CITATION:	*PW v The Queen* [2020] NTCCA 1
PARTIES:	PW
	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 2 of 2019 (21743702)
DELIVERED:	7 February 2020
HEARING DATES:	27 August 2019, 27, 28 and 29 November 2019
JUDGMENT OF:	Southwood and Kelly JJ and Riley AJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Verdict unreasonable or cannot be supported having regard to the evidence

One count of maintaining a sexual relationship with a child in circumstances of aggravation and one count of aggravated assault – Court required to make an independent assessment of whether, on the evidence as a whole, there is a reasonable doubt as to the guilt of the appellant – Whether a jury's advantage of seeing and hearing the evidence is capable of resolving a doubt experiences by the Court – Having regard to the whole of the evidence there was a genuine doubt about the appellant's guilt of both counts – Having regard to the advantages that the jury had in assessing the evidence, those advantages did not overcome a genuine doubt – Complainant's evidence implausible, lacked a ring of truth and reality – Appeal allowed – Appellant's convictions set aside – Appellant acquitted

CRIME – Appeals – Appeal against conviction – Evidence put before jury contrary to the ruling of the court which in the absence of expert evidence led to significant risk of impermissible inference that the conduct of the accused caused the deterioration in the complainant's behaviour and mental health over a period of six years which resulted in her involuntary hospitalisation – miscarriage of justice – Appeal allowed

CRIME – Adequacy direction to jury – jury not to embark on a course of reasoning that the complainant's deteriorating behaviour and mental health could be attributed to the sexual assaults alleged to have been committed by the appellant – unnecessary to decide

CRIME – Appeals – Appeal against conviction – Incompetence of counsel – Miscarriage of justice – Ground of appeal not necessary to consider

Criminal Code 1983 (NT)

R v Baden-Clay (2016) 258 CLR 308; *De Silva v The Queen* [2019] HCA 48; *Kelly v The Queen* (2010) 27 NTLR 181; *Libke v The Queen* [2007] HCA 30; (2007) 230 CLR 559; *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487; *Mahmood v Western Australia* [2008] HCA 1; (2008) 232 CLR 397; *Pell v The Queen* [2019] VSCA 186; *TKWJ v R* [2002] HCA 46; 212 CLR 124 – considered

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	M Nathan SC

Solicitors:

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

Judgment category classification:	B
Number of pages:	143

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

PW v The Queen [2020] NTCCA 1
No. CA 2 of 2019 (21743702)

BETWEEN:

PW
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD and KELLY JJ and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 7 February 2020)

Southwood J:

Introduction

[1] On 19 September 2018 the appellant was found guilty by a jury of:

(i) contrary to s 131A of the *Criminal Code* (NT), maintaining a relationship of a sexual nature with a child under the age of 16 years with the circumstance of aggravation that during the course of the relationship the appellant had sexual intercourse with the child without consent; and (ii) of aggravated assault upon the same child.

[2] Subsections 131A(2), (3) and (5) of the *Criminal Code* state:

(2) Any adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of an offence....

(3) A person shall not be convicted of an offence against this section unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions, and any evidence of doing any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

(4) ...

(5) If in the course of the relationship of a sexual nature the offender committed:

(a) an offence against section 192(8) or 192B; or

(b) an offence of a sexual nature for which the offender is liable to imprisonment for more than 20 years,

the offender is liable in respect of maintaining the relationship to imprisonment for life.

[3] The *actus reus* of the offence under s 131A of the *Criminal Code* is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to a child on three or more occasions. The word "occasions" in the phrase "three or more occasions" in s 131A contemplates at least three separate events or occurrences with a temporal separation or a separation in circumstances between the acts sufficient to warrant that description.[1]

[4] As to count 1 on the indictment, the Crown case was that between 21 December 2009 and 6 January 2010 the appellant sexually assaulted the complainant on four occasions when she was nine years old while he and his family were visiting the complainant's family in Darwin. On the first

1 *Kelly v The Queen* (2010) 27 NTLR 181.

occasion the Crown alleged that the appellant engaged in a single act of penile/vaginal sexual intercourse with the complainant without consent. On the second occasion the Crown also alleged that the appellant engaged in a single act of penile/vaginal sexual intercourse with the complainant without consent. On the third occasion the Crown alleged that the appellant engaged in one act of penile/vaginal sexual intercourse with the complainant without consent and one act of penile/oral sexual intercourse without consent. However, the complainant gave evidence that on the third occasion the appellant committed two acts of penile/vaginal sexual intercourse with her without consent and one act of penile/oral sexual intercourse with her without her consent. On the fourth occasion the Crown alleged that the appellant committed three acts of inserting an object into the complainant's vagina without her consent and committed one act of penile/oral sexual intercourse with her without her consent. To prove the appellant committed count 1 on the indictment it was only necessary for the Crown to prove that the appellant committed one act of sexual intercourse without consent on three of the four occasions on which the Crown relied. For example, if the jury was not satisfied that the Crown had proven the appellant committed any of the sexual assaults alleged to have been committed by him on the fourth occasion, but were satisfied beyond reasonable doubt that the appellant had committed the sexual assaults alleged to have been committed on the first, second and third occasions then the Crown would have proven count 1 on the indictment. It is of course unknown whether or not the jury

found that the Crown had proven the four sexual assaults alleged to have been committed by the appellant on the fourth occasion. They may not have found any of the acts of sexual intercourse alleged to have been committed on the fourth occasion proven beyond reasonable doubt and still have found the appellant guilty of count 1.

[5] As to count 2 on the indictment, the Crown alleged that on the first occasion the appellant sexually assaulted the complainant, the appellant also cut her with a knife on her arm.

[6] The appellant is the complainant's uncle. His wife is the complainant's mother's sister. The complainant and her family lived in a large three story home in Durack. The third level was simply comprised of an attic. The Crown case was that all of the sexual assaults were committed in the complainant's home while all five adults and four children were in the home. The complainant's evidence was that the first three sexual assaults occurred within a period of four or five days in a guestroom on the ground floor in which the appellant was staying. She said the fourth sexual assault occurred in her bedroom on the first floor. The complainant's parents, sister, two cousins, and maternal grandmother also slept in various rooms on the first floor. The appellant and the complainant's aunt were having relationship problems and her aunt did not always sleep in the guestroom.

[7] The Crown case was almost wholly based on the complainant's evidence. Her evidence was comprised of a recorded forensic interview which was

conducted by the police on 25 August 2017 when she was 17 years old, and her evidence at a special hearing before the trial judge on 22 and 29 June 2018 when she was 18 years old (almost nine years after the sexual assaults were said to have occurred). The complainant was cross-examined at the special hearing. The complainant's evidence during the special hearing was also pre-recorded and played to the jury. The trial took place in September 2018.

[8] The appellant appealed against his convictions.[2] The main issue in the appeal was that raised by Ground 1 – whether the verdicts of the jury were unreasonable and could not be supported having regard to the evidence.[3] Having had regard to the whole of the evidence led at trial, I found myself in the position of having a genuine doubt as to the appellant's guilt of both counts. Having had regard to the advantages that the jury had in assessing the evidence at the trial, I also found that those advantages did not allay my doubts. In my opinion, upon the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of either of the two counts. There was a significant possibility that an innocent person had been convicted.

---

2 The grounds of appeal are set out at [91] and [92] of their Honours Kelly J's and Riley AJ's Reasons for Decision.

3 *Criminal Code* (NT), s 411(1) – "unreasonable or cannot be supported having regard to the evidence".

[9] The other members of the Court came to the same conclusions, and on 29 November 2019 we allowed the appeal on Ground 1 and made the following orders.

1. The appellant's convictions for (i) maintaining a sexual relationship in aggravating circumstances contrary to s 131A of the *Criminal Code*, and (ii) aggravated assault are set aside.

2. The appellant is acquitted of both counts.

[10] When the Court allowed the appeal on 29 November 2019 I stated we would publish our Reasons for Decision in relation to count 1 and each of the other grounds of appeal later. Following are my Reasons for Decision.

Ground 1

Legal principles

[11] The relevant legal principles applicable to Ground 1 of the appeal are well established. They were recently reviewed by Weinberg JA in *Pell v The Queen*.[4] They are as follows.

1. The question the members of this Court must ask themselves is whether they think 'that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'[5]

---

4 [2019] VSCA 186 at [589] – [663].

5 *M v The Queen* (1994) 181 CLR 487 at 493; *Pell v The Queen* [2019] VSCA 186 at [590].

2. The decision in *M v The Queen*[6] requires each member of this Court to make his or her 'independent assessment' of whether, on the evidence as a whole, there is a reasonable doubt as to the guilt of the appellant. In doing so the members of the Court must give full weight to the jury's advantage in having seen and heard the witnesses give their evidence.

3. As the joint judgment in *M* states:

> 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. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. *If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence*."[7]

4. The High Court has made it abundantly clear, intermediate appellate courts will abrogate their statutory responsibility if they do not approach this ground of appeal strictly in accordance with the principles laid down in *M*.

---

6 (1994) 181 CLR 487 at 492-4 ("M"); *R v Baden-Clay* (2016) 258 CLR 308, 329-30 [65] – [66]; *Pell v The Queen* [2019] VSCA 186 at [591].

7 (1994) 181 CLR 487 at 494; *Pell v The Queen* [2019] VSCA 186 at [592].

5. *M* makes it clear that an intermediate appellate court will fail to discharge its duty according to law if it treats questions of credibility and reliability as being of no particular concern when dealing with the reasonableness and supportability of a conviction at trial.[8]

6. However, unlike the position in England, the legislation in all Australian jurisdictions does not empower an appellate court to set aside a verdict based upon any 'speculative or intuitive basis.'

7. Accordingly, the task of each of the members of this Court in dealing with Ground 1 was to carry out an independent assessment of the whole of the evidence. Having done so, each member of the Court must consider whether there is, in the mind of that particular judge, a reasonable doubt as to guilt. If such a doubt exists, it will ordinarily be a doubt that the jury ought to have had. In that event, a second question must be asked, namely, whether that 'doubt' persists notwithstanding the advantages over the appellate court that are normally ascribed to the jury.

The assessment of the complainant's evidence

[12] This was largely an oath against oath case. The appellant gave evidence during which he denied the charges against him; and there was not a great deal of evidence tendered by the Crown which was independent of the complainant's evidence. Even if the jury rejected the appellant's evidence, it

8 *Pell v The Queen* [2019] VSCA 186 at [595].

remained for the jury to consider, on the basis of the complainant's evidence, and any other relevant evidence, whether the prosecution had proved the guilt of the accused beyond reasonable doubt.[9]

[13] When making an assessment of a witness's evidence juries are frequently directed that they should have regard to the intrinsic likelihood of the witness's version of what is said to have occurred. The members of the jury are entitled to ask themselves: Does the witness's evidence have a ring of truth and reality about it? Was the witness straightforward and open or was the witness evasive or defensive? How did the witness's evidence stand the test of cross-examination? Has the witness's evidence been consistent overtime? Is what the witness said inherently probable or improbable? Has the witness admitted telling untruths or to giving incorrect or inaccurate testimony? Does the evidence of the witness contain internal conflicts or mistakes? Did the witness lapse into vagueness or other aberrations? Were there unexpected omissions in the evidence? Was there a weakness in the extent or lack of detail of the evidence? Does the witness's evidence convey a sufficient sense of reality about what is said to have occurred? Does the witness's evidence make sense? Juries are also directed to use their common sense and life experience.

[14] In my opinion, the complainant's evidence contains significant discrepancies and inadequacies and lacked probative force. It was not persuasive. It did

9 *De Silva v The Queen* [2019] HCA 48 at [12].

not convey a sufficient sense of reality about what she said occurred. Much of her evidence is implausible, intrinsically unlikely, illogical and incongruous. Her evidence changed considerably overtime, and during the course of both her forensic interview and the special hearing. Her explanations for the changes in her evidence lacked credibility.

[15] I found there were discrepancies and inadequacies in the complainant's evidence about each of the four occasions she claims that she was sexually assaulted. I have set out my analysis of the discrepancies and inadequacies in her evidence in roughly chronological order below. Some of the inadequacies and discrepancies in her evidence are much more significant than others. For example, the complainant's evidence about being cut with a knife on the first occasion, her evidence about the third and fourth occasions on which she claims she was sexually assaulted, and her evidence about a letter she wrote to her mother all beggar belief. In addition, in 2012 she engaged in an exchange of friendly texts with the appellant in a manner that was thoroughly inconsistent with her claims that she had been violently sexually assaulted by the appellant on four separate occasions when she was nine years old and was terrified of him. Finally, it is highly improbable that the appellant could have violently sexually assaulted the complainant on four separate occasions in the circumstances described by the complainant and not have been discovered by someone else in the house. My grave doubts about the veracity of the complainant's evidence about each occasion

arise from the sum total of all the discrepancies and inadequacies that I have discussed below.

First occasion

[16] The first sexual assault and the aggravated assault on the complainant was said to have occurred about two or three days before Christmas Day 2009. All five adults and four children were at home. Everyone had gone to bed. It was quiet. The complainant had gone to bed in her bedroom on the first floor of the house earlier than the others but had stayed up until 12 am or later watching a movie on her iPad. After the movie ended she went to the bathroom on the first floor to have a shower or a bath. The complainant's evidence-in-chief about the first occasion can be summarised as follows. When she came out of the bathroom she had only a towel around her and the appellant was sitting at the top of the stairs to the ground floor of the house. He asked the complainant to come with him down to the guestroom on the ground floor to catch a frog. He said they had to be quick. After they went into the guestroom the appellant told the complainant that before they caught the frog her father had asked him to check if she had washed herself properly. He told her to sit on the bed in the guestroom and the appellant put his hand under the towel and touched her on her thighs before inserting one of his fingers into her vagina. When the appellant did this the complainant said she "yelled out" and said, "It hurts". The appellant then grabbed a pocket knife he had on his key chain from a bedside table, held it against her shoulder and cut her. The cut bled and it hurt. He said that if the

complainant made another noise he would cut her again and would kill her mother, father and sister. After he cut her, the appellant pushed the complainant backwards on the bed so that she was on her back. He took the towel off her, he was touching himself and he asked her if she wanted to touch him. She said no and he said that she was not old enough to appreciate it anyway. He moved between her legs and inserted his penis in her vagina. He had fast and rough penile/vaginal sexual intercourse with her. He got faster and then he stopped and his whole body "sort of shook". After the appellant had finished, he pulled his penis out of the complainant's vagina and said that he had to get her cleaned up. Once again he said that if she made any noise he would kill everyone. The appellant tried to get her to walk but she couldn't. She was too sore and she was bleeding. He put an arm under her arms and took her upstairs and into the bathroom on the first level of the house. He made her sit on the drain in the floor. She later gave evidence that the drain was not even a metre in front of the bathroom door. She was dizzy and vomiting. The appellant went and got a jug of hot water and "he had this thing on the drain and he poured it between [her] legs and said it would stop any infection". The appellant held his "hands" between the complainant's legs to stop the bleeding and then he washed everything off her. "He washed inside and outside and then he picked me up and I don't remember anything else. I woke up the next morning and I was back in my room." She spent the next day "just watching television because it hurt a lot".

[17] During her forensic interview the complainant further clarified her evidence about the first occasion as follows.

> He had me with his right hand and he reached across himself with his left and grabbed [the knife] off the bedside table and then he held it in his left hand while he had me in his right and he held it against my shoulder *and when I yelled* he cut me and said that if I made another noise he would do it again and he'd kill my family.
>
> No, I didn't make another noise.
>
> *He cut me straight across my shoulder. It bled. It hurt.*

[18] There were also the following exchanges between the police and the complainant during her forensic interview. The first exchange was when the police were asking the complainant questions about the second occasion she was sexually assaulted. The second exchange was when the police were asking the complainant about where she was bleeding on the first occasion she was sexually assaulted.

Police:	And tell me exactly what he did with that knife on the second occasion?
Complainant:	He held it next to me, he had an arm – a hand on each shoulder and he just had it there against me but not – not cutting me.
Police:	When you say against you, against what part of you?
Complainant:	Against the top of my arm *where he cut me the last time*.
[...]	
Police:	And then when you were telling me about that time, you told me that you were bleeding, can you tell me where you were bleeding?
Complainant:	I didn't know if it was inside or outside my vagina.

[19] It is important to note that during her forensic interview the complainant did not qualify in any way how loudly she yelled when the appellant inserted his finger in her vagina. Nor did she qualify the nature of the cut to her arm nor the extent to which the cut bled. Nor did she qualify the extent to which she was bleeding from her vagina.

[20] I had the following concerns about the complainant's evidence of the first occasion she claims she was sexually assaulted.

1. The complainant's statement during her forensic interview, that she couldn't remember anything from when the appellant picked her up in the bathroom and when she "woke up in the morning she was back in her own bed", has the hall marks of a nightmare or a fantasy. This impression is reinforced by the complainant's evidence about the many versions of events she described in the letters she says she wrote about being sexually assaulted which are discussed at [28] to [36] below. For example, during the complainant's cross-examination about the number of times she stated that the appellant cut her in the letter addressed to her mother (which she admitted was untrue), there was the following exchange between defence counsel and the complainant.

Counsel:	Why did you write in the letter he "cut me more"?
Complainant:	I don't know, it just came out. I don't even remember writing half of this. I was just panicking and I know that when I panic things change, things get messed around in my head. All the different events mould into one. *I have nightmares of different things. It's all a mess*.

She also gave evidence that the letters she wrote were just stories.

2. No evidence was led from the complainant, or anyone else, that the appellant ever engaged in any prior grooming of the complainant, or behaved inappropriately towards her, or even showed any particular interest in her in the past. Nor was there any evidence as to how the appellant knew the complainant was in the upstairs bathroom and came to be sitting on the step at the top of the stairs waiting for her to come out. The complainant's decision to go to the bathroom at this very late time of night seems to have been a completely isolated and random decision. There was no evidence that she regularly used the bathroom at this time. It was out of the ordinary. Her mother gave evidence that it would be unusual for someone to be having a shower at 1 am. There was no evidence that the appellant was nearby when the complainant went from her bedroom to the upstairs bathroom. The guestroom is under the stairs so the appellant could not have seen the complainant go into the upstairs bathroom if he had retired to the downstairs guestroom for the night. Nor can the upstairs bathroom door be seen from the dining room or the upstairs veranda. Yet, in circumstances where the appellant's wife could have walked into the guestroom at any time, the complainant's evidence is that the appellant just happened to be sitting at the top of the stairs at or after midnight, after everyone had gone to bed, waiting for the complainant to come out of the bathroom so he could take her to the guestroom and violently sexually assault her. The

violent sexual assault occurs completely randomly in extremely risky circumstances that are utterly devoid of any context. The complainant's evidence lacks the ring of reality.

3. The complainant's evidence about the extent she bled from her vagina changes overtime. It is significantly inconsistent and evasive. Her evidence about this topic was as follows.

- During her forensic interview she stated the following.

> He tried to get me to walk but I couldn't. I was too sore and *I was bleeding* and he – he had an arm under my arms and he took me upstairs and back into the bathroom and he made me sit on the drain on the floor and I was dizzy and I was vomiting and he went and got a jug of hot water and he had this thing on the drain and he poured it between my legs and said that it would stop any infection *and he held his hands between my legs to stop it bleeding* and then washed – washed everything off me.
>
> Police: And when you were telling me about that time, you were bleeding. Can you tell me where you were bleeding?
>
> Complainant: I didn't know if it was inside or outside my vagina.

- During her cross-examination the complainant gave the following evidence about this topic.

> Counsel: Now, what about any bleeding from your vagina area, KLR. Was there bleeding from your vagina area?
>
> Complainant: Yes, I saw it on the bathroom floor when he put water on me.
>
> Counsel: Did you see it on the bedding?
>
> Complainant: No, my hips were off the edge of the bed.

[This statement is inconsistent with the complainant's evidence during her forensic interview that she was seated on the edge of the bed and "he pushed me backwards on the bed so I was on my back and he took the towel off me". The effect of that evidence is that her hips must have been on the bed when the appellant engaged in sexual intercourse with her on the first occasion. It is also difficult to understand how an adult male could have fast and rough sexual intercourse with a nine year old child, who was not consenting, if her hips were off the bed unless he was holding her hips in some way, and this was not the complainant's evidence.]

Counsel:	Did you see [blood] on the tiled floor below the edge of the bed?
Complainant:	No.
Counsel:	Can you comment, please KLR, how much blood was coming from your vagina area?
Complainant:	*It was just enough to smear the outside*. It wasn't dripping or gushing.

