SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0098

JOHN FRANCIS TYRRELL — Applicant

v

THE QUEEN — Respondent

JUDGES:	KAYE, NIALL and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	26 February 2019
DATE OF JUDGMENT:	15 March 2019
MEDIUM NEUTRAL CITATION:	[2019] VSCA 52
JUDGMENT APPEALED FROM:	*DPP v Tyrrell* (Unreported, County Court of Victoria 26 April 2018) (Judge Wraight)

CRIMINAL LAW – Application for leave to appeal against conviction – Historical sex offences – Offences alleged between 1965 and 1966 – Applicant convicted of four charges of buggery and six charges of indecent assault – Applicant acquitted on two charges of buggery and two charges of indecent assault – Whether verdicts of guilty unreasonable and cannot be supported having regard to the evidence – Whether delay in prosecuting applicant resulted in unfair trial – Crown case solely reliant on evidence of complainant – Substantial inconsistencies in complainant's evidence – Aspects of complainant's evidence improbable – Effect of delay – Witnesses and evidence unavailable – Application for leave to appeal granted – Appeal allowed – Conviction and sentences quashed – Judgment and verdicts of acquittal entered.

APPEARANCES:	Counsel	Solicitors
For the Applicant:	Mr P Doyle	Oxford Partners
For the Respondent:	Ms D Piekusis SC	Mr J Cain, Solicitor for Public Prosecutions

KAYE JA
NIALL JA
WEINBERG JA:

1 The applicant was charged on indictment with six counts of buggery (charges 2, 3, 4, 6, 10 and 14) and eight charges of indecent assault upon a male (charges 1, 5, 7, 8, 9, 11, 12 and 13). After a trial in the County Court, he was convicted of four charges of buggery, and six charges of indecent assault. He was acquitted on charges 4 (buggery), 11 (indecent assault), 13 (indecent assault) and 14 (buggery). He was sentenced to a total of 11 years' imprisonment with a non-parole period of 6 years and 6 months. That sentence was constituted as follows:

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
2	Buggery *Crimes Act 1958,* s 68(1)	20 years	5 years	Base
3	Buggery *Crimes Act 1958,* s 68(1)	20 years	5 years	1 year
5	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
6	Buggery *Crimes Act 1958,* s 68(1)	20 years	5 years	1 year
7	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
8	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
9	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
10	Buggery *Crimes Act 1958,* s 68(1)	20 years	5 years	1 year
12	Indecent Assault *Crimes Act 1958*, s 68(3)	10 years	2 years	6 months
Total Effective Sentence:		11 years		
Non-Parole Period:		6 years and 6 months		
Pre-sentence Detention Declared:		38 days		
6AAA Statement:		N/A		
Pursuant to s 6F on the *Sentencing Act 1991,* applicant is sentenced as a serious sexual offender in respect of Charges 1, 5, 6, 7, 8, 9, 10 and 12.				
Other orders Forensic order; Sex Offender Registration for life				

2 The applicant seeks leave to appeal his conviction and sentence. The application for leave to appeal against conviction is based on two grounds, namely:

> **Ground 1**: The verdicts of the jury are unreasonable and cannot be supported having regard to the evidence, because the verdicts of guilty are:
>
> (a) unsafe and unsatisfactory; and
>
> (b) inconsistent with the acquittals on charges 4, 11, 13 and 14.
>
> **Ground 2**: The delay in prosecuting the applicant resulted in an unfair trial.

Background circumstances

3 The offending that was the subject of charges 1 to 7 was alleged to have occurred in 1965, and the offending that was the subject of charges 8 to 14 was alleged to have occurred in 1966. The applicant was a Christian Brother. At the time of the alleged offending, he was a Grade 6 teacher at St Joseph's College in Geelong. The complainant was a student at St Joseph's College, commencing in Grade 3 in 1963. He remained at the college until 1969. At the time of the offending he was between 10 and 12 years of age.

4 The complainant had a number of medical problems. The muscles in his legs were not properly developed, as a result of which he was unable to participate in the usual sporting activities at the college, and his legs were required to be strapped to an alignment frame each night. He also had an issue relating to an undescended testicle. In January 1966 he underwent a medical operation to correct that condition.

5 According to the complainant's evidence, at the commencement of 1965, his mother, who was concerned about the complainant's progress in his education, approached the applicant requesting that the complainant be provided with additional lessons after school. As a consequence, it was arranged that he would attend at the applicant's classroom after school had been dismissed for the day for extra work. It was in that context that the offending was alleged to have taken place.

