CITATION:	*FN v The Queen* [2021] NTCCA 5
PARTIES:	FN
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 1 of 2021 (21811959)
DELIVERED:	20 August 2021
HEARING DATES:	9 June 2021
JUDGMENT OF:	Grant CJ, Brownhill J and Hiley AJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Unreasonable verdict

Applicant found guilty of sexual intercourse without consent and performing an act of gross indecency following trial by jury – Whether verdicts unreasonable and not supported by evidence at trial – The purported inconsistencies, discrepancies and other inadequacies identified by the appellant did not lead to a satisfaction that the jury, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt – Whether Crown address improper – Crown submission to jury that veracity of appellant not directly challenged in relation to two of the incidents charged – Appellant acquitted on both counts – Submission could have no bearing upon the jury's consideration of counts for which he was convicted – Appeal dismissed.

BCM v The Queen (2013) 303 ALR 387, *GAX v The Queen* (2017) 344 ALR 489, *Kassab (a pseudonym) v R* [2021] NSWCCA 46, *Libke v The Queen* (2017) 230 CLR 559, *Lynch v The Queen* [2020] NTCCA 6, *M v The Queen* (1994) 181 CLR 487, *Mucaj v R* [2021] NSWCCA 84, *Pell v The Queen* [2020] HCA 12, *R v M, WJ* [2004] SASC 345, *Roos v R* [2019] NSWCCA 67, *SKA v The Queen* (2011) 243 CLR 400, referred to.

REPRESENTATION:

Counsel:

Appellant:	N Redmond
Respondent:	V Engel with C Ingles

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	34

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

FN v The Queen [2021] NTCCA 5
CA 1 of 2021 (21811959)

BETWEEN:

FN

Appellant

AND:

THE QUEEN

Respondent

CORAM: GRANT CJ, BROWNHILL J and HILEY AJ

REASONS FOR JUDGMENT
(Delivered 20 August 2021)

THE COURT:

[1] Following a trial by jury the appellant was found guilty of five counts of sexual intercourse without consent and one count of performing an act of gross indecency without consent contrary to s 192 of the *Criminal Code 1983* (NT). The appellant was acquitted of six other counts charged on the same indictment. The appellant brings this appeal against those convictions on the grounds that the verdicts are unreasonable and not supported by the evidence, and that the prosecutor had improperly addressed the jury as to the manner in which the defence had been conducted resulting in a miscarriage of justice.

Background

[2] The complainant has an autism spectrum disorder with attendant developmental delay and impaired academic functioning. She was a student in a special needs area at her school. The offences were alleged to have been committed at various times while the complainant was between 14 and 17 years of age.

[3] The complainant is the appellant's niece. The appellant is married to the sister of the complainant's mother. The complainant had a close relationship with the appellant's son, who is a number of years younger than her. During the period in question, the complainant would frequently attend the appellant's home[1] after school and play video games with the appellant's son under the supervision of the appellant.

[4] The indictment charged 12 offences.

[5] Three counts on the indictment (counts 1, 8 and 9) were stand-alone charges in relation to separate incidents: indecent dealing (kissing the complainant on the lips, breasts and neck and touching her breasts and vagina); sexual intercourse without consent (digital penetration while alone in a motor vehicle together); and gross indecency (touching the complainant's vagina at the public swimming pool). Those incidents were alleged to have been committed at various times in 2016 and 2017. The appellant was acquitted of those charges.

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1 The appellant lived with his wife and son in a unit in Larapinta Drive, Alice Springs.

[6] Three counts on the indictment (counts 2 to 4) related to a single incident alleged to have taken place at the appellant's home in 2017. The appellant was said to have told his son to take a shower and, while the son was in the shower, he took the complainant to his bedroom. While there, he engaged the complainant in acts of digital intercourse, penile-vaginal intercourse and fellatio. The appellant was also acquitted of those charges.

[7] Three counts on the indictment (counts 5 to 7) related to a single incident also alleged to have taken place at the appellant's home in 2017. Again, the appellant was said to have told his son to take a shower in the master bedroom. The appellant and the complainant were in the son's bedroom. While there, he rubbed a small vibrator against the top of the complainant's vagina, inserted a dildo into the complainant's vagina and then put his penis into her vagina. The appellant was convicted of those charges.

[8] The final three counts on the indictment (counts 10 to 12) also related to a single incident which was alleged to have taken place at the appellant's home on 1 March 2018. At that time the complainant's father was in hospital. It was said that the appellant took the complainant with him from the hospital and travelled to his home. While there, the appellant inserted a dildo into the complainant's vagina, and then engaged the complainant in acts of fellatio and penile-vaginal intercourse, before leaving the unit to pick up the appellant's son from school. The objective evidence shows that there was only a short window of approximately 10 minutes between the appellant arriving at his unit with the complainant and then departing to

collect his son from school. The appellant was also convicted of those charges.

[9] On 9 March 2018, the complainant told a special needs education officer at her school that she had been sexually abused by her uncle over a period of about two years. The complaint was passed on to a school counsellor and her parents, and triggered an investigation. The complainant was examined by a medical practitioner later that day at the Sexual Assault Referral Centre in Alice Springs.