[This evidence is inconsistent with the complainant's evidence in her forensic interview about how much she was bleeding. If her hips were off the edge of the bed and the complainant was bleeding in the manner she described in her forensic interview, it follows that it would be more than likely that some of the complainant's blood dripped onto the tiles on the floor in the guestroom. In order to evade any suggestion that if she had been sexually assaulted, and was bleeding in the manner she described in her forensic interview, there would be real evidence of her

bleeding the complainant changes her evidence to – my hips were off the bed, and to – there was only just enough blood to smear the outside of her vagina. Whether such evidence would have been discovered is beside the point. It is the degree to which the complainant changes her evidence to explain why there would not be any evidence of her bleeding which damages her credibility.]

4. While offenders do make irrational and impulsive decisions, and sexual desire provides a very strong motive for sexual predators to assume great risk, the complainant's evidence that the appellant took her to the upstairs bathroom to wash her does not make any sense at all. The complainant also gave evidence to the effect that the appellant did not want to be caught – he cut her with a knife to ensure that she did not yell out. Yet, according to the complainant, the appellant not only takes a great risk of being caught by taking her from the landing at the top of the stairs on the first floor, while she is only wrapped in a towel, and engaging in violent sexual intercourse with her in the guestroom, but rather than wash her in the guestroom ensuite, he takes her upstairs while she is bleeding from her vagina and washes her in the upstairs bathroom where she not only continues to bleed from her vagina but also vomits. This is an extremely risky and illogical thing to have done. The risk of discovery was significantly increased for no apparent reason. The upstairs bathroom was used by all of the other children and the appellant's wife's mother. Given the guestroom had an ensuite in

which the complainant says the appellant washed her on the second and third occasions she says he sexually assaulted her, the natural and obvious thing for the appellant to have done was to wash the complainant in the guestroom ensuite and then take her directly to her bedroom. The implausibility of this evidence is supported by the fact that there was no evidence about how the vomit was cleaned up. Nor was there any evidence that anyone saw blood on the stairs or noticed the smell of vomit in the upstairs bathroom the next morning. The complainant's mother gave evidence that at no stage did she see any blood on any bedding. Nor did she notice any blood in the guestroom or splattered on the stairs. Nor did she see any blood or vomit on the floor in the upstairs bathroom. Nor did the complainant's father see any such blood.

5. The complainant's evidence that the appellant deliberately cut her with a knife to ensure that she did not yell again, which constitutes the Crown case about count 2 on the indictment, is irrational. It did not make any sense for the appellant to deliberately cut the complainant with a knife if he wanted her to remain silent so he could not be discovered. Cutting someone with a knife will ordinarily cause a person to involuntarily cry out in pain and creates a further risk of discovery. Depending on the nature of the cut, a cut of itself could also draw attention to the fact that the complainant had been harmed or interfered with. A cut that caused anything other than a minor scratch was highly

likely to be noticed by other members of the household as it was likely to require treatment of some kind, at the very least the application of a band aid. The complainant's suggestion that the appellant reached across his body with his left hand and picked up what seems to have been described as a Swiss Army knife (which would ordinarily have its blades folded in and closed), while he held the complainant who was seated on the bed with his right hand, and cut her, to an extent no greater than a thin paper cut is bizarre. Further, during the complainant's cross-examination, it emerged that despite what she told the police, she did not yell at all. She "gasped" or "squeaked" or said "ow". She said she used the wrong word when she said "yell". If the complainant did not yell, then there is a further reason for the appellant not to cut her with the knife as there was in fact no risk of the appellant being discovered as a result of her calling out and the complainant did not need to be silenced in such a violent manner or at all.

6. There are a number of additional problems with the complainant's evidence about the appellant cutting her with a knife. Most significantly her evidence about being cut with a knife was inconsistent and changed over time. Despite telling the police that the appellant cut her straight across her shoulder with the knife and that it bled and hurt, at the end of her evidence on this topic it appears that the appellant barely cut her. All the cut left was a thin line which the complainant could just see in the mirror, and the appellant cut her at the back of her

shoulder on her shoulder blade, not the top of her shoulder or arm. During her cross-examination, the complainant said that if it had happened now she would not pay much attention to it. If there had been a more significant cut on her arm the chances are that it would have been noticed by other members of the household and the sexual assaults may not have continued. The complainant's evidence changed as follows.

- In the letter the complainant wrote to her mother before these matters were raised with the police the complainant stated the following.

> […] he had ***a little knife*** and he ***cut my arm*** and said that if I made a noise he would cut me again and kill everyone.
>
> He told me to come back again and I had to so I went back two more times and they were the same ***except he cut me more***…

- During her forensic interview the complainant gave the following evidence about being cut with the knife.

> […] he grabbed the pocket knife off his key chain from off the bedside table and ***held it against my shoulder and he cut me***…
>
> It was I think a pocket knife with all the different fold out tools on it and it was like maroon or red and it was on a key chain…
>
> [The part he used] was straight on one side and curved on the other and it was like a knife basically and it was smooth edged.
>
> He had me with his right hand and he reached across himself with his left and grabbed it off the bedside table and then he

held it in his left hand while he had me in his right and *he held it against my shoulder and when I yelled he cut me*…

[At no stage did the complainant give evidence about how the appellant managed to unfold a blade of the knife with one hand.]

He cut me straight across my shoulder.
It bled.
It hurt.

There is also the complainant's evidence at [17] above to the effect that the appellant cut her *at the top of her arm* and the evidence at p 26 below.

- During her cross-examination the complainant gave the following evidence about being cut with the knife.

Counsel:	And you say that, whilst in that room, he produced the knife. Is that right?
Complainant:	Yes.
Counsel:	And what do you say the colour of the knife was, KLR?
Complainant:	It was maroon.
Counsel:	Did you describe it to the detective as a pocket knife?
Complainant:	Yes.
Counsel:	And what do you say that he did with the knife, KLR?
Complainant:	He took it off the bedside table. It was on the table closest to the door. He grabbed it and after touching me, ***he pushed me back down on the bed*** *and held it against my shoulder and said that, if I made a noise, he would use it*.

Counsel:	Alright?
Complainant:	[…] *and he used it*.
[…]	
Counsel:	And you say he used the knife to cut you, according to you, KLR, where did he cut you?
Complainant:	*It was just behind my shoulder*.
Counsel:	Now, just again, for the purposes of the transcript, I'm just going to describe your action there. *You used your right arm to show the left shoulder blade behind your shoulder*. Is that correct?
Complainant:	Yes.
Counsel:	*Did he cut deeply*?
Complainant:	*No*.
Counsel:	*Did it bleed, KLR*?
Complainant:	*A little bit. It was - if it happened now I wouldn't have paid much attention to it, but at the time, I was young and it hurt*.
Counsel:	*How do you know that it bled*?
Complainant:	*Because, I could see it and I could put my hand on it and I could see the blood*.
Counsel:	*Is that what you did, put your hand on the cut and you could see blood on your hand*?
Complainant:	*I had both hands like this, I was trying to get away.*
Counsel:	I'm just going to describe again, KLR, your action there for the purposes of the transcript, you crossed your arms and hands over your chest and shoulder area. Is that accurate?
Complainant:	Yes. Until he put my arms back again.

[At no stage during her evidence-in-chief did the complainant say she held her hands in the manner she described, nor did she say she tried to get away.]

Counsel:	*Well, just in relation to the question of the cut, you were saying that the cut was to the rear shoulder portion of your left shoulder. Correct*?
Complainant:	*Yes*.
Counsel:	And you are saying that the cut was not deep, but when you touched the cut you could see blood. Is that correct?
Complainant:	Yes.
Counsel:	And were you aware of blood dripping, or dropping onto the sheets on that bed?
Complainant:	No. I wouldn't have bled enough. [There was no such qualification during her forensic interview.]
Counsel:	When you say that he cut you, was it painful?
Complainant:	Yes.

[Her evidence about this changed later in her cross-examination, as follows.]

Counsel:	I asked you earlier about the cut and about whether or not you saw any blood on the bedsheets. Do you remember that question? And I understand that you don't recall seeing any blood on the bedsheets from the cut. Is that right?
Complainant:	Yes, they were dark, but you could – *there wasn't enough there for it to be obvious to someone. There was enough that I knew it was mine and I knew where it had come from*.
Counsel:	So, you knew – sorry, KLR, I interrupted you. Please finish?
Complainant:	*After a while it just blended in, once it soaked in*.

[The last answer is contradicted by what the complainant states in subpar 9 below.]

[…]

Counsel:	And, do you recall telling the police that according to yourself, PW said, "If you make another noise" – sorry. May I withdraw that question, KLR? After taking the pocketknife, you said that PW held that knife to your shoulder and cut you. Do you remember saying that to the police?
Complainant:	I remember him pushing me back *and then losing the knife* and saying if I made another noise he would cut me again.

[…]

Counsel:	*Now before the lunchbreak you pointed to the left shoulder blade of yourself as the area in which PW cut you, so that's the shoulder blade toward your back. Do you agree that that's where you pointed to before lunch today*?
Complainant:	*Yes*.
Counsel:	And how specific – how certain are you please KLR that that was the area that he cut you, that was the area of your…
Complainant:	that was definitely the area but I'm not 100% on which side.
Counsel:	All right. Was it – *was the cut to your arm*?
Complainant:	*It was to the back of my shoulder, the top of my arm*.
Counsel:	*Okay. Have you ever said something different to the cut being to the top or rear of your shoulder*?
Complainant:	*Not that I can recall*.
Counsel:	*Have you ever pointed to a different part of your body, where you say the cut occurred*?

Complainant:	*I can't think, maybe. If I did it half-heartedly in the statement. I don't know*.
Counsel:	*Well may I ask it like this KLR, did you not in your interview with the police, point to the top of your arm where your upper arm is*?
Complainant:	*I didn't realise that I was meant to be pointing to the exact space where I was cut. During the time of the statement, I wasn't asked to show where, it was just a general indication*.
[…]	
Counsel:	Did you KLR, ever inspect the cut in the mirror afterwards?
Complainant:	Yes, once.
Counsel:	*And can you give us an indication of how long the cut was, if you can say in centimetres or how you prefer*?
Complainant:	*About 7 centimetres, and just thin like a paper cut*.
Counsel:	Can I just clarify I heard you correctly, did you say 7 centimetres and thin line, a paper cut?
Complainant:	Yeah.
Counsel:	Okay?
Complainant:	*Maybe a little shorter, I don't know but it was thin*.
Counsel:	*So when you looked at it in the mirror, obviously you saw it so it was visible to you, yes*?
Complainant:	*Yes, just*.
Counsel:	When you say, "just" what you mean by "just"?
Complainant:	It's a difficult angle and *it was thin by the time I wiped the blood off and pull the scab off it – it was just like a line*.
Counsel:	Did you look at the cut – when you say it was a difficult angle KLR, are you saying to actually turn your head to look at it, to actually see it in the mirror?

Complainant:	Yes.
Counsel:	And when did you look at the cut, was it later on that night or was it on a later day and if a later day, what day?
Complainant:	It would have been the next day.

7. The inconsistency in the complainant's evidence about the level of noise she made when the appellant inserted his finger into her vagina (a 'yell' became a 'squeak') is also a significant discrepancy in her evidence. There was no explanation which made any sense, nor any apparent reason for the change in the complainant's evidence, unless it was to evade any suggestion that it was likely she would have been heard and the appellant caught out engaging in sexual intercourse with her. The complainant's evidence about this topic was as follows.

- During her forensic interview the complainant stated the following.

  > He put his finger inside me and I said – *I yelled out* and said, "it hurts"…

- During her cross-examination the complainant gave the following evidence,

Complainant:	I said, "Stop, it hurts." And I yelled out, *it was more of a squeak, I guess*.
Counsel:	When you say, "More of a squeak", can you repeat the sound now, what you made?
Complainant:	*No, I don't remember the noise I made* when – all I know is that obviously it wasn't loud enough to alert anyone.

Counsel:	*Well, you said "yell" didn't you, to start with? Just before you said "squeak"*?
Complainant:	*I don't know, I used that word to say that I'd made a noise that wasn't a word*.
Counsel:	Okay. *What do you define as a yell, KLR*?
Complainant:	*Like a gasp, or an "ow", like a noise, I don't know*.
[...]	
Counsel:	And, can I be very specific please, KLR, what was the sequence of events when you are told to sit on the bed? Could you take it part by part, step-by-step, please?
Complainant:	We went down to the room to look for the frog we walked in and he shut the door and he turned and he said, "Before we look for it, I just need to quickly check that you've washed yourself." He said that dad asked him to check. And he said, "Just sit down." So I sat down.
Counsel:	Can I ask at this point, KLR, whereabouts on the bed did you sit down? And, if it assists to refer to photograph number two, please?
Complainant:	I sat down on the side of the bed closest to the door. On the edge.
Counsel:	On the edge, and what happened then?
Complainant:	He put his hand up under the towel and he put one hand on one thigh on the inside and then on the other.
Counsel:	Yes. But was he saying anything at that stage?
Complainant:	No.
Counsel:	And, then is your evidence that after he did that to your thigh that he put his finger inside your vagina?
Complainant:	Yes.
Counsel:	*And it is at that point you say you yelled*?
Complainant:	*I said that it hurt*.
Counsel:	*Did you yell*?

Complainant:	*Yes. I made a noise. It wasn't loud*.
Counsel:	*Can I ask you what your definition, KLR, of a yell is*?
Complainant:	*It's not, like a yell or a scream, I've used the wrong word. It was just a – gasp or a – I don't know*.
[…]	
Counsel:	How many times did you make a gasp or a – I'm going to use the word "gasp" KLR. How many times did you make a gasp during this portion of the incident that we are discussing?
Complainant:	I'm not sure. I wasn't counting.
Counsel:	But you also say, didn't you, in your evidence that as well as PW saying if you make another noise he would do it again, in other words he will cut you again and he'll "kill my mum and my dad and my sister" that's what you told the police wasn't it?
Complainant:	Yes.
Counsel:	*Did you yell loudly at any time*?
Complainant:	*No I never screamed or yelled loudly*.
Counsel:	What about when he cut you?
Complainant:	It was a gasp, I've told you.
Counsel:	Was the cut painful, KLR?
Complainant:	Yes.
Counsel:	And was it very painful or a little bit painful or extremely?
Complainant:	*It was very painful*.

[The last answer contradicts the complainant's earlier answer that if it happened now she would not pay much attention to it.]

Counsel:	*Did you yell out KLR*?
Complainant:	*No, because I was too scared and if I had have yelled out then no one would have*

heard (sic) and maybe someone would have come and got me.

8. Significantly, during her cross-examination the complainant admitted she wrongly stated in the letter she initially claimed she wrote to her mother that the appellant cut her more on the second and third occasion he sexually assaulted her. There was the following exchange between defence counsel and the complainant.

Counsel:	So when you made this considered decision to rewrite the letter you were thinking clearly, weren't you?
Complainant:	No.
Counsel:	It was a clear decision because you wanted to have something that people would believe in you, correct, according to you?
Complainant:	It was a panic written piece of paper that was not going to go anywhere. Yes I wrote it, because I didn't think people would believe me. But I thought 100 other things as well, while I was writing this.
Counsel:	You gave very clear evidence to the police that only on one occasion, according to you, PW cut you with a knife. You said that happened only once. Correct?
Complainant:	And it did.
Counsel:	If we look towards the bottom of that letter, about five lines up. Do you agree that you wrote, according to you, in 2013?
Complainant:	Yes. I know that's wrong. It's been wrong since I first wrote it.
Counsel:	Let me finish the question, KLR, I have – "I went back two more times and they were the same except he cut me more." Do you agree that's what you wrote in 2013?
Complainant:	Yes.

Counsel:	And you're talking about those two occasions, you're talking about. You're talking about two subsequent occasions according to you of being sexually assaulted, aren't you?
Complainant:	Yes.
Counsel:	And "he cut me more" is what you said. And in your evidence to the police you said that he didn't cut you subsequently?
Complainant:	He didn't. I said that there are a lot of inconsistencies in this note.
[...]	
Counsel:	Why did you write in the letter that "he cut me more"?
Complainant:	I don't know, it just came out. I don't even remember writing half of this. I was just panicking and I know that when I panic things change, things get messed around in my head. All the different events mould into one. I have nightmares of different things. It's all a mess.

[If her statement in her letter about being cut more on the second and third occasions was false, there must be a real doubt about the veracity of the complainant's statement that the appellant cut her with a knife on the first occasion she claims he sexually assaulted her.]

9. There was also the following very telling exchange between defence counsel and the complainant.

Counsel:	He never cut you at all, did he KLR?
Complainant:	He did.
Counsel:	And the reason you told the police that he only cut you once is because you realised that people would have noticed cuts on you, correct?
Complainant:	No.
Counsel:	People would have noticed blood on the bedding wouldn't they, if you'd been cut?

Complainant: *They would have noticed blood on the bedding if I'd been cut once as well.*

[In the above exchange, the complainant is being questioned about: (i) the fact that she has changed her story about the number of times she claims she had been cut by the appellant; and (ii) the reason she changed her story was that she knew if she did not change her story about the number of times she was cut with a knife she would be caught out deliberately maintaining a false statement. In essence, it is put to her by defence counsel that the reason she changed her story is that she understood that if the appellant had cut her a number of times his acts would most definitely have been discovered, and no one had noticed she had been cut at all. Her ironic answer to the challenge to her credit is, in effect, to suggest if that was the case, why persist with her story about being cut at all. The problem with the complainant's answers is that she also changed or qualified her evidence about the extent to which she was cut. Her evidence became she could only just see the cut in the mirror, it was a line.]

10. If the complainant's evidence about count 2 on the indictment cannot be accepted then her evidence about the first occasion when she says she was sexually assaulted also becomes unreliable, as the assault with the knife is an integral part of what she says happened on the first occasion.

11. While it is now well understood that victims of violent sexual assaults react differently to the trauma they suffer and there is a wide range of victim reactions to such assaults; and children have different levels of resilience, comprehension and mechanisms of coping, the complainant's behaviour following the first occasion she claims she was sexually assaulted is inconsistent with her evidence that she was terrified of the appellant. She said she watched television the next day because she was sore, not because she was terrified of the appellant or trying to keep away from him. During her cross-examination she also gave evidence that she attended all Christmas meals with her family and the appellant's family, opened her presents and played with her new toys, attended her sister's birthday on 23 December 2009, and did not miss a single family trip. There was the following exchange between defence counsel and the complainant.

Counsel:	And you say that PW committed these violent acts upon you. So you were terrified of him, you say?
Complainant:	Yes.
Counsel:	Did you seek to spend all your time in the company of an adult while he was staying there after the first incident?
Complainant:	I don't remember.
Counsel:	Well, you didn't did you? Because according to you, you would sometimes spend time on your own. Correct?
Complainant:	Yes.
Counsel:	You said you were on your own in the library, when this second incident happened to you?
Complainant:	Yes.

Counsel:	Why, after the first incident KLR, did you not seek the company of an adult for protection at all times?
Complainant:	Do you think I had any faith left in adults after that?
Counsel:	Well, can you answer the question? Wasn't your grandmother a protector for you?
Complainant:	I suppose, yes.
Counsel:	Why didn't you seek the protection of your grandmother? Why didn't you stay at her side at all times, after you say this happened to you?
Complainant:	Because it wouldn't have made any difference.
Counsel:	Why do you say that it would have made no difference?
Complainant:	Because there is always night-time and there's times when people fall asleep and I can't be with them every waking minute.
Counsel:	You could sleep with your grandmother in the study, couldn't you?
Complainant:	Yes, I could have.
Counsel:	Why did you not do that, KLR?
Complainant:	I don't remember.

[It is significant that the complainant did not say, in response to the above questions, that she reacted in the way she did because she was in a state of shock and did not know what to do, or she felt responsible and thought she would be blamed, or she thought she would not be believed, or she could not comprehend the violence she had been subjected to, or she thought that if she stayed near the adults the adults may be harmed. The inconsistency in her behaviour, which was explored in the above cross-examination, is reinforced by the friendly

exchange of texts messages she had with the appellant in 2012 which is discussed at [40] to [44] below.