Evidence of complainant

6 The complainant commenced his evidence by describing his home life. His father, who was an interstate truck driver, was a violent 'drunk', who would 'belt' his mother and the complainant. The complainant's mother suffered ill-health for most of his childhood. On a number of occasions she would be bedridden. The complainant stated that subsequently she was diagnosed to suffer from a significant growth on her left ovary, which had to be excised. The complainant had a very good relationship with his grandparents, and he spent much of his time with his grandfather. However, that situation changed after his grandmother suffered liver cancer, which required his grandfather to spend much of his time with her.

7 The complainant gave evidence that in early 1965 his mother attended the school and spoke to the applicant about the extra lessons on a Monday at the commencement of that school year. The complainant said that when he and his mother went to the school, his mother knocked on the door, and the applicant opened it. The complainant remained outside while his mother spoke to the applicant. When the complainant and his mother returned home, she told him that she had organised for him to have extra tuition provided by the applicant.

8 On the following Wednesday, the applicant spoke to the complainant and told him that he wanted to see him after school. At the conclusion of the school day, the complainant attended the applicant's Grade 6 classroom. The applicant said to the complainant that his mother had told him about the complainant's trouble with his legs. He told the complainant he would like to have a look to see how bad they were, and he instructed the complainant to drop his trousers. The complainant complied with that direction. The applicant commenced to squeeze the muscles of the complainant's thighs. He turned the complainant around, and squeezed the back of his thighs. The applicant then pulled the complainant's underpants down, and forced his fingers up the complainant's anus causing him pain. (Charge 1 – indecent assault). The complainant commenced to scream, but the applicant put his hand over his mouth. He bent the complainant over a desk, inserted his penis into

the complainant's anus, and moved it in and out (Charge 2 — buggery). At the conclusion of the incident, the applicant said to the complainant 'Don't tell anyone. No-one will believe you, just take your punishment'. In cross-examination, the complainant said that he was able to say that the first incident occurred on a Wednesday, because he could hear the cadet band playing, and they played at the school every Wednesday. Under further questioning, the complainant agreed that he told the police that he heard a particular pupil (named Picone) playing the cornet, and he said that Picone also played that instrument on other nights.

9 The second occasion, on which the applicant abused the complainant, occurred two days later, on a Friday. During the day the applicant told the complainant 'I want to see you in the hall tonight'. At the conclusion of the school day, the complainant met the applicant in the hall. The applicant took him behind the stage, and instructed the complainant to remove his trousers, which he did. The applicant had with him a small brown earthenware ramekin with a lid on it. It contained butter. He told the complainant that that would make it easier for him. After the complainant removed his trousers, he bent over, and the applicant penetrated the complainant's anus with his penis (Charge 3 – buggery).

10 The jury found the applicant not guilty of the next charge, Charge 4, which was a charge of buggery. The complainant said that on the day of that alleged offence, the applicant again told him 'I'll see you in the hall after school'. Accordingly, after school the complainant went behind the stage in the hall. The applicant told him to remove his trousers, which he did. The applicant bent the complainant over, and again inserted his penis into the complainant's anus. The complainant said that the applicant used the ramekin of butter on each occasion from then on, including on that occasion.

11 The next event, described by the complainant, involved an incident in which the offences alleged in charges 5, 6 and 7 were committed.

12 On that occasion the applicant told the complainant to meet him in the science

room that was opposite the Grade 6 room. When the complainant entered that room, the applicant unlocked the door to an area that was known as the 'fume cabinet'. After they entered that area, the applicant told the complainant to sit down on a chair. The complainant complied. The applicant said 'You're learning'. The applicant then stood in front of the complainant, lifted his robe and cassock, and exposed his penis. He instructed the complainant to open his mouth. The complainant refused. The applicant again instructed the complainant to open his mouth. When the complainant again refused, the applicant slapped him across the ear. The applicant then put his penis in the complainant's mouth and made him suck it. (Charge 5 — indecent assault). The applicant then made the complainant play with the applicant's testicles and penis. The applicant then bent him over a counter, and inserted his penis into his anus (Charge 6 — buggery). The applicant removed his penis from the complainant's anus, turned the complainant around, and again pushed his penis into the complainant's mouth. (Charge 7 — indecent assault). The applicant's penis was then covered with butter from the ramekin and some faeces. As a result the complainant vomited. Some of it got onto the applicant's trousers. In response, the applicant belted the complainant on the bottom, back of the legs and back of his shoulders. He then forced the complainant to clean up his vomit.