[10] The initial complaint to the special needs education officer occurred after the officer had been discussing with the complainant the importance of truth telling and making good choices. The complainant said: 'I need to tell you the truth about something else … My uncle … has been raping me.' She told the officer that the last time it had happened was a few weeks before when her father was in hospital, and that it had been happening for about two years. The complainant was shaking and crying and said she had not told anyone else before because her uncle had told her not to tell anybody. She was nervous about telling her parents and concerned that his conduct might send her uncle to gaol and break down the family structure.

[11] The special needs officer took the complainant to the school counsellor. She too observed the complainant's distressed appearance. The complainant told the counsellor that she wanted to hurt or kill herself and that she was getting flashbacks of being raped by her uncle. She said that this had been going on

for about two years and she was worried that she was going to get into trouble. The complainant's parents were informed and attended at the school. The complainant told her father that the appellant had made her suck his penis and had raped her. She said it often happened when her cousin was in the shower, and that it had also occurred on another occasion when her cousin was at school and on another occasion in her uncle's car.

[12] During the medical examination later that day, the complainant provided a lot more detail about the various things she said she appellant had done to her. The doctor took swabs for DNA testing.

[13] On 11 March 2018, the complainant and her cousin (the appellant's son) were interviewed by police. On 13 March 2018, police executed a search warrant at the appellant's home. During the course of that search several vibrators and a dildo were found in a cupboard in the master bedroom, and were seized. The accused was interviewed by police later that day. Subsequent forensic testing of the dildo found DNA matching that of the complainant.

[14] During her interview with police, the complainant spoke of a general pattern of abuse by the appellant when she and the appellant's son were at his home after school prior to her aunt getting home. The appellant would tell his son to have a shower in the ensuite bathroom to the master bedroom, and would then take the complainant into the son's room and engage in various forms of sexual abuse. That included, on various occasions: vaginal penetration

with his penis, fingers, and/or a skin coloured penis dildo; touching the external areas of her vagina with a vibrator; and fellatio. It would sometimes be accompanied with kissing of her mouth and breasts. On several occasions he ejaculated and wiped himself with a towel. She would tell him to stop, or try to resist, but this was never effective in preventing or ending the conduct.[2]

Unreasonable verdicts

[15] The principles governing appeals on this ground of appeal were recently reviewed by this Court in *Lynch v The Queen* [2020] NTCCA 6,[3] and we largely repeat that review for ease of reference. In *M v The Queen*, the High Court stated:

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe" or "dangerous or unsafe". In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand".
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> …
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> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe and unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not

2 Appeal Book ('AB') 54, 68.

3 *Lynch v The Queen* [2020] NTCCA 6.

> disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regards to those considerations.[4]

[16] The test in *M v The Queen* has been affirmed in subsequent decisions of the High Court.[5] An appeal of this kind requires an appellate court to make its own independent assessment of the whole of the evidence, and to determine whether, having regard to any advantages the jury had, it holds a reasonable doubt about the guilt of the appellant. The task of conducting an independent assessment of the evidence requires an appellate court to weigh any competing evidence that might tend against the verdicts reached by the jury.[6]

[17] In considering convictions for sexual offences, where it may be assumed that the jury assessed the complainant's evidence as credible and reliable, there may be countervailing evidence which nonetheless required the jury, acting rationally, to have entertained a reasonable doubt as to guilt. The High Court has explained the process in the following terms:

> The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in the light of other evidence – the court is satisfied that

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4 *M v The Queen* [1994] HCA 63; 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

5 *SKA v The Queen* [2011] HCA 13; 243 CLR 400 at [11]-[14]; *GAX v The Queen* [2017] HCA 25; 344 ALR 489 at [25]; *Pell v The Queen* [2020] HCA 12; 268 CLR 123.

6 *SKA v The Queen* (2011) 243 CLR 400 at [24] per French CJ, Gummow and Kiefel JJ.

> the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[7]

[18] In terms of resolving any doubt held by an appellate court, the majority in *M v The Queen* said:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.[8]

[19] In *Libke v The Queen,* Hayne J expressed the process of reasoning as follows (footnotes omitted):

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt.[9]

[20] This formulation does not impose a stricter test than was laid down in *M v The Queen*. In *Pell v The Queen*, the High Court confirmed that the statement from *Libke* extracted above was consistent with what was said by the majority in *M v The Queen*.[10]

[21] The matters which an appeal court may take into account in determining whether it was open on the evidence to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. Matters which might

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7 *Pell v The Queen* (2020) 268 CLR 123 at [39].

8 *M v The Queen* (1994) 181 CLR 487 at 494.

9 *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at 596-597 [113].

10 *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45]; see also *Tyrell v The Queen* [2019] VSCA 52 at [70].

give rise to a reasonable doubt include whether a lengthy delay in making complaint requires particular caution; whether there are material inconsistencies between the initial complaint and the evidence given at trial; whether the surrounding circumstances suggest some ulterior purpose for a complainant's account; whether a complainant's testimony should be considered unreliable due to intoxication or some impairment of memory or suggestibility; whether there is a real possibility that the complainant's account was a reconstruction; whether collusion between a complainant and some other interested party cannot be excluded beyond reasonable doubt; or whether there are internal inconsistencies in the complainant's evidence, or inconsistencies with other evidence, which necessarily give rise to a reasonable doubt.