Second occasion

[21] The complainant's evidence-in-chief about the second occasion on which she says she was sexually assaulted may be summarised as follows. It must have been Christmas Eve or Christmas Day. It was a couple of days after the first occasion. Everyone was out on the balcony and in the dining room. The music was really loud. The television was on and everyone was talking. It was late at night after 11 pm. The complainant's mother, grandmother and her aunt were out on the balcony on the same level of the house. The other children were playing tip outside. The complainant was in the upstairs library which was the room in which some of the children including the appellant's children and their grandmother slept. She was watching television. The appellant came into the library and told the complainant to stand up. She got up and he grabbed her shoulder and her hair at the same time and said "Don't make a noise". She did not. The appellant took her downstairs to the guestroom. He stood her in front of the bed in the guestroom so that her back was facing him. She had a denim skirt on. He pulled it up around her hips and pulled her underwear down. The appellant "took off" his pants and made the complainant lie back on the bed. This time he had one of the kitchen knives. He started touching himself (masturbating) and touching the complainant again. He put more fingers in her vagina. He stood between her legs which were hanging off the edge of the bed. The

complainant was sitting up and the appellant put a hand on the back of her head and pushed her face between his legs. He was standing up and she was sitting on the bed. He "rubbed her face in it" and then pushed her back on the bed and "he [moved] up between her legs again". He put his penis in her vagina and had sexual intercourse with her. He went faster and faster and then took his penis out of her vagina and kept rubbing himself. The complainant said "he finished himself off on [her] face." Instead of stopping and shaking while his penis was in her vagina he pulled his penis out and rubbed himself. He kept rubbing and then the appellant's body started shaking and fluid came out of him onto her face. The appellant said, words to the effect of "That's all you are good for" and he said the complainant did well. The appellant then took the complainant into the guestroom ensuite. He made her sit on the drain again and he wiped everything off. He then took the complainant upstairs to her bedroom. The appellant said that she was his Christmas present and he was hers. He told the complainant to remember what would happen if she said anything and then he left her in her bedroom. She got changed and got into bed. She left the lights on so she could see if he came into her room again. The complainant just lay in her bed and eventually went to sleep.

[22] During her forensic interview the complainant's evidence about the second occasion was further clarified as follows.

> Police: And when you spoke about the second time you spoke about a knife. Can you describe for me that knife?

Complainant:	Um, it was one of the black handled ones. Mum had a big knife set in the kitchen and she'd just replaced it with a new one and he'd taken one of the old ones and it had black handles and silver dots on it and a silver blade.
Police:	And how big was it?
Complainant:	It was about as long as my hand.
Police:	Which part?
Complainant:	The blade.
Police:	And tell me exactly what he did with that knife on the second time?
Complainant:	He held it next to me, he had an arm – a hand on each shoulder and he just had it there against me but not – not cutting me.
Police:	When you say against you, against what part of you?
Complainant:	Against the top of my arm where he cut me last time.
Police:	How did you feel about the knife being near you?
Complainant:	I didn't know if he would cut me or not so I kept my mouth shut.
[…]	
Police:	Okay. Now KRL, you talked about – you said 'he rubbed my face in it' can you explain to me what you mean by that?
Complainant:	It was the whole area, I don't know how to describe it.
Police:	Which area?
Complainant:	Around his penis.
[…]	
Complainant:	On top of skin.

[23] I had the following concerns about the complainant's evidence of the second occasion she claims she was sexually assaulted.

1. The timing of the sexual assault on the second occasion was extremely risky. It was improbable that the appellant could have sexually

assaulted the complainant on that occasion without being caught. Everyone, including the younger children, was still up. It was after 11 pm and must have been close to the time when the children would be put to bed. As the other children were playing outside, there was a high probability when they came into the house they would walk past the guestroom and up the stairs. The complainant says nothing about when the children or the other adults went to bed, which must have been sometime during or after the time when she said the second sexual assault occurred. Nor does she say how those matters were dealt with by the appellant. When children of relatively young ages are put to bed it is very common for all children to be accounted for. It is likely that enquiries would have been made about the whereabouts of the complainant at the time the other children were put to bed.

2. There was the introduction of a 20 cm long, or thereabouts, black handled kitchen knife. The complainant's evidence about this was unreliable for the following reasons.

    - There is no mention of the use of a different knife in the complainant's letter to her mother.

    - According to the complainant, the appellant already had a pocket knife. There was no need for him to obtain another knife.

    - The complainant's evidence during her cross-examination was that she first noticed the kitchen knife in the appellant's hand when

they were going into the guestroom. It was not already in the guestroom and the complainant did not give evidence that she saw the appellant pick up the knife in the guestroom. On the complainant's evidence there is a fair inference that the appellant had the knife in his hand when he went into the library and took her down stairs. To take the complainant downstairs at knife point was an extremely risky and improbable thing to do as everyone was still up and the children were playing outside. On the complainant's evidence, there was the possibility that a child could have run upstairs or into the library at any time.

- There was a risk that the complainant's mother could have noticed the knife was missing from the kitchen as the appellant had the knife for a number of days. According to the complainant, he had the same knife on the third occasion. The appellant tries to evade any suggestion that her mother would have noticed the knife was missing by giving evidence about the provenance of the knife. She stated that it was an old kitchen knife and her mother had a new set of knives which she now used. By implication she is also suggesting that the appellant has thought things through to such an extent. He has picked a knife that her mother would not realise was missing. This evidence lacks the ring of reality. It is implausible that the appellant would have used such a knife when he already

had a knife and, on the complainant's evidence, had used it successfully to maintain her silence.

3. There was the following exchange between defence counsel and the complainant during cross-examination about the kitchen knife.

Counsel:	And you told the police on the second incident that there was a knife, do you recall that?
Complainant:	Yes.
Counsel:	And you say that that knife had a black handle?
Complainant:	Yes.
Counsel:	And you – how long in total do you say that that knife was, I mean – when I say in total KLR including the handle and the blade. Can you say in centimetres?
Complainant:	Maybe 20.
Counsel:	Okay. And where did he – could you see where PW – according to you, did you see where he took the knife from?
Complainant:	No I didn't see him take it but I knew where it was from.
[...]	
Counsel:	Did he have the knife with him in the library upstairs?
Complainant:	I didn't notice it. *He could have had it*.
Counsel:	When did you first notice it?
Complainant:	When he had it in his hand downstairs.
Counsel:	Was that in the guest bedroom or before one got to the guest bedroom whilst downstairs?
Complainant:	*It was as we were going in*, it was towards the start.
Counsel:	Sorry, towards the start?
Complainant:	Towards the start of being in the room.
Counsel:	Okay?
Complainant:	Towards the start of the event.

Counsel:	Okay. *And did he have the knife in his hand*?
Complainant:	*Yes*.

4. The complainant's evidence that the appellant made her sit on the drain in the guestroom ensuite does not make sense. The logical thing to have done was to wash the complainant in the shower in the guestroom ensuite. However, this evidence is consistent with the complainant's desire to punish herself which she said she expressed in the various letters and notes she wrote.

5. Some of the complainant's answers during her cross-examination about the second occasion are significantly inconsistent with her evidence during her forensic interview. For example, there was the following exchange between defence counsel and the complainant.

Counsel:	Just going back to the library, or your grandmother's room that you described in photograph number 4, you were watching television in that room you say, when PW approached you. Is that accurate?
Complainant:	Yes.
Counsel:	And, what did he do when he approached you, KLR?
Complainant:	He just came in the door and he told me to come downstairs again, or I'd know what would happen if I didn't.
Counsel:	Did he physically take hold of you in any way?
Complainant:	*I don't remember. I know I didn't fight. I didn't try to run. I didn't do anything. I just went.*
Counsel:	*So, you don't remember whether there was any physical contact from PW at that point*?

Complainant: *No. He could have had his hand on my back. I don't know. All I know is, I just walked down there.*

This evidence contrasts with the complainant's evidence-in-chief which was:

> I was in the library all the other kids were downstairs playing tip outside and he came into the library and he said, "Stand up." And I got up and *he grabbed my shoulder and my hair at the same time* and said, "Don't make a noise." So I didn't and he took me downstairs…

[The inconsistency in the complainant's evidence is made more telling by the fact that when speaking about the third occasion during her forensic interview, the complainant stated, "I was in my bedroom and he came in *and he grabbed me by the shoulder and my hair again*".]

Third occasion

[24] The complainant's evidence about the third occasion she said she was sexually assaulted was as follows. It happened two days after the second occasion. The complainant was in her bedroom. The appellant came in and grabbed her by the shoulder and her hair again and took her downstairs to the guestroom. He made the complainant take her clothes off and he took his clothes off. The appellant pushed the complainant back onto the bed like usual. Then he pushed her back further so that her head "was hanging off the edge on the other side of the bed". He "flipped" her over so she was on her stomach. He moved her legs outwards and he rubbed himself while he was touching her. He ran his hands all over her and then between her legs and he

put fingers inside her vagina. He knelt on the bed behind her and put his penis inside her vagina again. The appellant did that for a while and then he flipped the complainant over on her back. He inserted his penis into her vagina again while he had her knees bent upwards. The appellant pulled his penis out of her vagina and he started rubbing himself. "*This time he had the knife near my shoulder like usual* and he moved it up near my neck" and he told the complainant to open her mouth. "He put his penis in my mouth and held me like that to make me hold it open. His fluid came out of his penis again and I couldn't breathe because he had it in my mouth and every time I coughed he laughed." The appellant once again cleaned her up in the guestroom ensuite and took the complainant back upstairs.

[25] I had the following concerns about the complainant's evidence about the third occasion.

1. The description of the sexual assaults the complainant describes on the third occasion does not have the ring of reality. Her description of the sexual assaults is highly choreographed – "he pushed me back so that my head was hanging off the edge of the bed", "he flipped me over so I was on my stomach and he moved my legs outward", "he knelt on the bed behind me and put himself inside me again", "he flipped me over on my back", "he had my knees bent upward then he was between my legs", "I couldn't breathe because he had it in my mouth". The complainant's description of these acts is not childlike. It does not

describe the manner in which an adult is likely to have engaged in sexual intercourse with a nine year old child.

2. The complainant's description of the appellant inserting his penis into her mouth is lacking in important detail. On one view of her evidence, she is still lying on her back when the appellant inserted his penis in her mouth while at the same time holding the knife near her neck. Her description of these actions is implausible.

3. There is an internal conflict in the complainant's evidence about the appellant's possession of the knife. Her evidence is incongruous. She only mentions the appellant's use of the knife after she described the appellant having penile/vaginal sexual intercourse with her for the second time during the third occasion. The knife is an afterthought. Before the complainant gives evidence about the knife in her forensic interview, she told the police that: (i) the appellant grabbed her by the shoulders and the hair; (ii) pushed her back on the bed so that her head was hanging off the edge on the other side of the bed; (iii) moved her legs outwards; (iv) ran his *hands* all over her; (iv) flipped her over so that she was on her stomach; (v) flipped her over onto her back; and (vi) bent her knees upwards. All of those actions are likely to require the use of two hands. It is only after she gave that evidence that the complainant told the police the following.

> Police: I think – well you told me that "he was inside me again and he had his (sic) knees up",

	perhaps we –what was the next thing that happened after that – sorry had your knees up.
Complainant:	Um, he pulled himself out again just like the last time *and this time he had the knife near my shoulder like usual and he moved it up near my neck and he told me to open my mouth*.
Police:	And what happened then?
Complainant:	He put his penis in my mouth and held me like that to make me hold it open.
Police:	Describe that knife.
Complainant:	It was the same kitchen knife that he used the second time.
Police:	And you said he had the knife near your shoulder, what do you mean?
Complainant:	The same way as before, *he had it up against me but he wasn't using it*.
[…]	
Police:	Tell me about moving it up to your neck.
Complainant:	*He just slid it up* and told me to open my mouth and hold it open then *he had the flat part of the blade just pressed against my neck*.

[As I understand the above evidence, the complainant never moves off her back while the appellant engages in fellatio with her while at the same time holding the knife against her neck. The evidence does not make sense.]

Fourth occasion

[26] As to the fourth occasion, the complainant gave the following evidence. The fourth occasion occurred on the last night the appellant was in Darwin. The complainant was in her bedroom and the appellant came upstairs into her room. She was sitting up in bed on the pillow with her back towards the bed

head. After the appellant entered her room he turned and quietly shut the door. The appellant said, “Sorry I am late.” He sat down on her bed in front of her and unzipped his pants and took his penis out and started masturbating with one hand. He placed his other hand underneath the complainant’s nightie and ran his hand all over her. The appellant told the complainant that she needed to pick a few things and he said, “We’ll do three.” He told her to stand up. She did not do so and the appellant grabbed her by the back of the neck and made her stand up. He pushed her along and made her walk. The complainant picked up three things, a bottle of nail polish, an air conditioner remote, and a disposable plastic water bottle. When she picked up the water bottle the appellant said. “I don’t know if that will fit but we will give it a go.” The appellant went back to her bed and said he would “warm himself up”. He took his pants off and sat down on the bed with the complainant. He pulled her underwear down and touched her while he touched himself. He told her to sit in front of him with her legs open. He “grabbed” the bottle of nail polish, held it by the handle, and stuck the rest of the bottle in her vagina. He moved it around and in and out. While he was doing this with one hand, he was “getting off” with his other hand. He then took the nail polish bottle out of her vagina and “grabbed” the air conditioner remote and “stuck it” in her vagina. He moved the remote faster and faster, in and out, and up and down. While he was doing that the complainant felt a sharp pain and the appellant started laughing. The back of the compartment where the batteries are inserted in the remote had come off

inside her vagina. The appellant took the remote out, and stuck his fingers in her vagina and pulled the remaining piece out. He laughed the whole time. The appellant then held the water bottle so that the top of the bottle was facing the complainant. He tried to push it in her vagina but it wouldn't go in and it hurt. He told her to be quiet and said, "You know what will happen if you make a noise" but he didn't have a knife this time. He kept pushing the bottle into her vagina and eventually he got some of it in. He twisted the bottle and pushed it in and out. He kept touching himself while he was doing that. He then pulled the bottle out and rubbed himself really fast. He told the complainant to open her mouth. She shook her head and said, "No." The appellant grabbed her hair and "reefed [her] head around and kept shaking [her]". He kept "ripping" her head around. The complainant then opened her mouth. She was so scared she "wet herself". He watched this happen. The appellant rubbed his penis faster and faster and he "finished off" in her mouth. He ejaculated. The appellant then sat there for a bit rubbing her leg and said, "You really were a good girl." He stood up and put his pants back on. He put his hand on her head again, moved her head around and told her, "Remember what will happen if you say anything. I'll kill your mum, your dad and your sister and you." The appellant told her that she did not have to tell her parents that she wet her bed and then he left. The complainant got a towel and put it over the bed and laid down. She was in too much pain. The pain was in her stomach and between her legs. She eventually went to sleep, but it was not until the early hours of the morning.

[27] I had the following concerns about the complainant's evidence of the fourth occasion.

1. The evidence is lacking in significant detail. The complainant was small for her age when she was nine years old. Her mother gave evidence that "both girls were quite small". The Crown led no evidence about the size of the three objects which are said to have been inserted in the complainant's vagina. A photograph, which was in evidence, of the first floor veranda taken from inside the dining room shows what looks like two air conditioner remotes on the inside of an external wall of the room. They are quite large remotes. It is unknown whether the remote in the complainant's bedroom was of a similar size or not. Without evidence about the size of the three objects a doubt remains as to whether it would have been possible to insert the three objects into the complainant's vagina without causing her significant injuries.

2. The Crown was in a position to obtain evidence about the size of the air conditioner remote in the complainant's bedroom from the complainant's parents, and the size of the water bottle, and could have obtained expert evidence about whether such objects could be inserted in the vagina of the complainant, who was nine years old, without causing her significant injuries. Such evidence was potentially of assistance to the defence case. The appellant was at a significant disadvantage because of the amount of time which elapsed between

January 2010 and the complainant raising these matters with the authorities for the second time.

3. The occasion once again involved a great risk of discovery and for no apparent reason the appellant is said to have changed his *modus operandi*. The sexual assaults occur in the complainant's bedroom not the guestroom. There is some evidence to suggest that at this time the appellant's wife may have been sleeping with the other children in the library which was close to the complainant's bedroom, and at no stage did the complainant say that the appellant was whispering when he spoke to her or that he suppressed his laughter. The appellant's wife gave the following evidence.

> Once my mum left to go home, I actually stayed in the study [the library] with B and S slept with them it was only on the last night that we were there I stayed up until quite late in the morning again before going downstairs.

Given her evidence, that she avoided sleeping in the same room as the appellant, her evidence that she did not sleep in the library and slept in the guestroom on the last night she was in Darwin beggars belief. A fair inference is that someone has told her about the complainant's evidence of the fourth occasion, and the appellant's wife tailored her evidence to fit in with the complainant's evidence that the fourth occasion the complainant was sexually assaulted occurred on the last night the appellant was in Darwin. Someone has "let the rabbit run".

4. There is no evidence about what the complainant did with her wet bedsheet the next day or whether anyone noticed that she had wet her bed on any occasion during the period of time that the appellant was in Darwin. The complainant's mother did the complainant's laundry. She said that the complainant would have been incapable of doing her own laundry. The Crown did not ask the complainant's mother if the complainant had wet her bed over the Christmas/New Year period in 2009/2010.

The complainant's letter to her mother

[28] The complainant gave evidence that after the third occasion she was sexually assaulted by the appellant and before the fourth occasion, when she was nine years old, she wrote a letter to her mother about what she claims the appellant did to her on the first three occasions he sexually assaulted her. She says she tore up the letter and rewrote it in 2013 when she was 12 or 13 years of age. The "rewritten letter" ("the letter") was tendered in evidence during the complainant's evidence-in-chief. How the letter was admissible in the Crown case is unclear to me. The letter was: (i) a prior inconsistent statement made by the complainant; (ii) second hand hearsay evidence; and (iii) according to the complainant, not an accurate copy of the original letter she wrote to her mother. The letter was wrong in a number of places.

[29] The letter states as follows.

To mum

Please don't tell uncel (sic) [PW] (sic) I told you this because he said he would make everyone die. when (sic) it was tuseday (sic) it was late at nighttime (sic) *and I came out of the bedroom* and uncel (sic) [PW] said I had to quickly come down stairs *to see something*. I only had a towel on. I went down to his room and *Aunty Relle was gone* and he told me to sit on his bed and *he sat on the ground* and said that *mum* asked him to check I had washed myself properly. He put his hand under the towel and rubbed my rude parts. Then he stuck his finger inside my rude parts. I told him to stop because it hurt me and he had a little knife and he cut my arm and said that if I made a noise he would cut me again and kill everyone. Then he pushed my arms backwards and put his rude part inside my rude part and pushed in and out real hard. It hurt so much but I couldn't make any noise or move and then he took it out and I was *bleeding in my rude part* and my arm and he said that it was our secret. *I wen* (sic) *back to my room and cryed* (sic) *all night*. *He told me to come back again* and I had to so I went back two more times and they were the same *except he cut me more* and said that f-wording was the only thing I was good for and that if I stayed still it wouldn't hurt as much *but I tried really hard to hit him* and he just smiled please don't tell anyone from [KLR].

[30] Despite the complainant's evidence that she rewrote the letter in 2013 after she tore up the original letter, she did not write an addendum to the letter about the fourth occasion on which she claims she was sexually assaulted. Nor did she give evidence that she wrote about the fourth occasion in any of the many letters and notes she claims to have written about being sexually assaulted.

[31] The letter, and the complainant's evidence about the letter, adversely affected her credibility to a significant degree and, along with the other matters I have referred to, caused me to have very considerable doubts about the truth of the whole of her evidence.

[32] First, there are the following prior inconsistencies in the letter.

1. The letter states that the complainant's uncle spoke to her when she came out of her bedroom not the bathroom.

2. There is no mention of a frog in the guestroom in the letter.

3. The complainant states in the letter that the appellant said that her mother asked him to check if the complainant had washed herself properly. Whereas in her evidence the complainant said the appellant told her that her father had asked him to check.

4. The letter states the complainant went back to her bedroom by herself. There is no mention of the appellant assisting her upstairs and washing her in the upstairs bathroom.

5. The complainant says in the letter she cried all night after she was sexually assaulted. Whereas her evidence was that she could not remember anything that happened after the appellant picked her up in the upstairs bathroom after he washed her.

6. She states in the letter that she went back to the guestroom to be sexually assaulted on two more occasions because the appellant told her to. There is no mention of the appellant coming and getting her from upstairs on those occasions and taking her to the guestroom.

7. She states in the letter that the appellant cut her more on the second and third occasions he sexually assaulted her. Whereas the complainant gave evidence that the appellant only cut her once.

8. In the letter the complainant only describes three acts of penile/vaginal sexual intercourse without consent and no acts of penile/oral sexual intercourse and no sexual assaults committed by the appellant inserting objects into her vagina. Whereas the Crown charged eight acts of sexual intercourse without consent on the indictment including two acts of penile/oral sexual intercourse and three acts of sexual intercourse through the insertion of objects into the complainant's vagina; and the complainant gave evidence about nine acts of sexual intercourse without consent including four acts of penile/vaginal sexual intercourse, two acts of penile oral sexual intercourse and three acts of sexual intercourse through the insertion of objects into the complainant's vagina.

9. The complainant states in the letter that she tried really hard to hit the appellant. She said nothing to this effect in her evidence-in-chief. She once again changed her evidence during her cross-examination during which she stated that she struggled with the appellant.

[33] Second, the complainant's story about the letter changes constantly throughout her evidence. Her evidence about the letter goes through the following discrete phases:

1. Initially, during her forensic interview, the complainant gave evidence to the effect that the original letter still existed and had not been torn

up. She kept the letter as proof of what the appellant did to her. There was the following exchange between the police and the complainant.