13 In January 1966, the complainant underwent surgery in relation to an undescended testicle. After the surgery, he remained in hospital for about ten days. He then had a lengthy period of recuperation at home. As a result he missed the first few days of school. When he returned to school, he was in Grade 6. The applicant was his class teacher.

14 About one week after the complainant had returned to school, the applicant instructed him to go to the change rooms on the main oval. On that occasion, the applicant had a ramekin of butter with him. He put some butter on his finger, played with the complainant's penis and anus, and then inserted his finger into the complainant's anus (Charge 8 — indecent assault).

15 A few days later, a further incident occurred in the change rooms on the main oval. On that occasion, the applicant instructed the complainant to drop his trousers and underpants and to lie on the rubdown table. The applicant sucked the complainant's penis (Charge 9 — indecent assault), and then turned the complainant over, and inserted his penis into the complainant's anus (Charge 10 — buggery).

16 The complainant gave evidence that after he had returned to school following his operation, the applicant's behaviour towards him had changed. He said that the applicant was fascinated with the operation scar, and that he used to run his finger up and down it. The complainant also said that if he was lying on his back, or if the applicant was anally raping him, the applicant would grab his left testicle and squeeze it, causing him extreme pain.

17 The complainant also said that there were a few occasions when the applicant put butter on his fingers and would be fingering his anus, and it felt as if the applicant was trying to stick his hand up his anus, causing him substantial pain. In particular, the complainant described three such occasions on which that occurred. They formed the subject of charges 11, 12 and 13, which were each charges of indecent assault. The applicant was acquitted on charges 11 and 13, but convicted on charge 12.

18 The first such occasion occurred in the change rooms near the main oval. The applicant got the complainant to suck his penis, then he got him to bend down over the rubdown table while the applicant fingered his anus. The complainant said that all of a sudden it felt like the applicant was trying to stick his hand up his anus. The complainant turned his head and saw the applicant's arm, from the elbow to the shoulder, moving backward and forward in a thrusting motion. The complainant said that that caused him pain, stating that it 'felt like my guts were being ripped apart'. As mentioned, the applicant was acquitted on charge 11.

19 The next similar episode occurred in the hall upstairs. The complainant said that he did not recall whether there was any preliminary oral sex, but he recalled the

ramekin of butter being present, and he recalled being bent over. He said that it felt like 'quite a good bit' of the applicant's hand had been inserted into his anus. He said that the pain was like the first occasion, namely, 'it hurt like hell'. As a result, the complainant defecated. A bit of it landed on the applicant, who 'belted the hell' out of him again. The applicant forced the complainant to clean up the mess. As mentioned, the applicant was convicted on charge 12.

20 The complainant was not sure where the third occasion (charge 13) occurred in which the applicant again used his hand. On that occasion, as on the two previous occasions, he was bent over. He said that what penetrated him felt 'much bigger and harder than his penis'. At the end of the incident, the applicant instructed him to go home.

21 The complainant stated that on a couple of those occasions, he had noticed a few spots of blood on his underpants. He said that he washed the underpants himself. He did not complain after any of the incidents, because if he did so, he would not have been believed, and he would have been 'belittled'.

22 The final occasion, that was the subject of a charge, occurred in the change rooms at the main oval. The applicant bent the complainant over the end of the rubdown table and was anally raping him when the door opened. Brother McCabe walked in. The applicant did not slow down at all. Brother McCabe waited until the applicant had finished and then told the complainant to 'put your clothes on and go home'. On the next day, the complainant saw Brother McCabe in the school yard. As Brother McCabe walked past him, the complainant expected him to say something, but Brother McCabe just kept on walking and did not say anything.

23 In his evidence, the complainant stated that the abuse by the applicant was constant. He said that after the first occasion of abuse, he kept count of the times upon which the applicant had penetrated him, and there were 142 such occasions. He said that the abuse took place in a number of different locations, including in the room of a Brother Rahill (which was between the 5th Grade and 6th Grade

classrooms), the hall upstairs, the science room, and the change rooms on the main oval. On one occasion, it also took place in a single car garage at the edge of the road that ran to where building number 6 was.

24 The complainant stated that while he was in Year 5 and Year 6 he was terrified of the applicant, because he was being molested and belted by him. He said that physical punishment, with a leather strap, was a common occurrence at St Joseph's College. He also said that most of the sexual abuse of him by the applicant occurred on a Monday, Wednesday or Friday. On those occasions, the applicant told him where to go. The applicant would belt the complainant if the applicant arrived there before he did.