[22] The appellant relies on the following matters in support of the contention that the complainant's evidence was inherently unreliable:[11]

(a) evidence from a psychologist to the effect that the complainant faced psychological problems, particularly acting out lines and behaviours from characters in television programs and movies, and a preoccupation with online sexual content;

(b) evidence said to establish that the complainant struggles to understand the consequences of her actions;

11 See Outline of Submissions on behalf of the Appellant at [5]-[6].

(c) evidence that the complainant continued to see her boyfriend after being caught having sex with him, despite being told by her parents not to continue seeing him, and lied about doing so;

(d) the suggestion that the complaint was made to distract attention from rumours that the complainant had been smoking;

(e) evidence that the complainant lied to a schoolteacher about being pregnant and denied knowing it was a lie; and

(f) evidence of a history on the part of the complainant of telling lies and fantasising.

[23] The appellant's submission followed that those features of the complainant's condition and behaviours, when considered in conjunction with other matters arising and evidence received during the course of the trial, necessarily gave rise to a reasonable doubt. Those other matters largely involve assertions concerning inconsistencies between the account given by the complainant when she was interviewed by police, and what are said to be inconsistencies between the complainant's account and other evidence. Before going on to consider those contentions, it is necessary to examine the nature, sequence and timing of the complainant's accounts in order to put the matter into context.

[24] Although the complainant's primary evidence was that contained in her recorded interview with the police on 11 March 2018, she was not first cross-examined until 6 September 2019. The jury before which that initial

cross-examination was conducted was discharged for reasons which are not presently relevant. A second trial was conducted in November 2020 before a different Judge. The video recordings of the complainant's evidence given during the course of the police interview in March 2018, and in the cross-examination in September 2019, were viewed by the jury in the second trial.

[25] In most trials where a complainant is a vulnerable witness[12] the cross-examination will be conducted and pre-recorded during a special sitting convened under Part 3 of the *Evidence Act 1939* (NT) prior to the empanelment of a jury. During the first trial of this matter, however, the complainant was examined and cross-examined after the jury was empanelled. Her evidence commenced on Thursday, 5 September 2019 when her recorded interview with the police which was conducted in March 2018 was shown to the jury. The complainant gave evidence from the vulnerable witness room accompanied by a counsellor.

[26] The complainant's cross-examination commenced on the morning of Friday, 6 September 2019.[13] After some time the complainant requested a break and the jury was sent out for the morning adjournment. The complainant was warned not to speak to her parents or anyone else during adjournments while she remained under cross-examination.[14] When proceedings resumed, the prosecutor advised the presiding Judge that they had experienced some

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12 The complainant was a vulnerable witness because she was a child and the alleged victim of a sexual offence to which the proceedings related: see s 21AB(a) & (c) of the *Evidence Act 1939* (NT).

13 AB 108-120.

14 AB 121-122.

difficulty convincing the complainant to return to the vulnerable witness room, and that she was crying and upset. The jury was brought back in and the presiding Judge explained that there would be further delays because the complainant was a vulnerable witness. The proceedings were adjourned to 2 pm.[15] However, during the course of that afternoon the complainant refused to continue with the cross-examination at that stage and the prosecutor applied for the matter to be adjourned to the following Monday morning.[16]

[27] The cross-examination resumed on Monday, 9 September 2019. Much of the cross-examination involved the complainant being asked whether she remembered saying certain things to the police during her interview in March 2018, what she had meant when she said some of those things, and whether she had told police some of the things she said in answer to questions asked of her during the cross-examination. Some of the questions asked of her contained double negatives and others included words that the complainant did not readily understand. The Court adjourned every half hour or so to give the complainant a break. The cross-examination concluded during the morning of Tuesday, 10 September 2019.[17]

[28] Although the jury in the second trial did not experience the lengthy delays that occurred during the first trial between the Friday when the cross-

15 AB 123-131.

16 AB 136.

17 AB 633-694.

examination commenced and the Tuesday when it concluded, they had the advantage of watching and hearing the complainant's evidence, particularly as she was being cross-examined, and full opportunity to assess her demeanour and credibility.

[29] The existence of inconsistencies in a complainant's evidence in cases such as this does not necessarily render a verdict unsafe and unsatisfactory. As the New South Wales Court of Criminal Appeal observed in *Kassab (a pseudonym) v R*:

> The nub of the applicant's contention that the verdicts are unreasonable is that there are simply too many discrepancies in their evidence. I have considered this submission and the significance of the discrepancies relied upon by the applicant. In doing so I have had regard to the observations of Leeming JA in *Cabot (a pseudonym) v R* [2018] NSWCCA 265 (at [59]-[60]) and I adopt them as apposite in the present case:
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> > In almost every case which depends on testimonial evidence, witnesses will give inconsistent evidence. That is especially so in any case where the witness originally makes a complaint and later is asked to give evidence about it and is cross-examined about it. Material inconsistencies can of course detract from the probative value of a witness's testimony. However, the mere fact of inconsistent evidence does not of itself entail that a verdict cannot be sustained. Indeed, if the witness is capable of a mechanically perfect reproduction of evidence originally given in an interview or a statement months or years before, the appropriate inference may be that the witness has learned his or her lines but has little actual recollection of what occurred.
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> > Thus, it has commonly been stated that there is no necessary unreasonableness for the jury to accept some inconsistencies in the complainant's evidence. As McHugh J observed in *M v The Queen* at 534, '[i]t is the everyday experience of the courts that honest witnesses are frequently in error about the details of events'. Recently, in *Palmer v R* [2018] NSWCCA 205, Basten JA said (with the agreement of McCallum and Bellew JJ) at [51]:

> At the most general level, a suggestion that a witness must be credible in relation to all aspects of her evidence, or none, defies common sense. First, it elides questions of unreliability and untruthfulness. Once those elements are separated, it will generally be accepted that even witnesses who lie do not lie about everything, and witnesses who are unreliable in one respect may be perfectly reliable in another.

Juries play a vital role in all criminal trials but particularly so in sexual assault trials which rely so heavily on whether the complainant is to be believed. As McCallum J (as her Honour then was) observed in *Hawi v R* [2014] NSWCCA 83 at [480]:

> The advantage enjoyed by the jury is not confined to the benefit each individual juror has of seeing and hearing the witnesses. The strength of 12 jurors as a tribunal of fact derives also from their diversity and their opportunity to deliberate as a group in private throughout the trial, evaluating the evidence as it is given, with all of its visual cues. The appearance on paper of weakness in the evidence does not of itself establish the unreasonable discharge of that function. [18]

[30] Against that background, we turn to consider the assertions made concerning the complainant's condition and behaviours, and the other matters arising and evidence received during the course of the trial, which the appellant says necessarily gave rise to a reasonable doubt.

The complainant's condition and behaviours

[31] There was evidence before the jury from a child and adolescent psychiatrist in relation to the complainant's autism spectrum disorder, her severe receptive and expressive language delay, her mild intellectual disability, her severe executive functioning difficulties, her specific learning disorder and her scoliosis. Autism spectrum disorder is a developmental disability, not a mental illness, a psychiatric disorder or a manifestation of psychological

18 *Kassab (a pseudonym) v R* [2021] NSWCCA 46 at [260]-[261].

problems. There was no evidence before the jury that the complainant's disorder manifested in traits of deceitfulness or unreliability.

[32] Counsel for the appellant's reference to the complainant struggling to understand the consequences of her actions seems to be derived from her father's evidence to the effect that she sometimes does not seem to realise that when she does something there could be an effect.[19] As counsel for the respondent submitted, on proper characterisation the father's observation was to the effect that the complainant did not always realise that her actions might have certain consequences, rather than a suggestion that the complainant disregarded the risk of known consequences through lack of understanding. That observation was consistent with the psychiatrist's evidence that the complainant 'does not pick up on social cues; does not take hints or understand messages', and 'often makes odd or inappropriate comments, does not recognise the inconsistency'.[20] It does not follow from those features and presentations that the complainant was more likely to invent a serious allegation without regard for the serious impact it might have on those around her. Rather, in the present case, the complainant was quite conscious of the detrimental effect that making these serious allegations would have upon her family, particularly her uncle and cousin.

[33] The other contentions made in relation to the complainant's behaviours refer to lies that the complainant had told to others. Members of the jury would

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19 AB 275.

20 AB 489.

be familiar with teenage girls engaging in inappropriate behaviours and lying about it to their parents and others in authority. The complainant frankly admitted during her cross-examination that she had told these lies. In particular, the complainant was forthright in her answers and readily made admissions which she knew would not depict her in the best light, such as having sex with a boy when she was 14 and disobeying her parents when they told her not to see him anymore. In most cases she had already confessed these things to a teacher. When asked in cross-examination why she told a teacher that she was pregnant, she said that 'people [had] been telling [her] that you can become pregnant when someone comes in your belly button.'[21] As counsel for the respondent pointed out, that exchange demonstrates the complainant's naivety, as supported by the psychiatrist's evidence about the complainant's various disorders, rather than any innate dishonesty.

[34] The complainant also frankly agreed during cross-examination that she had a history of telling lies and a history of fantasising. However, no attempt was made by defence counsel to explore what she meant by this. At the same time as the complainant accepted that she lied on occasions in an attempt to stay out of trouble, and that she fantasised about television programs and movies, she maintained on oath that she was not fabricating the allegations about the serious sexual misconduct on the part of the appellant. That insistence was clearly made in full knowledge and understanding of the

21 AB 691-692.

consequences of her allegations and the impact it would have on both the appellant and the broader family structure.

[35] During submissions, counsel for the appellant contended that the complainant had a motive to lie about the appellant's conduct because during their discussion on the morning of 9 March 2018 the special needs education officer had asked her about rumours going around that the complainant was possibly smoking or hanging around with smokers. The complainant initially denied smoking, but shortly afterwards she apologised for lying about that and said she thought she would get into trouble for smoking.[22] It would seem to be an exercise in pure speculation that this could or would have led the complainant to fabricate serious allegations of sexual misconduct against her uncle, particularly in the realisation of the detrimental effect that would have upon her family and her good relationship with the appellant's son.