Police:	Did you write a note *once*?
Complainant:	Yes.
Police:	Tell me about writing that note.
Complainant:	I wrote it after the third attack. I wrote it to mum telling her what had happened and I was going to give it to her once he left but after the fourth one he just scared me that much I couldn't give it to her so I kept it.
Police:	*And what happened to that note*?
Complainant:	*I tried to get rid of it and couldn't*.
Police:	*And where is that note now*?
Complainant:	*Mum has it*.

[She does not say that she tore up the note and rewrote it.]

2. However, after a two minute break in her forensic interview, which was described as a "monitor break", the complainant told the police that the letter had been torn up and rewritten in 2013. However, she tells them that she rewrote the letter "word for word". She gave similar evidence during her evidence-in-chief at the special hearing. She said she was able to rewrite the letter because she had an image of the original letter on her old iPod. She rewrote the letter because she realised she had made a mistake and without the letter she had no proof of what had happened to her. During the first and second phases of the plaintiff's evidence about the letter, the purpose of both the original letter and the rewritten letter was to prove what the accused had done to her. There

were the following exchanges between the police and the complainant, and senior counsel for the Crown and the complainant.

Police:	[…] I wondered thinking about all that you've told me is there anything that we have missed that we need to talk about or if there is anything else that you want to say about it.
Complainant:	The note that mum has isn't the original. I tore it up and I rewrote it.
Police:	*So there was one note that you tore up and then you rewrote*. When did you rewrite it?
Complainant:	2013.
[…]	
Police:	And how come you wrote it then?
Complainant:	I tore up the first one and then I realised what I had done and *I didn't think that anyone would believe me if I didn't have a note so I tried to put it back together but I couldn't so I just rewrote it*.
[…]	
Police:	*Do you think you rewrote the same sort of note or was it a little bit different or?*
Complainant:	*Yeah, it was word for word*.

[That is, the letter was a duplicate. The complainant makes no mention of any of the inconsistencies in the letter or the reasons why there were those inconsistencies. During her forensic interview, the complainant does not tell the police she rewrote the letter numerous times with different versions of events to try and work through what had happened to her. Nor does she say that despite trying to make the letter look as if it was written by a nine year old child and having an iPod with the

original image, she deliberately wrote an inaccurate letter that was wrong in a number of places.]

[...]

Counsel (Crown): Now, we are moving to another topic and this is my last topic to ask you questions about. When you spoke to Detective Engels you mentioned towards the end of your interview with her about a letter that you wrote to your mother. You recall that letter?

Complainant: Yes.

Counsel: And can I just confirm that your evidence to Detective Engels was that you had written that letter following the third incident that you spoke to her about and before the fourth. Is that correct?

Complainant: I wrote a letter between the third and fourth incidents and rewrote it a few years ago.

Counsel: Okay. And so just getting to that – in your evidence you spoke and I just wanted to clarify. You were asked a question of when did you rewrite it and you answered in 2013?

Complainant: Yes.

Counsel: Are you able to clarify today when exactly that may have been roughly when it was you rewrote the letter?

Complainant: It was between our moving houses from Virginia to Bees Creek.

Counsel: And can I just ask you to go through that – *the process of rewriting,* what happened to the original letter that you wrote?

Complainant: *I got scared one night and wanted to get rid of it and so I tore it up and I realised that I'd made a mistake and I tried to fix it but I couldn't. So I wrote...*

Counsel: When you say you – sorry to interrupt. But KLR when you said that you realised you'd made a mistake what do you mean?

Complainant: *I realised that without the letter I had no proof of what happened.*

Counsel (Crown): And you said you had to fix it, what did you try and do?

Complainant: I tried to tape it back together.

Counsel: And were you able to do that?

Complainant: No.

Counsel: And so in terms of you spoke about rewriting what process did you go through?

Complainant: I could read a lot of it from what was taped together *but I also had a photo of the note on my iPod* so that I didn't have to carry the real thing around with me, because I liked to read it all the time.

Counsel: Why did you like to read it?

Complainant: As punishment.

Counsel: Punishment for whom?

Complainant: For me. I felt like I deserved what happened.

Counsel: Now KLR when did you take that photograph on your iPod?

Complainant: It would have been in the last few months before I tore it up.

Counsel: And when you initially wrote it, I think you said that you – well first of all why did you write it?

Complainant: When I first wrote I wrote it so mum explaining what had happened to me because I didn't know if it would happen again and didn't know what else to do.

Counsel: And why didn't you give it to her?

Complainant: Because he told me that he would hurt my family and my sister and my Aunt and everyone if I told anyone.

Counsel: Now you said in 2013 when you *first* tore it up because you were scared. What were you scared of?

Complainant: I was scared someone would find it. I was just scared that someone would know what had happened.

Counsel: And now KLR I'm going to ask that a document be shown to you. And when that document is

	brought in I'm going to ask if you can identify what that document is?
Complainant:	Okay.
Counsel:	Now KLR you can see the document before you in the plastic sleeve. Are you able to tell the Court what that is?
Complainant:	This is the note that I wrote in 2013, *word for word*, from the note I wrote back in 2009 after the events.

[Once again the complainant's evidence is that the letter is a true copy or a duplicate of the note or letter that she wrote in 2009 to inform her mother what had actually happened to her. Once again, the complainant makes no mention of writing numerous letters or using the numerous letters to work through what she claimed had happened to her. Nor did she say that the letter was not intended to be used as proof. She does not say she only rewrote the letter for herself and it was "also" meant to be torn up which was her subsequent evidence.]

3. At first, during her cross-examination, the complainant gave evidence that the letter was incorrect in a number of instances and was not copied "word for word". It contained mistakes. The letter was accurate when she wrote the original but the rewritten letter was – "wrong. It isn't the same as the last one." She admitted that a number of parts of the letter were wrong and had been wrong since she first rewrote it. There were a lot of inconsistencies in the letter that were not in the original letter. The letter was not written "word for word". She rewrote

the letter in a panic. There were the following exchanges between defence counsel and the complainant.

Counsel:	So what's written here is, word for word, letter for letter, what was written back in 2009. Correct?
Complainant:	No. *I know now that there is a mistake at the bottom.*
Counsel:	What's the mistake at the bottom, KLR?
Complainant:	That he cut me again.
Counsel:	[…] But what about this, what you wrote in 2009/2010, are you saying that letter, that we do not have a copy of, what you say you ripped up, was an accurate representation of what happened to you?
Complainant:	It was a nine year old's representation of what happened to me.
Counsel:	I asked you, KLR, whether what you wrote on the original letter was an accurate representation of what happened to you.
Complainant:	It was accurate when I wrote it, when I wrote the original.
Counsel:	Okay. And further, that what we're looking at here, is an accurate handwritten copy of the original. Correct? A duplication?
Complainant:	It's wrong. It isn't the same as the last one.
[…]	
Counsel:	Are you saying KLR when you just said now that you wrote it in a panic attack. Were you talking about the 2009 letter or the 2013 letter?
Complainant:	The 2013 one.
Counsel:	Well didn't you come to a considered decision to rewrite it because, I understand your evidence to be, if you rewrote it you might be believed. That's what you said previously?
Complainant:	Yes, it wasn't a natural thought process. It was just panic. I tore it up and I panicked and I rewrote it.

[…]

Counsel:	So when you made this considered decision to rewrite the letter you were thinking clearly, weren't you?
Complainant:	No.
Counsel:	It was a clear decision because you wanted to have something that people would believe in you, correct, according to you?
Complainant:	It was a panic written piece of paper that was not going to go anywhere. Yes. I wrote it because I did not think people would believe in me. But I thought 100 other things as well, while I was writing this.

Earlier in her cross-examination the complainant had also stated the following.

Complainant:	[…], I was copying it wrong. I know what happened and I wrote this in a rush. I wrote it in the middle of a panic attack. It was just something for me to get out on paper. It was something I just needed to get out and I know it's wrong but it was for me and I didn't do anything with this note. I just put it somewhere and I forgot about it and then someone went through my bag and found it and it wasn't meant to be found.

[The last statement of the complainant is not correct because she showed the rewritten letter to LM (the complainant's horse riding instructor) before it was discovered by her mother. It may be inferred that the complainant used the letter to support what she told LM.]

4. Later, during her cross-examination, when the complainant was being pressed about the number of inconsistencies in her evidence about the

letter, the complainant changed her story even further. She developed a position that she only intended the letter to be used by herself and no one else. She had written lots of letters. They were all different. The letters were part of a punishment book. She had written lots of letters with different endings to try and work through what had happened to her and escape from her circumstances. The complainant said that she rewrote the letter and "wrote it and wrote it and drew things". She got rid of them all and she was going to get rid of the letter too. They were just depressed notes. Despite the fact the letter was addressed to her mother, it was something for the complainant to use personally to try and come to terms with what had happened. The letters were all addressed to different people. She wrote some of them before she destroyed the original letter and some of them afterwards. They were just stories. There were the following exchanges between defence counsel and the complainant.

Counsel:	Why did you write, "He cut me more?" Why did you use those words?
Complainant:	I don't know, for the same reason that I don't know why I wrote this note or the other ones. I don't know why it's wrong, it was just a panic stricken note that I wrote. And it's one of many and they're all different.

[During her evidence-in-chief, the complainant stated that she rewrote the note because she realised she had made a mistake as the note amounted to some proof of what had happened to her.]

Counsel:	Can I ask you, what is one of many?
Complainant:	This isn't the only note I wrote. I rewrote it and wrote it and wrote it and I drew things and...
Counsel:	What did you do with the other copies of the note you wrote?
Complainant:	I got rid of them all for the same reason that I was going to get rid of this one.
Counsel:	Why did you not tell the police that you had written the note on multiple occasions?
Complainant:	I didn't write the same note over and over again. They were just depressed notes, they were – the same reason that I drew things and wrote things and I just did it – I just done it for years it's how I – how I cope. This note was not meant to be found. It was something for me personally, to try and come to terms with what happened.
Counsel:	It was something for you personally, but it was addressed to mum, isn't it?
Complainant:	Yes.
Counsel:	And, you say that your original intention was to give it to your mum, after what you say was the third incident. Correct?
Complainant:	Yes.
Counsel:	So, the original letter that you wrote, the very first one, was intended for your mum, wasn't it?
Complainant:	Yes.
Counsel:	Are you saying that all the other rewrites of the letter were not intended for your mum?
Complainant:	No. They were not. They were just me wishing I could do things over.
Counsel:	Why did you continue to write, "To mum," at the top of the letter?
Complainant:	That's just this one. They were all different. They were all addressed to different people. I even had one addressed to who I would tell if I ever told someone. They were all just me trying to find a way to figure out what happened.

[...]

Counsel: When you say word for word, did you mean that you copied down each word accurately from the electronic version of the 2009 letter?

Complainant: No. It's not accurate.

Counsel: It's very different, is it, to the 2009 letter?

Complainant: Yes. Are (sic) the other millions I wrote.

Counsel: With these others, did you – sorry with these other rewrites that you say, did you write each of them after you destroyed the original letter?

Complainant: I may have written some before that and I know I wrote most of them after.

Counsel: If you may have written some before that, were you not worried about your mum finding those copies of those versions?

Complainant: No. They were just stories. In my mind, I just changed them so that I never went to the bathroom or I never went downstairs, or I – I don't know, I told someone after the first event. I wrote all these letters to try and change it.

Counsel: To try and change the details?

Complainant: No. Try and change what happened to me in my head. I thought that if I came up with ideas to convince myself that it didn't happen, or to think of things I could have done to prevent it, because I felt that it was my fault. For some reason I thought that writing these notes would help. And, I was told by my psych at the time that it wasn't going to help; that I can't change what happened.

Counsel: Did you write down on each occasion a different version of events to what happened to you?

Complainant: They were mainly just me fighting back and getting away, or me telling someone early on.

[…]

Counsel: The other versions of the letter that you wrote, where did you store those other handwritten versions?

Complainant: In my diary. They weren't all just versions of the original note, they are completely different in their own ways. They weren't notes, some of them weren't addressed to mum. They were just my thoughts. They were just me trying to make sense.

Counsel: Did you have in existence many or several copies, several versions at the same time?

Complainant: I wrote them all in a book. I wrote my feelings and I wrote what happened and wrote things that I could have changed. So, yes, they were all in one book. And it was my punishment book.

[...]

Counsel: Where is the book now?

Complainant: I got rid of it.

Counsel: When did you get rid of it?

Complainant: Before I went to hospital in Perth.

Counsel: In 2015?

Complainant: Yes.

[...]

Counsel: Did you ever attempt to rewrite, word for word, any electronic copy of the original 2009 letter?

Complainant: I never tried to write it exactly. It was never my intention to make an exact copy. It just happened. It was just one of them and it wasn't meant to be found.

Counsel: It was, wasn't it, when you rewrote it, because that's why you rewrote it to perfection?

Complainant: I didn't rewrite it with the intention to make it exact word for word, make a duplicate and then handed to the police as proof. That was not my intention. It was just a quick thing that I started writing, copying of the other one. And it changed and I panicked and things happen, and I put it away. And that was it. And then someone found it in my bag.

Counsel: Did you say to me earlier in evidence that you mimicked your handwriting as a nine year old?

Complainant: Yes.

Counsel: When you rewrote this 2013 version?

Complainant: Yes, I did.

Counsel: And the deliberately made spelling mistakes, so they align with what you say you wrote in 2009?

Complainant: Yes. And this isn't the only note that I did that on. I wrote others with spelling mistakes and funny handwriting.

Counsel: So this letter, 2013, that's addressed to mum that mimicked handwriting and deliberate spelling mistakes to correspond with the original letter, was intended to be handed to somebody, wasn't it?

Complainant: The original one in 2009 was intended to be handed to my mother. The one in 2013 was not to go anywhere, it was for me. It was one of many.

Counsel: Many versions?

Complainant: One of my many writings, my disturbed writings, trying to come to terms with it. The same reason as the photos and the drawings. No one ever saw them, it's just this one note that has been found, because it wasn't written in my diary, it was a loose piece of paper.

[...]

Counsel: So, you discussed what you say happened to you in 2009 [with your psychologist in Darwin]. Is that your evidence?

Complainant: No. I just told her that I wrote about things that hurt me, things that I thought were my fault. I never told her exactly what happened. I never told her what the writings were specifically about. I just told her that it was a book full of awful things to punish myself and make myself feel low. And I still keep one of those books. I always have. It's nothing unusual for me.

Counsel: Where is that book?

Complainant: The new one? It's at home in my bedside table.

Counsel: So, the book you discussed with the psychologist, even though the psychologist according to you, gave you advice about these

writings. You agree that she gave you advice about the writings, by saying it's okay to do them. Yes?

Complainant: She said it's good for me to get it on paper. Yes. It wasn't a long session about nothing but this. I just told her in passing that I had a book that I wrote all my negative feelings in. And I wrote alternative endings to things that I wished hadn't have happened. And there were suicide notes in there and there were photos. It was an awful diary. And she knew about it, she didn't know what was in it exactly.

Counsel: Did she not ask you what was in it?

Complainant: No. I just told her that it was all my negative thoughts and beliefs and things that happened in my life.

5. Later still, during her cross examination, the complainant stated that the letter was an inaccurate copy of the letter she wrote in 2009 because the electronic image on her camera was unreadable. There was the following exchange between defence counsel and the complainant.

Counsel: Before the break, you gave evidence about the electronic copy of the 2009 letter, which was taken after the letter was torn, you remember saying that in evidence?

Complainant: Yes.

Counsel: The explanation you provided as to why the 2013 was not word for word was because the electronic version was unreadable or difficult to read. Correct?

Complainant: I think so.

Counsel: And, that the electronic version that you had that you deleted when you went to the school camp, was difficult to read. Recall that, because it was taken of the torn version, yes?

Complainant: Yes. I think – I think there was one of it before I tore it as well. I can't – I can't remember.

Counsel:	Sorry what was that?
Complainant:	I think there was a photo of it before I tore it as well. I can't remember I think there were both. I can't remember.
Counsel:	So there may have been two electronic copies?
Complainant:	Yes on the same camera. I just don't remember.
Counsel:	When you were discussing the electronic version with the police in 2017, you were asked this, "Did you think you rewrote the same sort of note, or was it a little bit different, or" and you said, "Yeah, it was word for word." You are then asked, "How do you know it was word for word?" And you responded, "Cause I took the photo of one that I tore up before I tore it." That's what you told the police, didn't you?
Complainant:	Yes, that's why I think I had two.
[...]	
Counsel:	So you now say, do you, that there may have been two copies, electronic copies of the 2009 letter?
Complainant:	There could have been, I don't remember.
Counsel:	Why did you take a copy, an electronic copy of the torn up version, if you already had a copy of the 2009 letter before it was torn up?
Complainant:	I don't know. Maybe, I couldn't find the previous one. I don't know, I don't have reasons for the things that I did with those notes. I can't make up a reason for you. I don't know.

[34] Third, there is the complainant's inconsistent evidence during cross-examination about taking an image of the original letter on her pink digital camera, and regularly taking apart the camera so that the image of the original letter could not be found by anyone else while at the same time there was a digital copy of the letter on her iPod. This evidence contradicts her evidence-in-chief that she took the image of the original letter with her

iPod. The complainant said she did not tell the police about the pink camera because she did not think it was relevant. She said this despite the fact the camera was said to have contained an image of the original letter. She said she did not correct the prosecutor about taking the photograph with the iPod because she was exhausted or just agreed or misheard. There was the following exchange between defence counsel and the complainant.

Counsel:	You couldn't rewrite if from what you'd taped together? So, what did you use to take a photograph, KLR?
Complainant:	I had a photo of the letter before I tore it up.
[…]	
Counsel:	What did you use to take the photograph of the original letter?
Complainant:	I had a little pink camera that my grandmother bought me.
[…]	
Counsel:	And that camera was accessible by anybody was it not? The pictures, the memory was accessible by anybody?
Complainant:	If they knew where to find it, I suppose.
Counsel:	Yes?
Complainant:	Yes.
Counsel:	So, you're saying that you had an electronic copy of the destroyed – subsequently destroyed letter on this pink digital camera. Is that your evidence?
Complainant:	Yes.
[…]	
Counsel:	So, why weren't you concerned, KLR, that your parents or anybody else could discover the electronic copy that was on the pink digital camera?
Complainant:	Because it was the same as the letter. I kept it hidden. I hid the battery, I had the memory card. I had it all in separate places.

[…]

Counsel:	[…] You would take apart that camera regularly, so that other people could not read the electronic copy of the letter. Is that your evidence?
Complainant:	Yes.
Counsel:	Are you making this up?
Complainant:	No.

[…]

Counsel:	So the copy that you have before you, this MFIB, are you saying that you wrote that from the electronic copy on the pink digital camera?
Complainant:	Yes, I couldn't read the one that I had taped back together.
Counsel:	And when you wrote this document that's before you now in 2013, in around 2013, did you try and write – your handwriting, did you try and make it the handwriting of a nine year old, of how you wrote when you were nine?
Complainant:	I tried to copy the one that I did last time, the first note.

[According to the complainant's own evidence, the last answer is not true because she did not accurately copy the letter. She says she deliberately changed what she claims she wrote in the first instance.]

Counsel:	Yes. Including the handwriting itself, yes?
Complainant:	Yes.
Counsel:	So, you tried to mimic your writing as a nine year old. Correct?
Complainant:	Yes.

[…]

Counsel:	So you deliberately misspelt words to make them fit in with what was rewritten before. Is that your evidence?
Complainant:	I copied it exactly the same as I did.

Counsel:	So, were you trying to pass this letter off as the original letter from 2009?
Complainant:	No-one was meant to find it. It was for me.
[…]	
Counsel:	When you were asked questions by the prosecutor did you say the photograph was taken on a different device to the pink digital camera?
Complainant:	It was taken from the camera. And it was put on my iPod as well.
Counsel:	You were asked this question […] "Right, now did you take that photograph on your iPod?" That was the question that was asked of you. You responded, "It would have been in the last few months before I tore it up." Do you recall saying that?
Complainant:	Yes.
Counsel:	Why didn't you correct the prosecutor that it was not the iPod you used to take the photograph?
Complainant:	I just must have agreed. I don't know, I would have been exhausted and not thinking. I just heard that the photo was on my iPod, when did it get there, and I answered. And, I know I should have corrected now, but at the time I just didn't.
[…]	
Counsel:	This pink camera, pink digital camera, when – you don't have that now, do you?
Complainant:	I think I do somewhere.
Counsel:	So, the digital copy will be on this camera, will it?
Complainant:	No. I wiped the memory card years ago. I've only got photos from school camps and things like that on it now.
Counsel:	Why did you?
Complainant:	I took it on school – because I took it on school camp, and I didn't want to bring that with me, so wiped the entire card.

[This is an extraordinary answer given the importance that the complainant placed on keeping a copy of the original note throughout her evidence as the digital image on her camera was the best evidence

of the original note. According to the complainant, it was the only true copy of the original note.]

