 However, there is no suggestion of improper compromise in the verdicts and there were some, albeit subtle, differences in the evidence relating to counts 1-3.

141 Further, the complainant's evidence more generally received some support in the body of complaint evidence. There was a particular aspect of that evidence which, in our assessment, strongly supported her credibility. In evidence that was ultimately left to the jury as evidence of context concerning uncharged criminal acts, the complainant described the use of Vaseline to facilitate penetration of her genitalia either by use of the applicant finger(s) or penis. EM gave evidence, reproduced above at [56]-[60] which provided support for the allegation of the use of Vaseline for this purpose. EM was present when the complainant had an immediate and visceral reaction when medical staff used Vaseline in treating her son for an "emergency circumcision".

142 While this evidence did not relate to a specific count on the indictment, the complainant's reaction and EM's description provided what the jury may have considered to be cogent support for the complainant's general allegation of

sexual abuse. It was an unusual detail for one person to fabricate, let alone two.

- 143 It was open to the jury, in the sense used by the High Court in cases such as *MFA v The Queen* and *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63 to find that the complainant was a generally honest and credible witness. It was also open to accept her evidence (beyond reasonable doubt) over the evidence given by her mother and sister.
- 144 While the reasons for the different verdicts do not jump off the pages of the record, it may be that the jury, as articulated in *MFA v The Queen* took “a cautious approach to the discharge of a heavy responsibility” and “drew back” from convicting on those counts where the evidence did not receive some form of support or was less certain in terms of surrounding detail.
- 145 The applicant has not discharged its onus of establishing that the verdicts fail the test of logic and reasonableness. We would not uphold ground 1.

Resolution of ground 2: were the verdicts on counts 1, 2 and 3 unreasonable or unable to be supported having regard to the evidence

- 146 The task to be undertaken by this Court under a ground asserting that a jury verdict is unreasonable is well-established: see, for example, *Morris v The Queen* (1987) 163 CLR 454 at 472-4; [1987] HCA 50, *M v The Queen* at 493-5, *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, *Pell v The Queen* (2020) 268 CLR 123 especially at 164-6; [2020] HCA 12, *Dansie v The Queen* (2022) 274 CLR 651; [2022] HCA 25 and *The King v ZT* [2025] HCA 9; (2025) 99 ALJR 676, for example at [21], [56] and [89].
- 147 As we have said, this was a case where the advantages enjoyed by the jury were considerable. This included not only the opportunity to see and hear the controversial witnesses live as they gave their evidence but also resided in the requirement for unanimity and the opportunity for collective discussion in the privacy of the jury room. On the other hand, the mixture of verdicts and the acquittals on counts 6 and 7, means that the observation made in *Pell v The Queen* at [39] – that the analysis “proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and

reliable” – may not be as significant as in a case where guilty verdicts are returned on all counts or on the vast majority of counts.

- 148 The jury received appropriate directions concerning the use of the applicant’s previous good character and we have taken into account the evidence that he had not previously been charged with sexual offences.
- 149 We have each carefully reviewed the evidence given by TM and BM concerning the applicant’s opportunity to commit the offences at Anson Street. Each of us has concluded, as we indicated earlier, that it was open to the jury to reject that evidence. In reaching factual conclusions as to the stark conflict in the evidence of opportunity to commit the offences charged in counts 1, 2 and 3, the advantages enjoyed by the jury were manifest and substantial. Aspects of the evidence of TM and BM were, as the respondent submitted, implausible.
- 150 We have kept in mind that the prosecution case was almost entirely dependent on the evidence of the complainant and paid close attention to the contents of the pretext call in which the applicant firmly denied any sexual wrongdoing.
- 151 Against that, the body of complaint evidence provided support for CC’s general allegation that the applicant sexually assaulted her during her childhood. The evidence of EM concerning the complainant’s reaction when doctors used Vaseline to treat her son is of some potency.
- 152 We have taken into account the powerful submissions made by Ms Hopper in her address to the jury at trial and the submissions made by Mr Stratton SC and Ms Hopper in their careful submissions to this Court.
- 153 Insofar as one can tell from reading a transcript, the complainant presented as a forthright and convincing witness. Where there were deficiencies in her evidence when it came to detail, these were brought to the attention of the jury in a forceful and persuasive way by counsel appearing at the trial.
- 154 Having reviewed the whole of the evidence, we are not left with a reasonable doubt as to the guilt of the applicant. While the mixture of verdicts is not easy to reconcile, it was open to the jury to distinguish between the counts and to give the applicant the benefit of the doubt on some counts, while convicting on the first three counts on the indictment.

Ground Three: her Honour erred in not directing the jury that:

(a) the jury might think that there was nothing to distinguish the evidence of the complainant on one count from her evidence on another count, and

(b) if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts

155 We dealt with ground 3 at [116]-[121] and set out the direction provided to the jury at [109]. As we said earlier, it may have been preferable for the trial Judge to have provided the jury with a “full” *Markuleski* direction which focused on the fact that each count depended on the complainant's evidence, and on her truthfulness, and on the fact that it may be difficult to justify a verdict of not guilty on one count (based on not believing the complainant) but guilty on other counts.

156 However, in the atmosphere of the trial, counsel did not consider it necessary to ask for any direction beyond that which was provided. That is not surprising when it was self-evident that the prosecution case on every count was dependent on the word of a single witness.

157 While we have taken into account the asserted deficiencies of the direction in considering the inconsistent verdicts ground, we would not grant leave to argue ground 3 as an independent ground of appeal.

Conclusion and orders

158 For those reasons, the Court makes the following orders:

- (1) Grant leave to appeal under grounds 1 and 2.
- (2) Refuse leave to appeal under ground 3.
- (3) Dismiss the appeal.