Corroboration

[36] In addition to the assertions made concerning the complainant's condition and behaviours, it was submitted that there was no corroboration of the complainant's evidence apart from her complaints on and after 9 March 2018 and the evidence of the complainant's DNA on the dildo which had been seized from the cupboard in the appellant's bedroom. That submission must be considered in light of the fact that: (a) the *Evidence (National Uniform Legislation) Act 2011* (NT) abolishes the requirement that evidence

[22] AB 296 & 299.

be corroborated and the trial judge give the jury a warning or direction in relation to the absence of corroboration, and precludes the trial judge from giving the jury a general warning of the danger of convicting on the uncorroborated evidence of a witness who is a child;[23] (b) the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) provides that on the trial of a person for a sexual offence the trial judge shall not warn the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness;[24] and (c) in any event, the DNA results provided evidence which, if accepted by the jury, operated in corroboration of the complainant's account.

[37] In that latter respect, this was not a case in which the other evidence was insufficient of itself to prove guilt. The complainant's evidence, by itself, was sufficient to prove the appellant's guilt if assessed as sufficiently reliable by the jury. That evidence was corroborated in the first instance by the unchallenged evidence of opportunity. Although that bare opportunity was insufficient to establish the guilt of the appellant to the requisite standard, it was an item of circumstantial evidence. The DNA evidence was further corroborative of the complainant's account, and so enhanced the reliability of that account, unless the jury concluded there was a possibility that its presence on the dildo was the result of secondary transfer or some

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23 *Evidence (National Uniform Legislation) Act 2011* (NT), ss 164, 165A(1)(d).

24 *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s 4(5)(a).

handling of the item by the complainant unrelated to sexual misconduct on the part of the appellant.

[38] The jury was entitled to disregard the possibility that the presence of the complainant's DNA related to other offending for which the appellant was acquitted or not charged. It would have been logical for the jury to conclude that the complainant's DNA must have been left on the dildo at the time of this offending on 1 March 2018, less than 2 weeks prior to the DNA swabs being obtained from the complainant, rather than at the time of any of the other offending in 2017.

[39] There was no direct or specific evidence to the effect that the presence of the DNA material could be the result of secondary transfer, or that it could be the result of innocent primary transfer on some occasion when the complainant may have found and accessed the bag containing the sex toys. It should be noted in that latter respect that the evidence was that the bag containing the sex toys was located on the top shelf of a cupboard in the master bedroom, rather than in any easily accessible location.

[40] Counsel for the appellant also suggested the possibility that it could be the DNA of another person, and in particular the appellant's wife, who was a blood relative of the complainant. That submission would seem to be predicated on a misunderstanding and misapplication of the expert's evidence that with the exception of identical twins, every single person has a different DNA code.

Evidence concerning the appellant's impotence

[41] The next evidence or matter to which counsel for the appellant drew attention was the unchallenged evidence of the appellant's wife to the effect that the appellant suffered from impotence. The contention put on this basis was that there must have been some doubt as to whether appellant would have been able to perform certain of the acts alleged within the relevant timeframes. In the case of counts 5 to 7 (of which the appellant was convicted), the conduct was alleged to have taken place while the appellant's son was having a shower. In the case of counts 10 to 12 (of which the appellant was also convicted), the conduct was alleged to have taken place during the 10 minutes or so between when the appellant and complainant returned to the appellant's residence and when they subsequently left the unit to pick up the appellant's son from school. The appellant also told the police that the reason he and his wife had the sexual aids was that "[his] dick [would] never go up" during sex with his wife.[25]

[42] However, as counsel for the respondent submitted, that evidence had nothing necessarily to say about the allegations made against the appellant, involving as they did his strong sexual interest in the teenaged complainant. This evidence did not form any part of the address to the jury made by the appellant's counsel at trial, for obvious and understandable reasons.

25 AB 581.

Inconsistencies in evidence concerning counts 5 to 7

[43] In relation to counts 5 to 7 specifically, counsel for the appellant contended that the veracity of the complainant was also undermined in the following respects:

(a) the complainant had told police that the small vibrator used by the appellant was white,[26] but during the search of the appellant's premises police found only a white remote control for a vibrator, rather than a white vibrator;

(b) the complainant told police that the appellant had taken her clothes off and told her to stay in his son's room while he got the vibrator from his room, and that when he was using the vibrator on her the appellant was masturbating, but during the course of cross-examination the complainant agreed with the proposition that the appellant did not use a 'toy dick' on her on this occasion;[27]

(c) the complainant had not said anything to the police about digital penetration, but when asked during cross-examination whether the appellant was doing anything else apart from using the vibrator on her, she said: 'I think he was inserting his fingers in me too, but I could be wrong.'[28]

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26 AB 86.