25 Subsequently, when the complainant was in Form 3, he was expelled from the college on the grounds that he had not turned up for classes. The complainant told the principal — Brother Carey — that he was sick of the applicant raping him, and he walked out of the school.

26 The complainant did not report the abuse to the police until September 2015. He said that he did not tell his mother of the abuse, because she was a devout Catholic, and if he had told her it 'would have killed her'. His mother died in September 2014. He had not told anyone else, because it was 'very hard for a man to admit that'.

Other prosecution witnesses

27 The prosecution called six other witnesses. The first witness was Peter Desbrowe-Annear. Mr Desbrowe-Annear attended St Joseph's College, and in Grade 5 he was in the same class as the complainant. When he was in Grade 6, he was taught by the applicant. Mr Desbrowe-Annear gave evidence about the routine at the school, the layout of the school, and the sporting activities. Terry Beaumont, also a former student of St Joseph's College, gave similar evidence. Mr Beaumont said that at that time he was a friend of the complainant. On occasions he would visit the complainant's home. He said that the complainant's mother was not a

healthy person, and sometimes when he visited the home the complainant's mother would be in bed. A third witness, John Beggs, gave evidence that he was in hospital in January 1966 at the same time as the complainant.

28 Brother John McCabe gave evidence on behalf of the prosecution. He confirmed that he was a teacher at St Joseph's College in Geelong between 1966 and 1969. Brother McCabe stated that Brother Tyrrell was a teacher at the school at the same time. He said that in June 2016 he was first asked, by Detective Galtieri, if he could remember an incident at the college when a child was being sexually abused in a change room, and he (Brother McCabe) walked in and told the child to put his clothes on. Brother McCabe stated that he did not remember that incident. Detective Galtieri stated that he would telephone Brother McCabe again in a few days' time and ask the same question. Brother McCabe thought about the incident in the following days, but he did not recall the incident described by Detective Galtieri, and he told the detective that when the detective telephoned him again.

29 Detective Kelly Smith, of the Geelong Sexual Abuse and Child Investigation Unit, gave evidence that on 2 September 2015 the complainant attended at the Geelong Police Station and stated that he had been a victim of a rape between 1965 and 1968. He said that the person responsible was the applicant, who was his 6th Grade teacher. On 4 September, Detective Smith took a statement from the complainant.

30 The last witness for the prosecution was the informant, Detective Leading Senior Constable Galtieri. Detective Galtieri is a member of the SANO Taskforce, which was set up to investigate allegations of sexual abuse that emanated from the recent Royal Commission. He first became involved in the matter in about February 2016. Detective Galtieri confirmed that his investigations had revealed that the applicant served two years at St Joseph's College, and he left at the end of 1966. The complainant was in Grade 5 at the school in 1965 and in Grade 6 in the following year. Detective Galtieri further ascertained that the applicant taught the Grade 6 class at the college during both years that he worked there.

31 Detective Galtieri also gave evidence as to the conversation that he had with Brother McCabe when he first contacted him. In particular, he said that it was a short conversation. He asked Brother McCabe if he had walked in on the applicant with a student in a sexually compromising position. Brother McCabe responded that he could not recall that happening. Subsequently, Detective Galtieri contacted Brother McCabe again and asked him if he had time to think about it. Brother McCabe responded that he had, and he said that his memory was clear, it did not happen. Detective Galtieri responded 'Well the allegation is you've walked in on Brother Tyrrell when he was anally raping a student'. Detective Galtieri also gave evidence as to the statement that he took from the applicant.

Evidence for the applicant

32 The applicant gave evidence, and called one witness.

33 In his evidence, the applicant confirmed that he was the Grade 6 teacher at St Joseph's College, Geelong in 1965 and 1966. In the following year, he moved to another school in Clifton Hill.

34 The applicant stated that the school day finished at 3:30 pm. After that the students would be involved in sport and recreation. The applicant would supervise the students' preparation for recreation, and then spend time having a cup of tea and talking to the other Brothers. The applicant himself did not have any role in supervising the students' recreational activities. He said that he did not have any key to the science room, sports room, garage, Brother Rahill's room, or to any other room than his own bedroom. He said that he had no reason to go into the sports room or the change rooms, or into any of the other rooms mentioned.

35 The applicant said that he had no recollection of the complainant at St Joseph's College. He said that there was no truth whatsoever in any of the allegations that the complainant made against him of sexual offending. He specifically denied penetrating the complainant with his fingers, penetrating him with his penis, or

performing oral sex with him.