[…]

Counsel:	Well, this pink digital camera, you still have the actual camera, you think, in your possession? In your...
Complainant:	Yes.
Counsel:	You still own the camera?
Complainant:	I don't think I have the memory card for it anymore, but yes, I have the camera.
Counsel:	So, when you destroyed the electronic copy of the 2009 letter, you did that prior to taking the camera on a school camp, did you?
Complainant:	Yes.
Counsel:	And when you say destroyed, did you destroy the individual electronic copy, or did you destroy the memory card or the SD card that was stored on?
Complainant:	I just went along and deleted all the photos..., so that I had space on that memory card to bring it on camp with me.
Counsel:	*Well, weren't you concerned that you deleted the piece of evidence that you said was so important to you, the original 2009 letter*?
Complainant:	*You couldn't read it anyway. I could barely tape it back together*.
Counsel:	So, the electronic copy of the letter was taken after the – let me rephrase. You took the photograph of the 2009 letter after you tore it up, correct?
Complainant:	Yes.
Counsel:	Because you couldn't read it right?
Complainant:	Yes.
Counsel:	So what use was the electronic copy if you couldn't read what was on the letter?
Complainant:	*It was all I had of it and that's why I deleted it because it was no use*.

[This evidence constitutes a major contradiction of the complainant's earlier evidence to the effect that she was able to accurately rewrite the original letter "word for word" because she had a photo of it prior to it being torn up.]

[35] Fourth, contrary to the complainant's numerous statements during her cross-examination that she rewrote the letter for her own benefit and no one was meant to find it, she gave the letter to LM (her horse riding instructor) during the course of complaining to LM about what she says the appellant did to her and was not accurate. This is a very significant inconsistency in her evidence. She does not tell LM, who she trusted, that the letter was written for her own use in order to try and work through what the complainant claims had happened to her. LM gave evidence that in late 2015 or early 2016 she had three or four conversations during which the complainant complained to her about being sexually assaulted by the appellant. Her evidence about the receipt of the letter from the complainant was as follows.

> … at some stage between all of this, I couldn't tell you when, she gave me a – it was like a sketch book with sketching that she had done and then in the back of it – was the letter she had written to her mum. I just gave that back to her. We did have a talk about – about the letter but I didn't do, sort of, anything else with that. I just gave her back – gave it back to her with the rest of the sketches.
>
> It was just like a blank book with drawings that she had done and the letter was just tucked in the back.

There was no suggestion in LM's evidence that the complainant did not know the letter was in the book, or that the complainant told LM that the

letter was not in fact a letter to her mother, it had been rewritten for her own use, and the complainant had torn up the original letter. A fair inference based on the matters which were being discussed at the time when LM was given the book is that the complainant intended her to receive the letter and read it as if it was a letter to her mother. That is, the complainant used the letter to convince LM of the veracity of what she told LM had happened to her, which is contrary to her evidence that the letter was written solely for her own use.

[36] In summary the complainant's evidence about the letter changes as follows.

- The letter was the original letter and was written after the third occasion she was sexually assaulted to accurately record what had happened to her on the first three occasions. It was proof of what had occurred on those occasions and she kept it for that reason.

- She wrote the letter to inform her mother about what had occurred but she did not give it to her mother because she was terrified of the appellant after he sexually assaulted her on the fourth occasion.

- She tore up the original letter in 2013 because she was worried that it might be discovered but rewrote it word for word soon after she tore the letter up. She was able to rewrite it word for word because she had a photograph of the original letter on her iPod.

- The letter was not accurate. It was wrong. She did not rewrite it word for word. But nonetheless mimicked the handwriting of a nine year old.

- She did not take a photograph of the letter with her iPod. She took a photograph of the letter with her pink camera and transferred the photograph to her iPod.

- She also took a photograph of the original letter after it was torn up.

- She destroyed the photograph of the original letter. She did not know if it would be recorded on the memory card of her camera.

- She wrote lots of letters with different outcomes addressed to different people. The letters were for her own use. They were written to punish herself and to try and work through what the appellant had done to her. The letter which was in evidence was one of those letters and was not meant to be discovered by anyone.

The overall impression of the complainant's evidence about the letter is that she displayed an extraordinary capacity to invent stories, or make up different versions of events, whenever she found herself in difficulty while she was being cross-examined. She told a number of untruths during her evidence about the letter. I could not be satisfied that the complainant wrote a letter after the third occasion she claims she was sexually assaulted. All that could be satisfactorily established is that the appellant wrote the letter, which was in evidence, before she gave her punishment book with the letter

in it to LM. The complainant's evidence about the letter significantly detracts from the veracity of the whole of her evidence.

The complainant's evidence about struggling with the appellant

[37] At no stage during her evidence-in-chief did the complainant even hint that she struggled against the appellant. Her evidence was to the effect that, as the complainant was armed with a knife, she complied with his directions and did not utter more than a squeak. However, during her cross-examination it was suggested to her that the statement in the letter to her mother that, "I tried really hard to hit him", was inconsistent with what she told the police and was untrue. Rather than accept the proposition which was put to her by defence counsel as correct, the complainant stated for the first time that she put up a considerable struggle against the appellant. There were the following exchanges between defence counsel and the complainant.

Counsel:	You say in the letter that you tried really hard to hit him? Didn't you? To make him stop?
Complainant:	I tried to fight him off, yes.
Counsel:	You didn't tell that to the police, did you?
Complainant:	It's obvious that I wasn't going to just lie there.
Counsel:	Well, so are you now saying that you did try and fight him off, KLR?
Complainant:	I would have struggled.
Counsel:	You say, "I would have struggled." What do you mean?
Complainant:	Yes.
Counsel:	Did you struggle or not?
Complainant:	I remember struggling, I remember moving, I remember him having to hold me down.

Counsel:	Well did you try and hit him?
Complainant:	I don't know. I would have tried to push him off.
Counsel:	Well?
Complainant:	So maybe I didn't aim for a certain body part and aim to hit him, but I tried to get him off me.
Counsel:	Well doesn't the letter say that, "I tried really hard to hit him." Doesn't that – isn't that what you've written in that letter?
Complainant:	I tried really hard to get away.
Counsel:	Well haven't you also said that you're afraid to yell out, because you're afraid that he would kill you?
Complainant:	Yes.
Counsel:	So were you not afraid if you hit him, or if you struggled against him, that he would kill you?
Complainant:	Yes, I was.
Counsel:	But you did it anyway, is that now your evidence? He struggled and tried to hit him in any event?
Complainant:	I tried to get away.
[…]	
Counsel:	I just want to be clear, KLR. What is written in the letter is, "I tried really hard to hit him", do you agree?
Complainant:	Yes, yes.
Counsel:	It doesn't say that, "I simply tried to struggle against him to get away." Does it?
Complainant:	I can't remember. I just remember how I acted how I reacted. And, it's not a hit, and it's not a struggle. I don't know, I just reacted. I did what I could and it wasn't enough.
[…]	
Counsel:	Did you try and hit him?
Complainant:	I tried to struggle. I tried to get him off me. For me, struggling and hitting, they are the same thing. I just acted in reflexes. I just – my body did what it could.

[38] The complainant's answers during the above exchange need to be considered in the context of the following exchange between defence counsel and the complainant during cross-examination.

Complainant:	[...] I wrote all those letters to try and change it.
Counsel:	To try and change the details?
Complainant:	No. To try and change what happened to me in my head. I thought that if I came up with ideas to convince myself that it didn't happen, or to think of things I could have done to prevent it, because I felt that it was my fault. For some reason I thought that writing these notes would help. And, I was told by my psych at the time that it wasn't going to help; that I can't change what happened.
Counsel:	*Did you write down on each occasion a different version of events to what happened to you*?
Complainant:	*They were mainly just me fighting back and getting away, or me telling someone early on.*
Counsel:	KLR, did you understand the question that I asked?
Complainant:	Yes, I did.
Counsel:	Can I ask it again? You stated in evidence that you wrote many different versions of this original letter, correct?
Complainant:	Yes, and it's not relevant.
Counsel:	*Well each different rewrite, did each different rewrite contain different versions of what you say happened to you? Did the details change*?
Complainant:	*They changed so that I could get out, yes.*

[39] The complainant's answers during the above exchanges are not only inconsistent with what she said on different occasions but they demonstrate that the complainant was greatly confused between what she says she made up and reality.

Prior inconsistent conduct – the text messages

[40] The complainant's credibility is further damaged by the fact that she engaged in an exchange of friendly texts with the appellant, texts which she did not disclose to the police during her forensic interview.

[41] During her forensic interview there was the following exchange between the police and the complainant.

Police:	What happened with your contact with him from [the fourth occasion] till now?
Complainant:	Um, I think he texted me once.
Police:	Tell me about that.
Complainant:	He just – it was when I – was around the time when I went to go to hospital, um, it was before that and he said – he didn't say anything out of the ordinary, he just said "I'm here if you ever need to talk about anything, I understand you're having a rough time", something along those lines.
Police:	Has there been any other contact?
Complainant:	No.

[42] In fact there was another exchange of texts which was initiated by the complainant. The texts were as follows.

Complainant:	hey [appellant]
Appellant:	Hey KRL, how are you? I'm at rottnest (sic) - just helped some friends swim from perth (sic)
Complainant:	cool
Appellant:	They did very well. When are you coming to Perth??
Complainant:	Im (sic) not 2 sure. *hopefully, soon I haven't been 2 perth* (sic) *4 ages*.
Appellant:	[The appellant's children] want to come to Darwin in the middle of the year when I go to Bali for work. So hope we can arrange it.

Complainant:	I was at the doctors cause my turtle bit me
Appellant:	That doesn't sound good. Did he think your finger was food?
	We had to take Trevor to the vet today because he was bitten by a snake. He will be okay, but my wallet will be damaged!
	How is karate going? [The appellant's son] just started Tai Kwon Do and he loves it.
Complainant:	I still love karate but I can't do it every day as I have so much homework... I hate year 7. I heard about Trevor. We have a bit more of a risk with metre high grass. All our dogs do is lick cane toads. They are morons.
	Joe licks the bird poo then rolls in it then licks it off himself.
	Idiots.
Appellant:	But I bet you love them though!

[43] During the complainant's cross-examination there was the following exchange between defence counsel and the complainant.

Counsel:	And you say that you did all of this to someone that you are petrified of, KRL, do you?
Complainant:	I did it so that nothing looked suspicious. I did it because if someone found out, it would have been my fault.
[…]	
Counsel:	Was it you that set up a Messenger account on Facebook?
Complainant:	It's – it's part of Facebook, isn't it?
Counsel:	Yes. You – you can choose on Facebook Messenger who you have private conversations with, can't you?
Complainant:	Yes, yes.
Counsel:	And do you agree with me that the year for this exchange, and its written underneath your name towards the middle, it's very faint, is in 2012. Do you agree?
Complainant:	Yes.

Counsel:	This is you sending these messages, isn't it KRL?
Complainant:	Yes.
Counsel:	Private messages to PW, your uncle?
Complainant:	Yes.
Counsel:	No one is forcing you to send these messages, are they?
Complainant:	No.
[…]	
Counsel:	Yes and the reason you sent this and the reason there is an open and friendly conversation between you and your uncle, is because he did not sexually offend [against] you in 2009/2010, did he KRL?
Complainant:	He did.
[…]	
Counsel:	You said an explanation as to why you had a conversation with uncle [the appellant], your uncle, was that you didn't want anything to sound suspicious, correct? That is what you said an explanation, do you agree? Sorry, if you agree could you please say the word?
Complainant:	Sorry, yes. Yes, sorry.
Counsel:	What did you mean by, "nothing to sound suspicious"? What did you mean by that?
Complainant:	I didn't want anyone to know what had happened. I didn't want to remember what had happened. I wanted everything to move on like it had been before.
Counsel:	"Like it had been before." What you mean like it had been before?
Complainant:	Before it happened.
Counsel:	So for example in 2007 when he visited you, nothing happened to you then did it?
Complainant:	No.
Counsel:	And you recall now that visit in 2007, do you?
Complainant:	No, I don't but I know nothing happened, otherwise I would remember.
Counsel:	So Facebook Messenger is a private conversation between you and the other person, do you agree?

Complainant:	Yes.
Counsel:	So no one else was ever going to know about this conversation unless you told them or PW told them, correct?
Complainant:	He could have told them.
Counsel:	But you didn't know that, did you KRL?
Complainant:	No. I don't.
Counsel:	You tell anybody, did you tell your mum or your dad or anybody at all that you're engaging in friendly conversation with PW?
Complainant:	I don't remember.
Counsel:	There was nothing to be suspicious about, was there?
Complainant:	Yes there was.
Counsel:	KRL this is a normal conversation between uncle and niece. Do you agree?
Complainant:	This was far from normal.
Counsel:	This conversation KRL was a normal conversation, do you agree?
Complainant:	It looks normal.
Counsel:	You're not accusing PW of doing anything to you in this conversation, are you?
Complainant:	No.
[…]	
Counsel:	And these are just normal, general conversation words between uncle and a niece, aren't they KRL?

[44] The exchange of texts between the complainant and the appellant which was initiated by the complainant is a perfectly normal exchange of texts between an uncle and a niece. The complainant's explanation as to why she engaged in this exchange of texts does not make any sense. Up to this point in time she had told no one about what she claims the appellant did to her and if the appellant had done what she claimed it was extremely unlikely that the

appellant would tell anyone else about it. Her reason for not telling the police about this exchange of texts, which was only brought to light by her mother, was that she forgot about it. However, the complainant knew what defence counsel was talking about immediately when the topic was raised in cross-examination. She did not even have to look at the texts when a copy of the texts was handed to her. The sending of these texts by the complainant to the appellant is significantly inconsistent with the complainant's evidence that she was terrified of him because he had sexually assaulted her on four occasions.

Support for the complainant's evidence

[45] There was the following evidence which supported the complainant's evidence. First, in either late 2015 or early 2016 she complained to her horse riding instructor, LM, with whom she had a good relationship, about being sexually assaulted by the appellant. The complainant's complaint to LM was partly consistent with what the complainant told the police during her forensic interview. LM's evidence was that the complainant told her the following.

> Yeah, that her uncle and auntie and cousins were staying with them over a Christmas period and he had raped her three times.
>
> The first time she was coming out of the shower wearing her towel and that he was waiting at the top of the stairs. I assumed it was before bedtime. She was having a shower before bed.
>
> He asked her to come down to his room which was downstairs to rescue a frog because apparently she was always rescuing frogs because she didn't like them drying up.

So she went down to his room. They were sitting on his bed and he said that he had to check that she had washed herself properly. She said he put his fingers inside her – in her private parts and then he raped her. She said he put his private parts inside her private parts.

It happened three times and she had written a letter to her mum which she was going to give to her and then for some reason she didn't – she didn't give me her the letter at that time. So it wasn't until we had the second conversation where she told me about the fourth time it happened and said that, yeah, after that she was too scared.

I had to promise on my life that I wouldn't say anything. Yeah, I had to promise that I would not say anything.

She was upset and crying [when she spoke on the phone]. Some parts she sort of got out okay and then other bits she was crying.

The first time [she spoke to LM] she said he had also threatened her with a knife. And that after everything was done, she was bleeding, so he sat her on the drain in the bathroom before cleaning her up.

It was probably two weeks later she told me about the fourth time it happened.

She just said on the fourth time it happened that she was up in her room and he came into her room and asked her to pick some items. At the time she just said one of them was a remote and that she put them inside her. That was about all she said at the time.

He said that all she was good for was fucking.

She said she was scared because he had threatened to hurt her, her parents, and her sister. He would kill her – her parents and her sister if she ever said anything.

And then she went into a little bit more detail on the fourth occasion. When he was up in her bedroom he was standing behind her and had his hands on her shoulders, and they walked around her bedroom and picked up three items. One was a bottle of nail polish, the second was I'm pretty sure the air conditioner remote, it was on a little clip near the door, and the third was a water bottle. So then he put the nail polish bottle inside her first, and then the air conditioner remote, and then the water bottle. He made a comment about how it wouldn't fit or something along those lines. And then he left the water bottle inside her while he touched other parts of her. And then he told her to open her mouth, and she wouldn't so he held her by the hair and shook her until she wet herself. [While telling LM this] she was crying. We stopped a few times because she had panic attacks. It was pretty tough.

In the last conversation we had she said that she was nine [years old when she was sexually assaulted].

[46] According to the complainant's evidence, there was a delay of more than five years in the complainant making the complaint to LM. Such delay of itself does not indicate that the complainant has behaved inconsistently with being sexually assaulted or that her evidence is necessarily unreliable. However, there were the following inconsistencies in what the complainant told LM: (i) initially the complainant only told LM that the appellant sexually assaulted her on three occasions (no reason was given for the complainant failing to state to LM that she had been sexually assaulted on four occasions); (ii) she did not tell LM that the appellant cut her with a knife on the first occasion he sexually assaulted her, she only stated that he threatened her with a knife; (iii) the complainant gave LM the letter addressed to her mother but she did not tell her that she had torn up the original letter up, nor did she tell LM of the use she claimed she made of such letters; (iv) the complainant did not tell LM that on the third occasion the appellant had penile/vaginal sexual intercourse with her twice not once, nor was LM told that the appellant had penile/oral sexual intercourse with the complainant on that occasion; (v) the complainant provided no detail about the second and third occasions she claims the appellant sexually assaulted her; and (vi) the complainant did not mention the appellant's possession of the kitchen knife.

[47] Looked at in the context of the whole of the complainant's evidence, the complainant's statements to LM do not overcome the problems with the complainant's evidence that I have identified above.

[48] Second, the complainant's mother gave the following evidence about her discovery of the letter which has a tendency to support the complainant's evidence.

> The girls often take horse riding lessons, it's a regular occasion for A [the complainant's sister] on Wednesdays at Fred's Past Reserve, and I was down there with a horse and the horse float. On that occasion, because we were using the indoor arena, KLR had elected to take her lesson at home with their instructor, LM. When I was waiting for A to finish a lesson, during that time I – because I was always so concerned in that – in that period with KLR's mental deterioration I just as a parent it was a safety thing to – to always kind of just keep an eye on things and just – just – just make sure she was okay. As a parent, I also had – I would check school lunch – sorry, school bags to make sure there wasn't a week-old sandwich in there. So, her – it wasn't always there but her schoolbag was in the back of the car and I opened the schoolbag and I checked her – her – checked for food and I – there was an exercise book in there and I opened the exercise book and a – a folded piece of paper fell out.
>
> It was a letter that was – that started with "Dear Mum" and it described a period when KLR had been sexually abused by [the appellant].
>
> A's lesson was halfway through I had to wait until she finished her lesson because obviously she had a horse there and – and I called Mark and I – without giving him details I just said there was something really serious had happened and I needed him to ask LM stay behind after she finished her lesson with KLR. And then I – A obviously finished her lesson and we loaded the horse and then I – I went home and unloaded.
>
> I asked Mark to stay in the house and, at this stage, it was starting to get a little dark and I – I went down there just outside the stables, after KLR finished washing her horse and – and we sat on the pavement and – I told – I told KLR I'd found the letter – the letter.
>
> She kind of looked a little bit white. I was worried that she would launch into a full-blown panic attack, that she is prone to at that stage and – which is why I asked LM to stay because she's so close that perhaps that might help. I asked her, "Did this happened to you?" [She said], "Yes." And, "Did you write the letter?" [She said], "Yes." *And I asked her whether it was written at the time and she said, "Yes."* I remember being worried about other people and – and said something about that and, obviously I wanted her to – asked about talking about it and she said she couldn't tell anyone. She wasn't ready and I was just so concerned with her – fragile state that I – yeah.

[49] Once again, the complainant incorrectly stated that the letter was the original letter (she wrote it at the time) and her answer to her mother must have conveyed to her mother that the complainant was sexually assaulted in the manner stated in the letter. She did not tell her mother that she was sexually assaulted on a fourth occasion. As is now apparent, the complainant no longer maintains that the letter is accurate account of what she says happened to her. In other words, she gave her mother a different version of events to what she told the police and the court. According to her own evidence, the complainant misrepresented what occurred to her mother.

[50] Third, the complainant's mother gave the following evidence about the complainant's change in behaviour over the 2009/2010 Christmas/New Year period which had the potential to support the complainant's evidence.