27 AB 658-659; cf AB 87.

28 AB 660. See Respondent's Summary of Submissions at [12]-[14].

[44] So far as the first matter is concerned, among the items located and seized by police during the search of the appellant's premises were devices which were described on the property record receipt as a 'flesh-coloured rubber dildo', '2 pink remote controlled sex toys', '2 black vibrating sex toys with remote' and '1 white NASSTOYS remote'.[29] The complainant may well have had in mind the flesh-coloured rubber dildo and or the white remote control when police asked her what colour was the vibrator during her interview on 11 March 2018.[30] She was endeavouring to provide detail of those and other events that had happened in 2017.

[45] The other two inconsistencies asserted result from things said by the complainant towards the end of a lengthy and 'creeping' cross-examination. The jury was entitled to accept what the complainant had said when she was interviewed by the police some 18 months earlier in relation to these events and the other incidents of which she spoke going back to 2016. The inconsistencies identified by counsel for the appellant do not go to the essential features of the complainant's account of the offences;[31] and 'were explicable in a manner that did not provide a basis for them to reflect on [the complainant's] credit'.[32]

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29 AB 493. See also AB 40 and photographs at AB 501-502.

30 At AB 86.

31 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *BCM v The Queen* [2013] HCA 48; 303 ALR 387.

32 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *R v M, WJ* [2004] SASC 345.

Inconsistencies in account concerning counts 2 to 4

[46] In relation to counts 2 to 4 (of which the appellant was acquitted), the first occasion on which the complainant had said that sex toys were used during that particular episode, and that the appellant had changed positions when he was putting his penis into her vagina, was in answer to questions asked during her cross-examination. Counsel for the appellant also submitted that the complainant's evidence to the police that those events occurred following her breakup with her boyfriend was not supported by the evidence of the appellant's son.

[47] Consistently with the principles and having regard to the circumstances traversed above, these inconsistencies do not go to the essential features of the complainant's account of the offences for which he was convicted, and in context are explicable in a manner which does not reflect adversely on her reliability generally. To the extent they gave rise to some doubt in relation to these particular charges, that doubt is reflected in the verdict for acquittal.

The son's showering habits

[48] Counsel for the appellant also pointed to evidence given by the appellant's son concerning his showering habits (relevant to the incidents charged in both counts 2 to 4 and counts 5 to 7), which was asserted to be different and sometimes contradictory to the complainant's evidence about the son's showering habits. This was said to include evidence given by the son in relation to his ordinary practices that: (a) he got out of the shower when he

had finished cleaning himself, not when his father told him to; (b) he and the complainant sometimes showered at the same time (in different bathrooms), in order to see who could finish quickest; (c) he showered regardless of whether the complainant was present at his home; and (d) the complainant often continued to play Minecraft while he was showering.

[49] The appellant's son gave evidence that the complainant was at his home every two to three weeks and that the two of them would often play Minecraft and Disney Infinity games together. At those times, his father (the appellant) would usually be present and his mother would be still at work. He said he showered after school most days and that his father would tell him to shower. If he refused or tried to delay his showering, his father would threaten to stop him playing Minecraft and to take the complainant home. That always worked to persuade him to get into the shower.[33] He said he would shower in his parents' bathroom, and he would usually find his father and the complainant in the lounge room when he got out.[34] He agreed that 'on occasions' when he was showering the complainant must have continued to play Minecraft because she had built more things in the game before he returned from his shower.[35]

[50] There was nothing in the son's evidence about his showering habits which was either directly or indirectly inconsistent with that of the complainant in

33 AB 156.

34 AB 164.

35 AB 204.

any significant respect. Moreover, the son's evidence, if accepted, established that there was opportunity for the offending to occur.

Inconsistencies in account concerning count 8

[51] In relation to count 8 (of which the appellant was acquitted), the first occasion on which the complainant had said that the appellant took her to the park and told her to 'suck his dick' was in answer to questions asked during her cross-examination. It should be noted, however, that the complainant only gave that answer after counsel asked her about an occasion on which the appellant took her to the park after going to McDonald's and asked her: 'What did you do there?' It was in response to that question that the complainant replied: 'He told me to suck his dick.'[36] Counsel for the appellant also drew attention to the fact that the complainant had initially told the special needs education officer at her school that the appellant would sometimes ask her to suck his penis when they were together in the appellant's car, while the appellant's son was attending piano lessons. However the complainant made no further mention of this conduct when interviewed by the police.

[52] Consistently with the principles and having regard to the circumstances traversed above, these inconsistencies do not go to the essential features of the complainant's account of the offences for which he was convicted, and in context are explicable in a manner which does not reflect adversely on her

36 AB 664-665.

reliability generally. To the extent they gave rise to some doubt in relation to this particular charge, that doubt is reflected in the verdict for acquittal.

Counts 10 to 12 – inconsistency and inherent implausibility

[53] The contextual evidence in relation to counts 10 to 12 was as follows. The complainant and her mother had gone to the hospital to visit her father and found the appellant there. The complainant asked her parents if she could go with the appellant to pick up his son from school. The complainant's account, given approximately one week later, was that instead of going directly to the school, the appellant took the complainant to his home and took her into the son's bedroom and engaged in the alleged misconduct. The appellant's son remembered that his father was late to pick him up that day. He thought his watch indicated it was about 3.15 or 3.16 pm when the appellant arrived.[37]

[54] Counsel for the appellant sought to attribute great significance to the small window of opportunity for that offending to occur – namely between 2.59 pm when the appellant and the complainant left the hospital where they had been visiting the complainant's father, and about 3.15 or 3.16 pm. During that time the appellant and the complainant walked to the car, the car was seen at the corner of Bath Street and Stott Terrace at 3.03 pm, the appellant drove to his home with the complainant, the offending is said to have taken

37 AB 144-5.

place, and the appellant and the complainant got back in the car and went to the son's school.

[55] On the complainant's account, the appellant compelled the complainant to take off her clothes, took off his own clothes, kissed the complainant, went to his bedroom to get a towel and a dildo, dragged the complainant back by the ankle when she went to leave, used a flesh-coloured "toy dick" on the complainant, put his penis in the complainant's mouth and then in her vagina, and then withdrew, ejaculated and wiped himself with a towel. Counsel for the appellant contended that all of this could not have happened within the short period of time between leaving the hospital and arriving at the school.

[56] When he was interviewed by the police on 13 March 2018, the accused said that he had left the hospital at about 3.10 pm and driven straight to his son's school, along Bath Street into Larapinta Drive, and got to the school some time between 3.15 pm and 3.17 pm. The jury clearly rejected that account in light of the other evidence, including that the appellant's vehicle was recorded on CCTV as being at the corner of Bath Street and Stott Terrace at 3.03 pm that day. No evidence was placed before the jury of the time it would take to drive from the hospital to the appellant's unit in Larapinta Drive, and from there to the son's school. However, these were all locations that would have been well known to the members of the jury, who would have drawn their own inferences about whether there was time and

opportunity for the appellant to stop at his home on the way to picking up his son and engage in the offending conduct.

[57] In addition to that timing issue, counsel for the appellant also relied on what were said to be inconsistencies in the complainant's account. First, it was contended that the complainant would not have willingly accompanied the appellant from the hospital to his home if he had previously been sexually abusing her. Second, during her police interview the complainant did not initially mention the vibrator or fellatio but only did so later in the course of that interview. Third, during the cross-examination of the complainant in September 2019 she could not remember whether the appellant produced a vibrator or a "toy dick" that day in March 2018. Fourth, the complainant was compelled to admit during her cross-examination that she had been wrong when she spoke about the appellant covering up a camera which was in the room, because the camera had been removed from the room long before 1 March 2018; and she could not remember during her cross-examination most of the things that she had told the police.

[58] Consistently with the principles and having regard to the circumstances traversed above, these inconsistencies do not go to the essential features of the complainant's account of the offences, and in context are explicable in a manner which does not reflect adversely on her reliability. Moreover, the complainant's evidence about this event received support from the appellant's son's evidence that the appellant was late to pick him up that particular day, the DNA evidence showing complainant's DNA on the dildo,

and the complainant's description of the 'toy dick' which matched one of the items found by police during the course of the search conducted by police at the appellant's home on 13 March 2018.

Conclusions

[59] As described at the outset, the cross-examination of the complainant was lengthy and took place some 18 months after she had told the police what had happened to her, not only 10 days earlier but also over a period of about two years commencing in 2016 when she was 14 years of age. Understandably, her memory about particular occasions would have been diminished not only by the passage of time but also because of the similarity in circumstance between much of the offending which she alleged, involving as it did various sex objects and activities. The lengthy cross-examination enabled the jury to carefully observe the complainant when she was giving her evidence, particularly at the later stages of her cross-examination on the third day of evidence where most of the alleged inconsistencies now asserted by the appellant emerged.

[60] The jury was also entitled to have regard to the psychiatrist's evidence about the complainant's developmental and other difficulties when considering how to assess her performance under the stress of cross-examination, and the nature, content and context of her complaints in relation to each of the incidents. As has also been described, the complainant's evidence was attended by compelling complaint and DNA evidence.

[61] The complainant's failure to complain earlier in relation to the incidents in 2016 and 2017 was quite understandable in light of the fact that her complaints involved a close family member, and had the potential for broad and destructive ramifications in the broader family context. Also understandably, she would have been worried that she would not be believed. She had already created difficulties by engaging in activities which her parents did not approve of such as having sex with her boyfriend when she was 14 and lying about that, smoking, lying to a school teacher about being pregnant and lying and fantasising on other occasions. Having regard to all of those matters, it was open to the jury to conclude that the delay in making complaint did not fatally undermine the complainant's reliability in relation to the essential elements of the offences for which the appellant was convicted.

[62] There are two further matters which warrant mention in this context.