> Yeah, so, like, KLR's the – usually the – when she sees other kids she's – she's the master of ceremony. She likes all the plays and the – she reads books and she's – she's active and she's social and she's the director of all social activities and she was like that, you know, as far as I recall *for the first few days*. And, then over that – that period of that stay she became disinclined to – to lead the kids in the kind of, like, playing and puppet shows and all that stuff as she used to do. And, she kind of, yeah, she moved – she moved away from that. She became a little detached, and a little reserved.
>
> My sister and I – it just came in general conversation, everyone was sitting, I think, at the dining table on one occasion. And, it was – because we – no explanation for her behaviour we just thought she was getting older, perhaps, you know, because there's a bit of an age gap. Maybe, well it was fun for the first couple of days, little kids got annoying and, you know, maybe it was just part of a getting a little bit more independent and being annoyed by the little brats.
>
> I mean obviously, she still – you know, she did – she would still attend anything we went to and stuff like that which, you know, anything we attended during the day and stuff like that but she became just a little

distant. Something I couldn't put my finger on, just – just not as – not as close, not as – just not KLR.

There was also the following exchange between defence counsel and the complainant's mother.

Counsel:	And likewise the visit to the Casino for lunch on Christmas lunch – let me ask you this, [...]. Firstly, did all nine of you go to that lunch?
Mother:	Yes.
Counsel:	Was there anything of note during that lunch that concerned you at all?
Mother:	No. I mean, as I said, like, KLR, was quieter than normal, but at that point I didn't have serious concerns about it.

[51] In my opinion, there was a reasonable possibility that the explanation given by the complainant's mother for her change in behaviour was an accurate explanation of the complainant's change in behaviour. This conclusion is supported by the evidence of the complainant's grandmother who stated:

> KLR would come [into the library] and watch TV as well *but because she was a bit older she may go outside and speak to her mum and (sic) T* or – so they just did their own thing.
>
> [...]
>
> For the first few days KLR was very happy go lucky and then on Christmas day she was reserved because when we went out – we went to the Casino for Christmas day and she kind of stayed where I was sitting at the table. Her (sic) and the four children sat with me and then she was just quiet. You know, she just seemed very quiet.
>
> [She wasn't ordinarily a quiet girl with the children.] No, with the other children she liked to tell them what to do and show them what to do and help them with – how to make things, how to do anything. She was very, very good like that with children.
>
> She just seemed to be – sometimes she'd stay in her room or, you know, the other three children seem to be playing by themselves little bit.

> Whereas, before she was always with them or – you know when – the whole forward together.
>
> … At the time I thought – cause she's – she was a little bit older than them that it might be just she doesn't want to interact with the children or you know she's – she was nine years old. So, everyone changes and sometimes she'd go out with a mum and auntie and sometimes I think she thought the others were a little bit little. You know, young for her sometimes.

It has not been shown that the reasons proffered for the change in the complainant's behaviour by her mother and grandmother were not the real reasons for her change in behaviour.

[52] Fourth, the complainant's mother gave the following evidence about the complainant's change in behaviour following the departure of the appellant which had the potential to support the complainant's evidence.

> KLR started to lose interest in some of those extracurricular activities she was doing. The things that she loved so much, like karate, violin. She started to lose interest in you know, school from sort of, you know, where she previously studied. Books, she used to read like, oh my God, 10 books a week that's why we had a library. She stopped reading as much, and I'm not saying she stopped it immediately but she did. She – and definitely the, I guess, the contact between – between all – all of us, which included her sister, A, it just – it just – that closeness just wasn't there anymore.
>
> Whereas the – you know the child that we knew would always – I mean she – she wasn't shy about a sort of coming up hand, you know, there were hugs and, you know, I love and even with her sister she's – she's always been really, really loving of A. She – she would sometimes like flinch just – just - just with casual touch, it didn't matter who it was. She definitely, definitely wasn't as close to her sister and they were – they were always, thank God I had children that didn't – I'm not saying they didn't fight but they were – they've always got on really well. So, and – and there were times where – and KLR had never been a kind of angry child but there were times where she started to always – you know it wasn't she created situations of angry but you know there was – it almost just like trying to push us away.

[53] These latter behavioural changes may be consistent with the trauma associated with sexual assault. However, it is apparent that the complainant had mental health issues which were unrelated to sexual assault. As there were potentially multiple causes of the complainant's change in behaviour, without expert evidence, there is a reasonable possibility that the plaintiff's change in behaviour had nothing to do with sexual assault. The fact that the complainant was able to text the appellant in a normal manner tends to suggest that he was not the cause of her change in behaviour. In addition, she told the appellant in those texts that she still enjoyed karate but was unable to attend because of the amount of home work she had to do.

[54] Fifth, the complainant's father gave similar evidence to the complainant's mother about the complainant's behavioural change. In addition, he stated the following.

> I suppose I didn't pay any attention to her interaction with other adults. It's more now, I suppose, the only thing that sticks in my mind being so long ago, is her interaction with me.
>
> Just significantly less interaction. Just, you know, don't get the hugs and smiles you did previously and yeah, didn't talk as much, that sort of thing.
>
> There was talk in the days leading up to Narelle and [the appellant] leaving, or the family leaving that there was a potential there for Narelle and [the appellant] to look for work in Darwin and potentially, you know, look at moving to Darwin, because we thought the kids would get on really well. So, there was talk about that and, you know it was never any serious talk, but I remember as we (sic) left we were standing in the carport, we were saying goodbye. I called KLR down from upstairs, because she hadn't come down to say goodbye. So, I called her down and said, you know, "Say goodbye to everyone" and I said to her, you know, "[the appellant and auntie N] are thinking about moving to Darwin getting some work here, wouldn't that be great?"

She just turned white and looked at the ground and didn't respond

[55] I agree with their Honours Kelly J and Riley AJ that there is reason to doubt the above evidence for the reasons given by their Honours at [119](d) below.

The appellant's evidence

[56] As to the appellant's evidence, I accept senior counsel for the appellant's submission that objectively there was nothing on the face of the appellant's testimony which justified its rejection in circumstances where he was seeking to recount events of a Christmas vacation eight or nine years ago. The main contest about the appellant's evidence related to his recollection of his behaviour towards his wife and lack of participation about family events. The evidence about these matters was equivocal and any disparities in the appellant's evidence in this regard did not constitute material lies.

The advantages of the jury

[57] I accept that the jury in this case had a number of advantages over the members of this Court in assessing the evidence led at trial. They were present in court throughout the whole trial and they had the opportunity to observe the behaviour and demeanour of the witnesses while they gave their evidence. They saw all of the witnesses except the complainant in person and were therefore imbued with the atmosphere of the trial. They also had the benefit of each other's views during their deliberations. They could bring to bear their life experience and their collective common sense. The fact that the verdicts were unanimous carried significant weight.

Conclusion as to Ground 1

[58] I compared the jury's advantages to my own position. I concluded that advantages did not allay the genuine doubt I have as to the appellant's guilt caused by the inadequacies and discrepancies in the complainant's evidence which are readily apparent from the trial transcript. The advantages enjoyed by the jury are likely to have been hindered by the matters raised in Ground 2 of the appeal which are discussed below at [135] to [138] in the Reasons for Decision of their Honours Kelly J and Riley AJ. Further, the trial below was a particularly emotional trial which involved a complainant who was vulnerable in a number of ways. It must always be born in mind that all trials are to be determined according to reason and not emotion.

[59] I concluded for the reasons set out above that the complainant was an unreliable witness. Her evidence lacked the ring of truth and reality.

Grounds 2, 3 and 4

[60] I have had the advantage of reading a copy of their Honours Kelly J's and Riley AJ's Reasons for Decision and I agree with their Honours Reasons for Decision in relation to Grounds 2, 3 and 4 of the Appeal.

KELLY J and RILEY AJ

[61] On 19 September 2018 the appellant was found guilty of one count of maintaining a sexual relationship with a child with circumstances of aggravation. He was also found guilty of one count of aggravated assault.

On 22 November 2018 he was convicted and sentenced to imprisonment for 16 years with a non-parole period of 11 years and three months.

[62] The offending was said to have occurred between 22 December 2009 and 5 January 2010. In that period the appellant, his wife and their two children spent a holiday with the complainant's family at their home in Durack. The appellant's wife is the sister of the complainant's mother. It was a large house spread over three levels. At the relevant time there were nine people staying in the house being the two families and the children's grandmother.

[63] The Crown case was that the appellant maintained a sexual relationship with the nine year old complainant over that period by engaging in a range of sexual misconduct including penile/vaginal sexual intercourse without consent, on four separate occasions. The circumstances of the alleged offending, as described by the complainant, involved a significant level of violence. The alleged incidents were brazen in nature in that they occurred in a fully occupied house consisting of five adults and four children at a Christmas family reunion. The appellant gave evidence at his trial in which he denied the offending.

The allegations

[64] The evidence in chief of the complainant was given in the form of a recorded child forensic interview ("CFI") with police when she was 17 years of age and subject to cross-examination at a special hearing when she was 18 years of age. It was to the effect that three of the assaults took place in

the downstairs guestroom which had an ensuite. The fourth occurred in the complainant's bedroom upstairs. The guestroom downstairs was the room allocated to the appellant and his wife. The remainder of the family slept upstairs on the first floor of the house where, together with an open plan kitchen, living and balcony area, there was a library or TV room where the grandmother and some children slept, two bedrooms which belonged to the complainant aged 9 and her younger sister, and the main bedroom and ensuite occupied by the complainant's mother and father. There was also an upstairs bathroom and separate toilet. The stairs were visible from the living area and balcony.

[65] On each occasion the house was occupied by both families.

[66] The complainant described the alleged incidents in the following terms.

The first incident

[67] Everyone was at home: the complainant's mother, father and sister, the two cousins, the Grandmother, the appellant and his wife.

[68] It was late at night and everyone else was in bed, she had stayed up in her room watching a movie.

[69] The complainant described returning from the upstairs bathroom wearing only a towel having had a late shower or bath when everyone else was in bed asleep. The appellant was sitting at the top of the steps and lured the complainant into the guestroom on the pretence that there was a frog in his

room. He then told the complainant that her father had asked him to check whether she had washed herself properly. He put his hand under her towel and on the inside of her thigh and he held it there for a time. Then he put his hand on her other thigh and put his finger into her vagina. The complainant yelled out saying, 'It hurts'. (Later, when cross-examined about where people were and who would have been able to hear her yell, she said she had used the wrong word: it wasn't a yell. "It was just a – like a gasp or a – I don't know.")

[70] She said the appellant produced a pocket knife from his keychain on the bedside table and cut her across the shoulder, causing it to hurt and bleed. This left a fine 7 cm cut. He threatened that if she made another noise he would cut her again and kill her mum, dad and sister. He then pushed her onto the bed so she was on her back. He started touching his penis and asked her if she wanted to touch him, but she said no. He then inserted his penis into her vagina and, pushing back and forth, had fast and rough penile/vaginal sex until he stopped and his whole body sort of shook. She was bleeding but she doesn't know if it was inside or outside her vagina.

[71] She said in the CFI, "It felt odd and he pulled himself out of me and said that he had to go get me cleaned up and he said again that if I made any noise he'd kill everyone and he took me upstairs. He tried to get me to walk but I couldn't, I was too sore and I was bleeding and he – he had an arm under my arms and he took me upstairs and back into the bathroom and he made me sit on the drain on the floor and I was dizzy and I was vomiting

and he went and got a jug of hot water and he had this thing on the drain and he poured it between my legs and said that it would stop any infection and he held his hands between my legs to stop the bleeding and then he washed everything off me."

[72] She said he washed her inside and outside and then he picked her up and she didn't remember anything else. She woke up the next morning and she was back in her room.

The second incident

[73] The complainant said there was a night in between and the second incident happened at night on Christmas Eve or Christmas night. Everyone was awake. The children were playing downstairs, the adults were on the balcony and in the dining room and the music was really loud. The TV was on and everyone was talking. The appellant approached her in the library/tv room and told her to stand up. He grabbed her shoulder and hair at the same time and said, "Don't make a noise." Then he took her downstairs.

[74] He stood her in front of the bed, facing the bed. He pulled her skirt up around her hips and pulled her underwear down. He took his pants off and made her lie on the bed. He had a black kitchen knife, with the blade about as long as her hand. He held it next to the top of her arm, where he had cut her last time, but he didn't cut her. He started touching his penis and touching her, putting fingers in her vagina.

[75] He then stood between her legs, with her legs hanging off the end of the bed. His shorts were around his ankles and he had nothing else on. He pushed her face between his legs, rubbing her face around the area of his penis, and then pushed her back on the bed. He did the same thing as the first time, going faster until he took himself out. He kept rubbing and then his body started shaking and then fluid came out of him on to her face and he said, "That's all you're good for." He also said she did well.

[76] The intercourse hurt and made her cry but she did not call for help.

[77] The appellant took her to his bathroom, sat her on the drain and wiped everything off. Then he took her upstairs and said that she was his Christmas present and he was hers and to remember what will happen if she said anything and then he left.

The third incident

[78] The complainant's evidence was that this occurred two days after the second occasion. It was night time and everyone was asleep in their bedrooms. By this stage the grandmother may have gone back to Western Australia.

[79] He came to her bedroom, grabbed her by the shoulder and the hair and took her downstairs to his room. He made her take her clothes off and he took his off and pushed her on her back to the edge of the bed, then flipped her over to her stomach and moved her legs outwards. He was masturbating and ran his hands all over her, including around her vagina, and then put fingers inside her vagina. He then knelt on the bed behind her and put his penis

inside her vagina and did that for a while. Then he put her on her back and put his penis inside her vagina.

[80] He took his penis out and started masturbating. He had the same knife as on the second occasion near her shoulder. As before, he touched her with the knife but did not use it. He moved the knife to her neck and she thought he was going to kill her. He told her to open her mouth and he held the flat part of the knife against her neck. He put his penis in her mouth and held her to keep her mouth open. She could not breathe with his penis in her mouth and when she coughed he would laugh. Fluid came out of his penis in her mouth. He then cleaned her, this time in the ensuite attached to the downstairs bedroom, and took her upstairs.

The fourth incident

[81] The complainant said that it was night time and everyone but the grandmother was there. She was not sure where everyone was as she was in her room.

[82] This was the appellant's last night visiting her family. The appellant went up to the complainant's room. She had her lights on and was sitting up in bed. He shut the door quietly and said, "Sorry I'm late." He said that tonight was their last night together so it was going to be special and he was going to "let her choose". He sat on the bed in front of her, unzipped his pants and started masturbating himself with one hand and running his other hand all over her.

[83] He said that she needed to pick a few things and he said, “We’ll do three.” He told her to stand up and she didn’t so he grabbed her by the back of the neck and made her stand up. She didn’t walk either so he pushed her along and made her walk. She picked two things, a bottle of nail polish from the bedside table, and then the air-conditioner remote from its holder next to the door. (She was not asked why she chose such objects or whether she anticipated that the appellant was going to sexually assault her with them.) The door wasn’t locked and she looked at it and thought about running out but he grabbed her again and locked the door. She was taking too long, and he said, “One more thing.” She picked the disposable plastic water bottle off the study desk and he said, “I don’t know if it’ll fit but we’ll give it a go.” They went back to the bed and he said he would warm himself up.

[84] He took his pants off and sat on the bed. He pulled her underwear down and touched her and himself and told her to sit in front of him with her legs open. He held the handle end of the nail polish bottle and put the rest inside her vagina. He moved this around and inside and out while masturbating.

[85] He then put the air-conditioning remote inside her vagina, moving it up and down fast and hard. She felt a sharp pain and the back cover of the battery section had come off inside her. He took the remote out and then removed the back piece. He was laughing the whole time.

[86] He then attempted to push the lid-end of the water bottle inside her vagina but it wouldn’t go in and it hurt. He told her to be quiet, saying, “You know

what will happen if you make a noise." He didn't have a knife visible but she was scared it may be hidden so she didn't say anything. He kept pushing the water bottle in and eventually he got some of it in and he twisted it and pushed it in and out. He kept touching himself while he was doing that and then he pulled his penis out. He was rubbing himself really fast and told her to open her mouth.

[87] She shook her head and said, "No," and he grabbed her hair and "reefed" her head around. He kept shaking her and "ripping" her head around. She opened her mouth and was so scared she wet herself. He watched that and rubbed himself faster and then ejaculated in her mouth. He sat there for a bit rubbing her leg and said, "You really were a good girl."

[88] Then he stood up and put his pants back on. He put his hand on her head, moved her head around and said, "Remember what will happen if you say anything, I'll kill your mum, your dad and your sister and you."

[89] She put a towel down over the bed. She was in too much pain, in her stomach and between her legs, and didn't fall asleep till the early morning.

The appeal

[90] Leave to appeal, and an extension of time within which to appeal were granted by a single judge on 11 April 2019.

[91] The original grounds of appeal were:

Ground 1: The verdict was unreasonable and cannot be supported having regard to the evidence.

Ground 2: Contrary to the Court's ruling, evidence was put before the jury which in the absence of expert evidence led to the significant risk of an impermissible inference that the conduct of the accused caused the deterioration in the complainant's behaviour and mental health over a period of six years which resulted in her involuntary hospitalisation in a psychiatric hospital.

Ground 3: The learned trial judge erred in not adequately warning the jury (in the absence of the jury's discharge) that they were not to embark on a course of reasoning that the complainant's deteriorating behaviour and mental health could be attributed to a traumatic experience.

[92] During the hearing of the appeal, the appellant was granted leave to add a further ground of appeal.

Ground 4: Trial counsel made fundamental errors in the representation of the appellant so as to result in a miscarriage of justice.

[93] A number of particulars of incompetence were provided. These were winnowed down to six.

(a) Counsel did not seek a ruling at the outset to exclude all evidence of psychological/ psychiatric and /or behavioural deterioration.

(b) Counsel cross-examined the complainant as to her failure to tell her parents that she did not want to go to Perth.

(c) Failure to adequately confine by way of objection and seeking a ruling as to the precise parameters of behavioural evidence before commencement of the trial.

(d) After the Court ruled on the limitations of behavioural evidence, counsel failed to make discharge applications warranted at various stages, including after the respondent's final address.

(e) Counsel did not adequately establish through cross-examination a basis to raise a reasonable possibility that the complainant had created a false document to convince her riding instructor.

(f) Failure to adduce expert evidence with regard to the likelihood of injury from unlubricated penetration of a nine year old.

Ground 1: The verdict was unreasonable and cannot be supported having regard to the evidence.

Appellant's contentions

[94] The appellant relied on a range of matters in relation to Ground 1.

[95] The appellant contended that there was no basis for the jury to reject the appellant's evidence in circumstances where he was seeking to recount events of a Christmas vacation eight years earlier.

[96] The appellant also contended that there were a number of aspects of the complainant's evidence which should have caused the jury to have real concerns about her credibility.

[97] The first of these was the description of the assaults, which the appellant contended were implausible. The crimes alleged were noteworthy because of the significant level of violence inflicted and the brazen nature of the rapes in the context of a fully occupied house accommodating 5 adults and 4 children at a Christmas family reunion. The first incident was alleged to have occurred after the appellant tricked the victim into going downstairs, late at night, to his guestroom to which his wife also had access. The victim gave evidence that there was vigorous penile vaginal intercourse at knife point in which a 7 centimetre cut was inflicted on her shoulder which bled. The complainant gave evidence that, rather than clean up the evidence in the attached bathroom, she was carried upstairs to the main living and accommodation section of the house and there was cleaned up after bleeding and vomiting on the bathroom floor.

[98] The appellant also relied on significant discrepancies and the implausibility of the complainant's evidence about a letter addressed to her mother, which her mother found in her bag. In the CFI the complainant represented that it was a letter she had written as a child (after the third attack) and carried around with her until she showed her riding instructor in 2015-2016. After the CFI was suspended and resumed, she changed her story and said that the letter was not the original but was copied word for word from the original

minutes after she ripped up the original. Later in her evidence she gave a series of inconsistent and increasingly improbable accounts of how the letter came into being.

[99] The appellant also relied on evidence of subsequent friendly contact with the appellant, initiated by the complainant, which the appellant contended contradicted her evidence that she was terrified of the appellant as a consequence of the alleged offending and the threats made to her and her family. The appellant pointed out that in the CFI, when asked if she had had any contact with the appellant since the events she described, she said, “I think he texted me once,” around the time she went into hospital. She said the appellant didn’t say anything out of the ordinary, just something along the lines of, “I’m here if you ever need to talk about anything, I understand you’re having a rough time.” She positively denied any other contact. After the CFI the complainant’s mother found a Facebook message in friendly terms from the complainant to the appellant written several years after the alleged rapes. The appellant pointed out that the complainant was aware that her parents and her aunt knew about the disclosed text message. (The aunt had asked the appellant to contact the complainant.) However, she elected not to disclose the Facebook message that they did not know about. It was only by chance that the mother found the Facebook entry and gave it to police.

Respondent's contentions

[100] The respondent contended that none of these matters rendered the jury's verdict unreasonable or unsupportable in accordance with the evidence; that the jury was entitled to accept or reject any part of a witness's evidence and was directed accordingly; and that none of the matters raised by the appellant, either individually or in combination, would preclude a jury, acting reasonably, from being satisfied of guilt beyond reasonable doubt.