[63] First, counsel for the appellant did not press as a freestanding ground of appeal that the verdicts were inconsistent. That was no doubt because it could not be said that the evidence in relation to the different counts was so co-extensive or interdependent that the verdicts of acquittal and conviction could not reasonably and logically stand together. However, counsel for the appellant submitted that the conviction on some charges and the acquittal on other charges involving similar scenarios or circumstances illustrated, or was at least reflective of, the unsafe and unsatisfactory nature of the verdicts

for conviction. That does not necessarily follow. As the New South Wales Court of Criminal Appeal observed in *Mucaj v R* (citations omitted):

> It is not to be assumed that a jury, properly directed, will have misunderstood its proper function, or misapplied itself to the evidence in convicting on some counts and acquitting on others. There are a number of reasons why apparently inconsistent verdicts may reflect a correct discharge of the jury's function. First, as explained by King CJ in *R v Kirkman*, in a passage adopted in *MacKenzie*, where there have been multiple charges, with convictions on some but not others, it may be proper to infer that the jury has taken a "merciful" view by not convicting on all counts, although the evidence may have supported such convictions. That is not this case: there were four counts involving reasonably discrete incidents, but within a short timeframe.
>
> Secondly, and more importantly in the present context, a careful consideration of the evidence may demonstrate "available explanations for the differentiation in the verdicts which are consistent with the assumption that the jury approached their task in a proper manner and did not simply compromise their function."[38]

[64] Similarly, in *Nguyen v R*, the New South Wales Court of Criminal Appeal observed:

> It cannot be assumed at the outset that the not guilty verdict returned against count 2 so affects the credibility of the complainant that a guilty verdict for count 1 was not open to the jury: *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at [34] (Gleeson CJ, Hayne and Callinan JJ). It is not universally the case that a not guilty verdict returned against one count points to the jury's rejection of the complainant as a witness of truth. A jury is entitled to, and should, take a far more careful and nuanced approach than that to assessing the reliability of witness testimony.[39]

[65] That observation reflected what had been said in *Roos v R*:

> Nevertheless, if there is a proper way by which the verdicts may be reconciled, allowing the appellate court to conclude that the jury properly performed its functions, that conclusion is generally to be

38 *Mucaj v R* [2021] NSWCCA 84 at [16]-[17].

39 *Nguyen v R* [2021] NSWCCA 85 at [63].

preferred: *MacKenzie* at 367 (Gaudron, Gummow and Kirby JJ). It is also to be kept in mind that a verdict of "not guilty" does not necessarily imply any "want of confidence" in the complainant but "may simply reflect the cautious approach to the discharge of a heavy responsibility": *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at [34] (Gleeson CJ, Hayne and Callinan JJ). As Spigelman CJ had earlier remarked in *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290 at [34]:

> In the common case of multiple sexual assaults against a single complainant, often over a period of time, juries frequently acquit on some charges and convict on others. The issue raised by *Jones* is to determine when an acquittal so affects the credibility of the complainant that, in combination with other factors, a conviction was not open to the jury. A court of criminal appeal must perform this task whilst acknowledging the role of the jury as emphasised in *M v The Queen*, *MacKenzie* and *Jones* quoted above.[40]

[66] Second, the inconsistencies relied upon by the appellant in pressing the contention that the conviction verdicts were unreasonable gave rise to quite different considerations to the matters which led to that conclusion in *Pell*. In that case, the unchallenged evidence of the opportunity witnesses was inconsistent with the complainant's account, in that at the time the conduct was alleged to have taken place the accused would have been greeting congregants near the Cathedral steps and at all times accompanied by an acolyte, and the place in which the conduct was alleged to have taken place would have been subject to the continuous traffic of people in and out. Having regard to that evidence and direct inconsistency, there must have remained a reasonable possibility that the offending had not taken place and there ought to have been a reasonable doubt as to guilt. In the present case, there was no countervailing opportunity evidence of that type.

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40 *Roos v R* [2019] NSWCCA 67 at [43]-[45].

[67] Having reviewed the evidence we are satisfied that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the counts upon which he was convicted.

Prosecutor's address to the jury

[68] The other ground of appeal is that the prosecutor made improper comments during his closing address. The prosecutor told the jury that the complainant had not been directly challenged in relation to two counts on the indictment, namely counts 8[41] and 9[42]. The appellant says those comments were improper. The complainant was directly challenged as to *it all* being a lie. Counsel for the appellant also contended that the prosecutor did not elaborate, and the judge did not direct, on how this purported failure to challenge the witness could be used by the jury in their reasoning.

[69] As counsel for the respondent pointed out, the prosecutor made those comments in the course of his narrative relating to each of those charges. Near the end of his address concerning count 8 the prosecutor said:

> My learned friend's cross examination of MD in respect of this McDonald's incident did not directly challenge her that she had made this allegation up. It could be said that my learned friend made a challenge to the incident taking place or not, right at the end of his whole cross-examination of MD when he makes a blanket challenge at page 70 when he says, "I suggest to you, you've created this story so you didn't get into trouble with your parents or the school for smoking", to which MD says, "I tell you I didn't make it up. I started smoking because of my uncle.[43]

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41 AB 439.

42 AB 440.

43 AB 439.

[70] During his lengthy address concerning count 9 the prosecutor said:

> The cross examination of MD in respect of this pool incident again doesn't include a direct challenge to its veracity.[44]

[71] These comments had nothing to do with the other counts. Indeed the fact that the appellant was acquitted on both of these counts suggests that the jury was not influenced by those comments. Nor could those comments have had any bearing upon the jury's consideration of the other counts, relevantly counts 5 to 7 and 10 to 12.

[72] This ground is not made out.

Disposition

[73] The appeal is dismissed.

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44 AB 440.