[101] The respondent submitted that the complainant gave detailed and consistent evidence about each of the four episodes of offending and was unshaken in cross-examination about her account of what had occurred. Counsel argued that while there was a real risk of detection and this was unusual, this does not significantly undermine the credibility of the complainant's account. The apparent implausibility of such offending was squarely put to the jury in counsel's closing address and re-iterated in the summing up.

[102] In relation to the letter, the complainant was cross-examined extensively about how it came to be created. While conceding that "there were potential differences in the complainant's evidence as to its purpose and how it was reproduced", the respondent submitted that the jury was entitled to take into account the fact that the letter was "reproduced" some years after the events in question when, on the complainant's evidence, she was suffering significantly from deteriorating mental health. The respondent pointed out that the suggested effect of this evidence on the complainant's credit was

extensively dealt with in counsel's address and in summing up and the members of the jury were entitled to make up their own minds on the issue.

[103] The respondent relied on answers given by the complainant in cross-examination on the Facebook message. She said that it was sent during a period when she didn't want to remember what had happened, when she "wanted everything to move on like it had before".

[104] Counsel elaborated on these contentions in oral submissions on the hearing of the appeal.

[105] Counsel for the appellant pointed to the evidence of the grandmother that the complainant slept in the library with her each night she was there except one night when one of the younger ones wet the bed and the complainant went back to her own room.[10] He put this forward as, effectively, alibi evidence.

[106] Counsel for the respondent submitted that the last two alleged episodes took place after the grandmother had gone home and one of the others is alleged to have taken place while the adults were awake and socialising so that the grandmother's evidence does not amount to an alibi.

---

10 This is supported by the complainant's mother who said that the complainant gravitated to the grandmother. She said they moved the mattresses and camp bed into the library and her understanding is that they all ended up in there at some time. (She did add that there was no guarantee that the complainant was not in her own room at some time while the grandmother was there.)

Principles:

[107] In *M v The Queen*[11], Mason CJ, Deane, Dawson and Toohey JJ said that the test for an unsafe or unsatisfactory verdict was whether the court thought that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The majority emphasised, however, that it was not the function of the court to answer that question merely by examining the transcript of evidence and the exhibits. Their Honours said that:

> "… in answering that question the court must not 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 regard to those considerations."

The plurality explained the application of the test as follows:

> "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. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

---

11 [1994] HCA 63; (1994) 181 CLR 487 at 493.

Gaudron J agreed with the majority formulation of the test, as did Brennan J, although Brennan J said that the question as to whether it was "open to the jury" to be satisfied of guilt beyond reasonable doubt was to be resolved by asking whether the jury was "upon the whole of the evidence ... bound to have a reasonable doubt" or whether "the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused".

[108] In *Libke v The Queen*[12] Hayne J (citing the passage from the majority judgment in *M v The Queen* referred to above) said:

> 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. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

Consideration:

Appellant's evidence

[109] We consider that whether or not to accept the appellant's evidence was a matter for the jury. But, as they were warned by the trial judge, if they rejected his evidence, that alone was not enough to convict him. They still needed to be satisfied beyond reasonable doubt of the truth and reliability of the evidence of the complainant about what she said the appellant did.

---

12 [2007] HCA 30; (2007) 230 CLR 559 at 596-597 para [113]; See also *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].

Implausibility of the complainant's accounts

[110] The appellant contends that the complainant's account is implausible for a number of reasons including the extraordinary degree of risk that the appellant would have to have taken to do the things described.

[111] He is said to have committed multiple violent rapes in the environment of a full house and with substantial risk of exposure by reason of part of his conduct being in the public areas; some of the offences taking place in the room he shared with his wife who could have entered at any time and at a time when she could be expected to be returning to the room; carrying or half carrying the complainant up the public stairs while she was dressed in a towel and bleeding from a cut on the shoulder and from her vagina; and cutting the complainant on the arm which would leave a mark and evidence of assault.[13]

[112] We acknowledge that there are offenders who do undertake significant risks whilst offending. However, there was nothing in the material placed before the jury to suggest the appellant was one such person.[14] We agree that the

---

13 As part of the submissions in relation to risk, a great deal of importance seems to have been placed on the evidence of various people about where the appellant's wife was sleeping. The appellant said she slept in the bed downstairs every night. The wife said she waited until the appellant was asleep and then went to bed downstairs, or slept on the couch, and then moved into the library after the grandmother left. The complainant's mother said the appellant's wife (her sister) and her husband (ie the complainant's father) used to stay up late watching movies and sometimes the wife was on the couch reading. About all that can meaningfully be said about this evidence is that, at least for the first two alleged incidents, the wife must have been either in the downstairs bedroom (in which case the incident simply could not have happened), or upstairs in the lounge, possibly awake (in which case the risk in carrying a bleeding child dressed only in a towel up the stairs to the upstairs bathroom would have been extreme, and the risk of grabbing her by the shoulder and hair and marching her downstairs only slightly less so).

14 It was suggested to the appellant in cross-examination that the fact that he had started up a new business as a franchisee meant that he was a risk taker, a proposition which he rejected.

extraordinary degree of risk that would have been involved contributes to the conclusion that the complainant's account is implausible. We would not, for that reason alone, consider the jury's verdict to be unreasonable and unsupportable on the evidence. However, it was a matter to be weighed in the balance when we considered whether we have a reasonable doubt as to the appellant's guilt and then go on to consider whether a reasonable jury, considering the whole of the evidence, ought to have had a reasonable doubt.

[113] Another thing which makes the entire account implausible is that there was no suggestion of any grooming by the appellant. Without any prior indication of what was to come, he is said to have committed violent sexual assaults upon the complainant. We know that the two families had been together before. The complainant gave evidence of going to Perth for her grandfather's (or great-grandfather's) funeral and agreed that the appellant's family had visited in 2007, when she was seven and that there had been nothing untoward in the appellant's conduct then. There may well have been other contact. In the mother's evidence about behavioural changes in the complainant, she said that usually when the complainant saw the other kids (ie the cousins) she was "the master of ceremonies", "the director of all social activities", but that over that Christmas period "she became disinclined to lead the kids in the kind of playing and puppet shows and all that stuff that she used to do". This would seem to indicate that they had been together on more than one or two occasions. Again, this was a matter

to be weighed in the balance when we considered whether we have a reasonable doubt as to the appellant's guilt and then went on to consider whether a reasonable jury, considering the whole of the evidence, ought to have had a reasonable doubt.

[114] The appellant contended that the fourth episode described by the complainant was the most improbable of all, and should have caused the jury to have entertained a reasonable doubt as to the appellant's guilt. The appellant relies in particular on what he submitted was the extreme unlikelihood of anyone being able to insert objects of the kind alleged (a nail polish bottle, an air-conditioning remote with a battery cover and a disposable water bottle[15]) into the vagina of a nine year old child without causing significant injuries which must have been noticed.

[115] Counsel for the respondent submitted that extreme caution must be exercised before accepting such a submission. He contended that, in the absence of evidence as to the size, shape and sharpness of the objects in question (and medical evidence as to the elasticity of the vagina of a nine year old child), this would be inviting the jury to speculate.

[116] We do not agree. When the question before the jury is correctly formulated, one can see that no speculation is involved at all. The jury would not have been speculating about the size and shape of actual objects; they would have

---

15 It is true, as counsel for the respondent pointed out, that the complainant's evidence is that the water bottle was only inserted a short way. However, she told the riding instructor that he left the water bottle inside her while he touched other parts of her body, which would require a significant degree of penetration.

been assessing the credibility of the complainant's account. The question they should have been considering is whether they were convinced beyond a reasonable doubt that the complainant's account was true – that is to say whether they were satisfied beyond reasonable doubt that any such things were inserted into her vagina

[117] When the jury reflected on the complainant's account, they were entitled to take into account their common experience that the kind of objects the complainant claimed were inserted into her vagina come in a range of sizes and that some of them are quite large (air-conditioning remotes in particular are commonly of a substantial size and angularity). It was for the Crown to lead evidence to provide a basis upon which the jury could be satisfied beyond reasonable doubt that such a seemingly unlikely event occurred. In the absence of any evidence from the complainant about the size and shape of the things she says the appellant inserted into her vagina (ie evidence to suggest that they were sufficiently small to render her account that they were inserted into her vagina at age nine plausible) there must be a reasonable doubt about her account – ie a reasonable possibility that she was not telling the truth. (The same considerations apply to this court's consideration of the issue.)

[118] We do have a reasonable doubt about the complainant's evidence in relation to the alleged fourth incident. It remains to consider this, along with all the other evidence, to determine whether this is a doubt which a reasonable jury ought to have entertained.

[119] The respondent contended that there was some independent evidence to support the complainant's allegations.

(a) There was evidence from the grandmother that at some time during her visit, the complainant told her mother she had "a sore wee" and was given some Bepanthen (a cream used for rashes and similar problems) to put on it. However, she could not say whether this occurred before or after the appellant arrived at the house. The trial judge rightly warned the jury against the danger of drawing an inference that the "sore wee" had been caused by non-consensual intercourse given the range of other possible explanations, and directed them that they should not do so unless they had excluded all other possibilities.

(b) There was evidence from the mother and grandmother that they noticed a change in the complainant's behaviour over that Christmas period. They said she was more withdrawn and did not take the lead in activities with the other children as she used to do. The mother said that the adults had discussed this over dinner one night during that Christmas period, but in the absence of another explanation, put it down to the fact that the complainant was getting older and to the age gap between her and the younger children. (The grandmother gave evidence that that was her assumption too.) The mother also said that in the period immediately following the holidays, the complainant lost interest in the extracurricular activities she loved so much like karate and violin.

In our view, care should be taken not to place too much weight on this evidence. First, the evidence was given after the adults became aware of the complainant's allegations, and there may have been a tendency to view the past through the lens of that knowledge. Second, there is reason to doubt the accuracy of at least some of those recollections. For example, around three years later the complainant sent a Facebook message to the appellant saying she still loved karate. (See [128] below.) Third, there is every possibility that their first instincts were correct and that any changes in the way the complainant played with the other children could be accounted for by the fact that she was growing up and less keen to play with the younger ones. There is no suggestion that any of the adults were sufficiently concerned about any such change to make further enquiries.

There is no evidence that any of the adults noticed any injuries on the complainant or any other indicia that she had been subjected to multiple violent rapes. Nor is there any evidence that anyone noticed either the appellant or the complainant moving around the house in a way that excited suspicion even with the benefit of hind sight. There is evidence that the appellant danced with the children, including the complainant, when the family went to a hotel for a meal.[16]

---

16 The appellant was under something of a disadvantage in that, following his divorce, he did not have access to family photographs of the holiday which, it was submitted, would have shown the complainant happy and behaving normally – although of course it would have been open to his lawyer to subpoena these.

(c) The respondent relied on evidence of the complainant's distress when telling the riding instructor about the allegations in late 2015 or early 2016. Again, care must be taken in placing too much weight on this evidence. There can be many reasons why a person may become distressed, and it must be remembered that, by this time, the complainant was suffering from mental health problems for which she had earlier been hospitalised.

(d) The respondent also relied on evidence of the complainant's father that the complainant turned pale when she heard the appellant say in January 2010, as they were leaving, that the family were thinking of moving to Darwin. There is reason to doubt the reliability of this evidence. The appellant denied that it occurred: it was not disputed that he had recently bought a franchise business in Perth and had no plans to come to Darwin. Further, one questions the likelihood of the father noticing that the child had turned pale and, if he did, of remembering it for 8 years or so. There is no suggestion that he was concerned enough about it at the time to ask the complainant what was wrong.

Difficulties in the complainant's evidence about the letter

[120] The complainant gave the following different accounts about the nature and origin of the letter which her mother found in her bag, and which gave rise to a complaint being made to police.

Representations to the riding instructor

[121] The complainant's riding instructor gave evidence that the complainant told her, in late 2105 or early 2016, in one of their nightly telephone conversations, that she had been raped by her uncle. In the first telephone conversation in which she told the riding instructor this, the complainant said that her uncle and aunty and cousins were staying with them over a Christmas period (she did not specify when); that her uncle had raped her three times; and that she had written a letter to her mum that she was going to give to her but that for some reason she didn't give to her at the time. The riding instructor also said that it was about two weeks later that the complainant first told her about a fourth time that the uncle had sexually assaulted her.

[122] The riding instructor said that the complainant had shown her the letter she had written to her mum. It was tucked in the back of a sketch book in which the complainant had drawn faces and horses. She was shown the letter which became an exhibit in the proceedings and confirmed that that was the letter the complainant had shown her.

The child forensic interview

[123] In the CFI conducted on 25 August 2017, the complainant gave two different versions of what the letter which was later placed before the court was.

(a) Initially she said, “I wrote it after the third attack. I wrote it to mum telling her what had happened and I was going to give it to her once he left but after the fourth one he just scared me that much that I couldn’t give it to her so I kept it.”

(b) She was asked what happened to the letter and she said, “I tried to get rid of it and couldn’t.”

(c) She was asked where it is now and she said, “Mum has it.”

(d) She was asked how Mum got it and she said, “I carried it around with me until last year or the year before. [She then described showing the note to the riding instructor.] … and when she [ie the riding instructor] gave it back to me I put it in my bag in a book in the car and I don’t know why Mum was going through my bag but she found it.” (This was a clear representation that the letter her mother found in her bag is one that she wrote as a nine year old after “the third attack”. That is also the effect of the mother’s evidence about what the complainant said to her.)

(e) The interview was suspended at one point and after it was resumed, the complainant was asked if she had anything more to say. She said, “The note that Mum has isn’t the original. I tore it up and I rewrote it.”

(f) Asked when she re-wrote it she said it was in 2013.

(g) Asked why she re-wrote it, she said, “I tore up the first one and then I realised what I’d done and I didn’t think anyone would believe me if I didn’t have a note so I tried to put it back together but I couldn’t so I just re-wrote it”.

(h) She said the original was “gone”. She said she re-wrote the letter minutes after she tore up “the other one”.

(i) She was asked if she wrote the same sort of note or if it was a little bit different. She said, “Yeah, it was word for word.”

(j) Asked how she knew it was word for word, she said, “’Cause I took a photo of the one that I tore up before I tore it.” Asked where the photo was, she said, “I don’t know. It was on my old ipod.” Asked if she still had the old ipod, she said, “Maybe. I don’t know.” (The ipod was never produced.)

Examination in chief at the special hearing

[124] In examination in chief, the complainant gave the following explanation of how the letter before the court had come into existence.

(a) “I got scared one night and I wanted to get rid of it and so I tore it up and I realised that I’d made a mistake and I tried to fix it but I couldn’t.”

(b) “I realised that without the letter I had no proof of what happened.”

(c) She said she tried to tape it back together but she couldn't.

(d) Asked about her thought processes, she said, "I could read a lot of it from what was taped together but I also had a photo of the note on my ipod so that I didn't have to carry the real thing around with me, because I liked to read it all the time."

(e) Asked why she liked to read it, she said, "As punishment, for me. I felt like I deserved what happened."

(f) She said she took the photo on the ipod in the last few months before she tore it up.

(g) Asked why she wrote the "original" note, she said, "When I first wrote it , I wrote it so Mum – explaining what had happened to me because I didn't know if it would happen again and I didn't know what else to do."

(h) She said she didn't give it to her Mum because the appellant told her that he would hurt her family and her sister and her aunt "and everyone" if she told. (The list of potential victims has grown to include the aunt "and everyone" – and "kill' has become "hurt".)

(i) She said she tore up the "original" because she was scared that someone would find it. She said, "I was just scared that someone would know what had happened."

(j) She was shown the letter that was placed before the court and asked what it was. She confirmed, “This is the note that I rewrote in 2013, word for word from the note I wrote in 2009 after the events.”

Cross-examination

[125] In cross-examination, she gave a number of shifting accounts.

(a) First she agreed that she had written an original letter “between the end of 2009 and the end of 2010” (ie not after “the third attack”), and said, “That [ie the letter before the Court] is not the letter I wrote.”

(b) She said she could not remember when she tore up the letter, but it was after they moved to Bees Creek. She agreed that she tore up the original letter three or four years after it was written.

(c) Asked where she kept it (ie the “original”), she said, “I kept it in a box for a while and then I started carrying it around with me.” It was a thin cardboard box taped to the underside of her bed.

(d) Asked if she was scared of someone finding the letter, she said, “I was when I kept it in a box. That’s why I started carrying it around.”

(e) She said, “I had it in my pocket a lot of the time, or in my shirt or in my bag.”

(f) Asked if she was worried about her mum finding it in the wash, she said, “No. Generally I didn’t want it going through the washing

machine. I'd take it out. I'd put it in whatever clothing I was wearing at the time."

(g) Asked if she took it to bed, she said, "It would go in my bedside table, taped to the top."

(h) She said she took the photo of the letter, ages before she tore it up on a little pink camera that her grandma bought her. Much later in her evidence she said that the photo was hard to read because it was a photo of the torn up letter. Then she said she thought there was one of it before she tore it as well. She couldn't remember. She was asked if she had ever attempted to rewrite word for word, any electronic copy of the untorn 2009 letter. She said, "I never tried to rewrite it exactly. It was never my intention to make an exact copy. It just happened. It was just one of them [ie one of the letters she wrote, referred to below] and it wasn't meant to be found."

(i) When asked if she was worried about anyone seeing the photo, she said she wasn't, "Because it was the same as the letter. I kept it hidden. I hid the battery, I had the memory card, I had it all in separate places." She agreed that she would deconstruct the camera regularly so that other people could not read the electronic copy of the letter.

(j) She said she did not tell the police about the pink digital camera and the separation of the memory card and the battery because she didn't think it was relevant.

(k) She was asked, "And when you wrote this document ….. did you try and make it the handwriting of a 9 year old, of how you wrote when you were 9?" She answered, "I tried to copy the one that I did last time, the first note."

(l) She was asked, "And what about the spelling mistakes? Did you know how to spell "uncle" [when you wrote this note]?" She answered, "Yes, they were the same as the note previously," and "I copied it exactly the same as I did."

(m) Asked, "Were you hoping to pass this letter off as the original from 2009?" she answered, "No-one was meant to find it. It was for me." (This is in contrast to her answer to police, "I didn't think anyone would believe me if I didn't have a note so I tried to put it back together but I couldn't so I just re-wrote it.")

(n) She was asked why she used the same handwriting she had used three years earlier. She said, "Because I had ruined the last one and I realised I had made a mistake and I wanted it back. So I re-wrote this one and no-one was meant to find it. It was for me. I didn't hand this in."

(o) She was asked, “So, what’s written here is, word for word, letter for letter, what was written back in 2009. Correct?” She said, “No, I know now that there is a mistake at the bottom …. That he cut me again.”

(p) She was asked whether the original was an accurate representation of what happened to her. She said, “It was a 9 year old’s representation of what happened to me.” She was asked, “Was it accurate?” and she said, “It was accurate when I wrote it, when I wrote the original.”

(q) Asked about the current letter she said, “It’s wrong. It isn’t the same as the last one.”

(r) It was pointed out to her that in her evidence she said the appellant told her “dad” had asked him to check to see if she had washed properly, and the letter said he told her that her “mum” had asked him to do that. She said, “There’s a lot of inconsistencies in the one I re-wrote;” also, “I don’t know. I was copying it wrong. I know what happened and I wrote this in a rush. I wrote it in the middle of a panic attack. It was just something for me to get out on to paper. It was just something I needed to get out and I know it’s wrong but it’s for me and I didn’t do anything with this note. I just put it somewhere and I forgot about it and then someone went through my bag and found it and it wasn’t meant to be found.” (This is not true.

She showed the letter to the riding instructor and represented to her that it was a letter she had written when she was 9.[17])

(s) She was asked, “Well, didn’t you come to a considered decision to re-write it because, as I understand your evidence to be, if you rewrote it you might be believed. That’s what you said previously,” She responded, “Yes, it wasn’t a natural thought process. It was just panic. I tore it up and I panicked and I rewrote it.”

(t) She was directed to some of her earlier evidence in which she said she re-wrote the note some time after she tore up the original and she agreed that this was the case.

(u) She was asked, “It was a clear decision because you wanted to have something that people would believe in you, correct, according to you.” She said, “It was a panic written piece of paper that was not going to go anywhere. Yes I wrote it because I didn’t think people would believe me. But I thought a hundred other things as well while I was writing this.”

(v) It was pointed out to her that in her evidence she said that the appellant had cut her only once, that is on the first occasion, but in the letter she wrote, “I went back two more times and they were the same except he cut me more.” Her comment was, “He didn’t. As I’ve said, there are a lot of inconsistencies in this note.” Also, “I don’t

17 as she initially did to police.

know, it just came out. I don't even remember writing half of this. I was just panicking and I know that when I panic things change, things get messed around in my head. All the different events mould into one. I have nightmares of different things. It's all a mess."

(w) She was cross-examined about the evidence she gave that "this 2013 letter" was copied word for word from "the 2009 letter". It was put to the complainant that that evidence was not correct, that it was not word for word. She answered, "No, It's wrong." (It was never put to her by defence counsel that the story about a 2009 letter was untrue and there was no such letter, or that the letter before the court was just a false document she had made up in order to convince people she was telling the truth about being sexually assaulted. Defence counsel went along with the assumption – which had no basis in evidence except the complainant's say so – that there was in fact a 2009 letter. This may have led the jury into making the same assumption, in which case they may have taken the letter as supporting the complainant's allegations, despite the other difficulties with her evidence.)

(x) Asked why she told the prosecutor it was word for word, she said, "I've used that – I used the wrong term. I used it loosely.[18] And I know that word for word means exact, and I meant that I copied the

18 This is not the only time the complainant gave evidence to this effect: she said much the same about using the word "yell", when she changed her evidence to say it was more like a gasp.

handwriting. And I copied the spelling and the words but I know there's inconsistencies. I know."

(y) It was put to her that the letter did not contain the truth. She said, "It's inconsistent. I've told you that. I've told you that it was dad and not mum. And I've told you that he didn't cut me more than once. So no, this letter is not the truth."

(z) It was pointed out to her that the letter says she tried really hard to hit the appellant, contrary to her evidence that she complied passively. Her answers were couched in the form of hypotheticals: "It's obvious that I wasn't just going to lie there." "I would have struggled." "I would have tried to push him off."

(aa) She was cross-examined about the accuracy of each particular of the letter.[19]

(bb) In relation to the discrepancy between, "mum" in the letter and "dad" in her evidence, defence counsel asked, "Do you have an independent recollection of what the 2009 letter said?"[20] She answered, "The 2009 letter said "dad" and I've copied it incorrectly."[21] Asked if she could provide an explanation for that miscopying, she said, "Because at the time I remembered it differently, I wasn't thinking. It changes in my

---

19 This gave her an opportunity to bolster her credit by saying that everything that hadn't been contradicted was true.

20 reinforcing the notion that there really was a 2009 letter

21 in effect, self-bolstering (at least potentially in the mind of the jury)

dreams and in my nightmares and in the notes I wrote and in my memory. But I know what happened."

(cc) It was pointed out to her that the letter said, "I went back to my room," not that the appellant took her upstairs to the bathroom. She said, "I went back to my room after the bathroom," and "No, this letter was not an accurate description of what occurred on those nights. This letter is missing a lot of details including the fact that I went to the bathroom that night."

(dd) It was pointed out to her that the letter says, "He told me to come back and I had to so I went back two more times and they were the same except he cut me more." She said, "Yes and again that's incorrect." Asked why she wrote that, she said, "I don't know, for the same reason that I don't know why I wrote this note or the other ones. I don't know why it's wrong. It was just a panic stricken note I wrote. And it's one of many and they're all different." "This isn't the only note I wrote.[22] I rewrote it and wrote it and wrote it and I drew things and …," "I didn't write the same note over and over again. They were just depressed notes, they were – the same reason that I drew things and wrote things and I just did it. I've just done it for years now. It's how I – how I cope. This note wasn't meant to be found. It was something for me personal, to try to come to terms with

22 She said "wrote", not "copied".

what happened."[23] (Again, this is falsified by the fact that she showed it to the riding instructor.)

(ee) She was asked why, in that case, the letter had, "To mum" at the top. She said, "That's just this one. They were all different. They were all addressed to different people. I even had one addressed to who I would tell if I ever told someone. They were all just me trying to find a way to figure out what happened." She also said, "They were just me wishing I could do things over." (This contradicts completely her evidence that she carefully copied this one letter from an original letter which she tore up but immediately regretted it and copied word for word from a photograph of the original she had on her ipod. This letter is the one she showed the riding instructor. It was addressed "To mum" – not the riding instructor – and she told the riding instructor she had written it as a child, when these things happened to her.)

(ff) She was asked whether she wrote the other letters before or after she destroyed the original. She said, "I may have written some of them before that and I know I wrote most of them after." Counsel put to

23 Defence counsel followed up this extraordinary revelation by again referring to "the original letter". He asked, "So, the original letter, the very first one you wrote, was intended for your mum, wasn't it?"

her that it was very different from the 2009 letter, she said, "Yes, as are the other millions I wrote."[24]

(gg) She was asked whether she was worried about her mum finding those copies, and she said, "No. They were just stories. In my mind I just changed them so that I never went to the bathroom or I never went downstairs or I – I don't know, I told someone after the first event. I wrote all these letters to try and change it." "To try and change what happened to me in my head. I thought that if I came up with ideas to try and convince myself that it didn't happen, or to think of things I could have done to prevent it, because I felt that it was my fault. For some reason I thought that writing these things would help. And, I was told by my psych at the time that it wasn't going to help; that I can't change what happened."

(hh) She was asked about the content of "the many different versions of the 2009 letter". She said, "They were mainly just me fighting back and getting away, or me telling someone early on." "They [ie the details] changed so that I could get out, yes." (This explanation moves away from the evidence of a single letter miscopied in a panic attack. The letter before the Court does not appear to be an attempt to change anything – at least in a positive way. How would changing "dad" to "mum" and being cut more often represent a change for the

24 Again and again, defence counsel kept reinforcing the notion that there was, in fact, an original letter written in 2009. He appeared to have adopted the assumption that this was the case. If there had been such an "original", this would tend to support the complainant's allegations.

better or something she could have done to prevent herself being sexually assaulted? It looks more like a letter written to try to convince someone else that something did happen – and that is the use to which she put it when she showed it to the riding instructor.)

(ii) Later she said, "I changed them [ie the details] to make me somehow punish myself. I don't understand it. I still don't." (This is almost the opposite of the first explanation for changing the details.)

(jj) The complainant went on to give evidence about a book, or diary in which she wrote some of these different versions. She called it her "punishment book". She said she got rid on the punishment book before she went to hospital in Perth. She said it was part of her plan, when she decided to do the thing that got her put in hospital in the first place. She said the book also contained photographs. "They weren't related to the case at all. They were just photos of me where I thought I looked bad and I used them as punishment as a reminder. And I just stuck them in there."

(kk) Later she said she wrote in the book about things that hurt her, things that she thought were her fault. It was a book full of awful things to punish herself and make herself feel low. She wrote all her negative feelings in there. And she wrote alternative endings to things she wished hadn't happened. There were suicide notes in there and

photos. She said, “And I still keep one of those books. I always have. It’s nothing unusual for me.”

(ll) Later in cross-examination, she said that the letter before the court was the letter she had been carrying around with her at all times because she was worried about it being found. (Initially she said that it was the “original” letter she had carried around.)

(mm) Later still she said, “The book wasn’t proof. It was the same as the letter. It’s just me writing my messed up thoughts down.” After that, she said the letter before the court was different from the others. “The rest of them were just similar but not – not copies.” Later still she said “the 2013 letter” (ie the one before the court) was for her. “It was one of my many.”

(nn) Questioned about the deliberate spelling mistakes and childish writing, she said, “Yes. And this isn’t the only one I did that on. I wrote others with spelling mistakes and funny writing.”

[126] These shifting and improbable stories about how the letter before the court came into being cast considerable doubt on the complainant’s veracity and the reliability of her evidence. The different versions cannot be reconciled. At least some of them must be untrue. Of particular concern is that, without any rational explanation being given, she tried to write the letter as if it had been written by a 9 year old and represented to the riding instructor that she had written it at the time the events described in it had occurred, and

initially made the same representation to the police. There must be considerable doubt about the truth of the complainant's evidence that there was an original letter which she wrote when she was nine – either shortly after the alleged rapes or between the third and fourth episodes. This concern about the complainant's credibility and reliability must extend to her evidence about the allegations against the appellant, and these matters cause us to have a reasonable doubt about the truth of those allegations.

[127] Those doubts are reinforced by the complainant's evidence that she wrote "millions" of other letters, all different, in which she changed the details of what she said had happened to her, and that she kept a "punishment book" in which she wrote stories that were not true (as well as unflattering photos of herself) in order to punish herself because she believed she deserved it. It is at least reasonably possible that the letter she showed the riding instructor, and which her mother found in her bag and gave to police, was simply another fantasy story of this nature.

The Facebook communication

[128] There is evidence that after the Christmas visit in 2009 (the exact date is unclear), the complainant and the appellant engaged in a friendly Facebook exchange initiated by the complainant. The Facebook messages were

discovered by the complainant's mother and were put into evidence at the trial. What appears to be two separate exchanges[25] read as follows.

First exchange	
Complainant:	hey uncle phil
Appellant:	Hey K, how are you? I'm at rottnest – just helped some friends swim from perth
Complainant:	cool
Appellant:	They did very well. When are you coming to Perth??
Complainant:	Im not too sure. Hopefully soon I haven't been 2 perth 4 ages.
Appellant:	B and S want to come to Darwin in the middle of the year when I go to Bali for work, so hope we can arrange it
Second exchange	
Complainant:	Hi I was at the doctors cause my turtle bit me
Appellant:	That doesn't sound too good. Did he think your finger was food?
	We had to take Trevor to the vet today because he was bitten by a snake. He will be ok but my wallet will be damaged!!
	How is Karate going? B just started Tae Kwan Do and he loves it.
Complainant:	I still love karate but I can't do it every day as I have so much homework … I hate year 7. I heard about Trevor. We have a bit more of a risk with meter high grass. All our dogs do is lick cane toads. They are morons.
	Joe licks the bird poo then rolls in it then licks it off himself
	Idiots
Appellant:	But I bet you love them though!!

25 We formed the view that there were two separate exchanges because the topics are different; what we take to be the second exchange begins with, "Hi," and the icons next to the conversation are indented from the icons in what we take to be the first exchange. It is possible that there was only one exchange. That was not explored in cross-examination. It makes no difference to the outcome of this appeal whether there were one or two exchanges.

[129] The complainant told the police in the CFI that she had only had one contact with the appellant and that was at the request of her mother or her aunt because the appellant had also experienced mental health issues. The Facebook message/s set out above were discovered and disclosed by her mother. These friendly, private Facebook exchanges with the appellant, which were initiated by the complainant, are quite inconsistent with her claim that she was fearful of him.

[130] Her explanation in cross-examination for sending these messages was unconvincing, indeed irrational. She said, “I did it so that nothing looked suspicious. I did it because if someone found out, it would have been my fault.”

[131] There was no reason at all for her to take active steps to ensure nothing looked suspicious. On her evidence, all she had to do was to keep quiet. In any event, as was put to her in cross-examination, a Facebook message is private. It would not have been seen by anyone else for the purpose of allaying suspicion. By far the most likely explanation for these messages is that they were normal, friendly, niece to uncle communications.

[132] This, too, casts serious doubt on the veracity of the complainant’s evidence that she had been brutally sexually assaulted by the appellant

Conclusion on Ground 1

[133] The shifting, incompatible stories of the genesis of the letter that the complainant showed the riding instructor, and that her mother found, along

with the evidence of the punishment book, cause us to have a reasonable doubt about the guilt of the accused. So does the implausibility of the complainant's account in relation to "the fourth episode", combined with her lack of detailed evidence about the objects she says were inserted into her vagina. (These doubts are reinforced by the other matters referred to in [134].

[134] In our view, these matters, combined with the doubt cast on the complainant's credibility by the Facebook messages, and the general implausibility of the complainant's evidence about the accounts as a whole, ought to have caused the jury to have a reasonable doubt about the guilt of the accused on the charges on the indictment. We agree that the verdict is unreasonable and cannot be supported by the evidence, and that there is a significant risk that an innocent man has been convicted. This ground of appeal must succeed.

Ground 2: Contrary to the Court's ruling, evidence was put before the jury which in the absence of expert evidence led to the significant risk of an impermissible inference that the conduct of the accused caused the deterioration in the complainant's behaviour and mental health over a period of six years which resulted in her involuntary hospitalisation in a psychiatric hospital.

[135] In summary, the appellant's submission in relation to Ground 2 was this.

(a) The trial judge made a ruling allowing evidence to be called about an observed change of behaviour by the complainant provided it was

limited to evidence of observations made at the time of the alleged offending and it's immediate aftermath.

(b) There followed unfortunate questions by defence counsel in cross-examination asking why the complainant wasn't scared to go to hospital in Perth knowing the appellant lived in Perth in order, presumably, to show inconsistency with her evidence that she was afraid of the appellant. This led (inevitably) to the complainant disclosing that she had been an involuntary patient in a mental hospital in Perth.

(c) In order to refute any assertion of inconsistency the prosecution was then given leave to call evidence from the complainant's mother that the decision to send the complainant to Perth as an involuntary patient was the mother's decision and the complainant had no say in the matter. After some argument, the prosecution was also given leave to adduce evidence from the mother that she made this decision because of concerns she had about the complainant's deteriorating mental health. (The purpose of this evidence is not clear.)

(d) In making the rulings in (c), the trial judge gave a clear indication that there should be no suggestion that there was a causal link between the alleged offending and the complainant's mental illness, as the Crown had elected not to call expert evidence as to whether there was such a link.

(e) However, in re-examination of the complainant's mother, the prosecutor put to the mother that the deterioration in the complainant's behaviour continued, and then, immediately afterwards, that she had concerns about her deteriorating mental health.

(f) Finally, in submissions, the prosecutor said to the jury:

> "We know – and this is another thing; we know that her own evidence of how much she struggled with what happened to her, that her feelings of self-worth plummeted, that there were issues of self-loathing, that there were issues where she felt that she wanted to punish herself.
>
> We know that in 2015 her mother took her down to Perth to a hospital facility where she was there for three months."

(g) The appellant submitted that re-examination went further than the leave given by the judge to adduce evidence of observed behavioural changes limited only to the time of the alleged offending and its immediate aftermath (as did evidence from the father in which he made a clear link between observed, minor behavioural changes over the Christmas visit, to later more extreme behavioural changes, to the complainant being hospitalised in Perth).

(h) The appellant also submitted that the submission to the jury set out in (f), contravened the judge's ruling that there should be no suggestion that there was a causal link between the alleged offending and the complainant's mental illness, the Crown having elected not to call expert evidence to establish any such link.

[136] The respondent demonstrated, by reference to the transcript, that a great deal of admissible evidence of the complainant suffering mental health problems was adduced in answer to questions mainly in cross-examination, and contended that once that evidence was before the jury, the Crown was entitled to make submissions about it.

[137] While that is unarguably correct, we consider that the evidence pointed to by the appellant, which was adduced by the Crown, went beyond the trial judge's rulings and that the final submission by the prosecutor (set out at [135](f) above) impermissibly "joined the dots", effectively inviting the jury to conclude that the complainant's mental illness was a result of having been raped by the appellant. This occurred in the absence of any expert evidence to establish such a link and contrary to the spirit of the trial judge's ruling. This ground of appeal should be allowed. However, this is of no real consequence, as the first ground of appeal succeeded leading to the conviction being set aside and an acquittal recorded. (Had the appeal succeeded on ground 2 alone, the most appropriate order would have been for a retrial.)

[138] We add that, in our view, the evidence in re-examination from the mother (as well as the admission of evidence from the father about later behavioural difficulties), should not have been before the jury, and in combination with the impugned submission of the prosecutor, may well have been a factor in leading the jury to overcome doubts they ought to have entertained on a consideration of the admissible evidence in the case.

Ground 3: The learned trial judge erred in not adequately warning the jury (in the absence of the jury's discharge) that they were not to embark on a course of reasoning that the complainant's deteriorating behaviour and mental health could be attributed to a traumatic experience.

[139] One of the bases of the fourth ground of appeal is that defence counsel ought to have asked for the jury to be discharged after the evidence referred to in ground 3 was introduced and/or after the submissions referred to in that ground had been made.

[140] The appellant contends that in the absence of such an application being made and granted, the trial judge ought to have given a stronger warning to the jury that they were not to reason that the complainant's deteriorating behaviour and mental condition were caused by the alleged offending.

[141] In his summing up to the jury, all the trial judge said about the issue of behavioural changes was:

> "The Crown case also depends on change of behaviour, evidence of change of behaviour. Members of the jury, I probably do not [need] to say anything much about that. That is a matter for you, and bear in mind though that a lot of the evidence is retrospective by some eight years or thereabouts and so there is a risk or possible risk of retrospective misattribution of change of behaviour and the like"

[142] The appellant submits that his Honour ought to have:

(a) warned the jury that there was no evidence that the complainant's mental illness was caused or contributed to by any trauma;

(b) warned them not to reason that the complainant's deteriorating behaviour and mental condition were caused by the alleged offending; and

(c) directed them, as a matter of law, that they should ignore the prosecutor's submission to this effect, referred to in the discussion of Ground 2.

[143] The appellant relied for that submission on the case of *Mahmood v Western Australia*.[26]

[144] In *Mahmood*, the appellant appealed against his conviction for the murder of his wife. He took part in a recorded interview with police on the day of the murder in which he denied that he had killed his wife. He also participated in a two hour video a week or so later in which he had re-enacted the events of the day of the killing and in which he sought to explain why he had not heard the assault on his wife and why he had so much of her blood on his clothing. At the trial the prosecution tendered the record of interview but not the re-enactment. The accused tendered a short excerpt from the re-enactment when a police witness could not remember the details. In his address to the jury, the prosecutor referred to the short excerpt and submitted that the demeanour of the accused during the excerpt was "cold-blooded and clinical", a submission which it was conceded on appeal was misleading. In the course of summing up, the judge said that "it would seem

26 (2008) 232 CLR 397.

to me that it would be unwise for you to draw any adverse view against the accused because of his demeanour" in the video excerpt and that it would be "more relevant" to have regard to the accused's demeanour during the record of interview taken on the day of the murder.

[145] On appeal to the High Court, the plurality (Gleeson CJ, Gummow, Kirby, and Kiefel JJ) allowed the appeal on the ground that the judge should have given the jury a binding direction in unequivocal terms to ignore the prosecutor's submissions regarding the accused's apparent lack of emotion in the video excerpt, rather than a comment which the jury was free to accept or reject.

[146] Given that the appeal has been allowed on Grounds 1 and 2, we do not consider it necessary to decide this ground of appeal. We note that no application was made by defence counsel for a direction of this nature after the evidence complained of was led, or after the submission which is complained of was made by the prosecutor, and no application was made for a re-direction after the summing up.

Ground 4: Trial counsel made fundamental errors in the representation of the appellant so as to result in a miscarriage of justice.

(a) Counsel did not seek a ruling at the outset to exclude all evidence of psychological/ psychiatric and /or behavioural deterioration.

(b) Counsel cross-examined the complainant as to failure to tell her parents that she did not want to go to Perth.

(c) Failure to adequately confine by way of objection and seeking a ruling as to the precise parameters of behavioural evidence before commencement of the trial.

(d) After the Court ruled on the limitations of behavioural evidence, counsel failed to make discharge applications warranted at various stages, including after the respondent's final address.

(e) Counsel did not adequately establish through cross-examination a basis to raise a reasonable possibility that the complainant had created a false document to convince her riding instructor.

(f) Failure to adduce expert evidence with regard to the likelihood of injury from unlubricated penetration of a nine year old.

[147] We do not find it necessary to consider this ground of appeal either as the appeal has been allowed on Grounds 1 and 2. As noted above, there were some quite serious deficiencies in the conduct of the trial by defence counsel. Further, when counsel for the respondent attempted to ascertain the response of defence counsel at the trial to the particulars of this ground of appeal, counsel was unco-operative. He provided an affidavit which simply said: "I took every forensic decision that at the time I considered to be in the best interest of [the appellant]," and would not comment further. This is not

what the court would expect of counsel faced with the serious allegations underlying this ground of appeal.

[148] However, the test for whether an appeal should be allowed on the ground of incompetency of counsel was explained by the High Court in *TKWJ v R* [27] :

> The critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred. However, "whether counsel has been negligent or otherwise remiss ... remains relevant as an intermediate or subsidiary issue". That is because the issue of miscarriage of justice in such cases ordinarily subsumes two issues. First, did counsel's conduct result in a material irregularity in the trial? Second, is there a significant possibility that the irregularity affected the outcome? Whether a material irregularity occurred must be considered in light of the wide discretion that counsel has to conduct the trial as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel. Accordingly, "it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence". The appellant must show that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome of the trial.
>
> [citations omitted]

[149] There would seem to be little point in going through the exercise of determining whether all of the errors alleged to have been committed by defence counsel in the course of the trial were indeed errors and, if so, whether they meet this stringent test. The appeal has been allowed on other grounds.

[150] ORDERS:

1. The appeal is allowed on ground 1 of the appeal.

---

27 *TKWJ v R* [2002] HCA 46; 212 CLR 124 at [79].

2. We set aside the convictions of the appellant of:

(a) maintaining a sexual relationship in aggravating circumstances contrary to s 131A of the *Criminal Code*; and

(b) aggravated assault.

3. The appellant is acquitted of both counts.