36 The applicant further denied that he ever conducted after school classes for any of the day students at the school. He said that no parent of a child ever approached him and asked him to conduct such classes for her child. He said that he never carried ramekins of butter to parts of the school.

37 The applicant said that he left St Joseph's at the end of 1966 because his superiors in the governing body sent him to teach at Clifton Hill. He remained at Clifton Hill for some seven years.

38 The applicant further stated that he took his final profession, to continue in the religious congregation, in December 1966. For that purpose he had left St Joseph's College at the beginning of December to do a ten day retreat.

39 The other witness, for the applicant, was Mr James Keck, a colorectal surgeon.

40 Mr Keck stated that he did not have any specialist expertise in relation to sexual abuse injuries but he had treated male patients who have suffered anal injuries.

41 Mr Keck had been provided with a statement made by the complainant, and part of the evidence given by the complainant at the committal proceeding. Counsel asked Mr Keck to express an opinion relating to the complainant's description of the incidents, that were the subject of charges 11, 12 and 13. Mr Keck expressed the view that if an adult's clenched fist was inserted into the anus of a child at the age of 11 or 12 years, he would expect that the lining of the anal canal would split and lacerate, and that the internal sphincter would rupture. If the fist was lubricated, there would be less potential for trauma to the lining, but it would not make any difference to the potential for the anal muscles to rupture. As a result a significant amount of bleeding would take place, more than a few spots on the underwear. Mr Keck then stated that if an adult penetrated the anus of an 11 or 12 year old with the hand, that would have the same potential for the internal sphincter muscle to rupture and for the lining to tear. Mr Keck further stated that if, instead of a hand or fist, a finger or

fingers were inserted, there would be potential for damage, but it would be difficult to know whether it would require two, three or four fingers to occasion such damage. In addition, other variables would affect the result, including the use of lubrication, and the amount of force used.

Application for leave to appeal against conviction: Ground 1

Applicant's submissions

42 The first submission, made by the applicant in support of ground 1, was that the jury's verdicts of acquittal on charges 4, 11 and 13 were logically inconsistent with the conviction of the applicant on charges 3 and 12 on the indictment. Counsel for the applicant relied on that submission, first, as a discrete basis for impugning the convictions on those two charges, and, more generally, as a basis for contending that, in all the circumstances, the jury's verdicts were unreasonable and could not be supported having regard to the evidence, because the verdicts of guilty on all the other charges are unsafe and unsatisfactory.

43 Counsel for the applicant submitted that the evidence of the complainant on each of charges 3 and 4 was materially similar, which raised the question as to how his conviction on charge 3 could be reconciled with his acquittal on charge 4. In particular, it was submitted that there was no relevant feature of the complainant's evidence on charge 3 which made it stronger or more reliable than the evidence he gave on charge 4. Counsel noted that in his evidence in chief, the complainant had stated that the incidents, that were the subject of charges 1 and 2, took place in Brother Rahill's room, but that the incidents, that were the subject of each of charges 3 and 4, took place upstairs in the hall. In cross-examination, the complainant said that each of the first three instances of sexual abuse — that is, the incidents, that were the subject of charges 1, 2, 3 and 4 — all occurred in Brother Rahill's room, so that he must have made an error when he said that the incidents, that were the subject of charges 3 and 4, occurred in the hall. However, it was submitted, that error in the complainant's recollection could not have accounted for the different verdicts on

those two charges.

44 Counsel further submitted that the applicant's acquittal on charges 11 and 13 were logically inconsistent with his conviction on charge 12. Charges 11 and 13 represented the first and third occasions upon which the applicant was alleged to have penetrated the complainant's anus using his hand. Thus, it was contended, the verdicts of not guilty on those charges were inconsistent with his conviction on charge 12, which was the second such occasion. Counsel contended that the applicant's accounts of events of the incidents, that were the subject of charges 11 and 13, were no less detailed, or vivid, than the complainant's evidence on charge 12. In fact, it was contended, the complainant's recollection of the second event (the subject of charge 12) was not particularly distinct. He was not clear where it occurred, and he could not recall what happened in the lead up to the act of penetration.

45 Counsel then turned to the submission that there were a number of cogent reasons, that put in doubt the reliability and credibility of the evidence of the complainant on each of the charges on which he was convicted.

46 Counsel noted that in his evidence, the complainant stated that the abuse took place in 1965 and 1966, when he was in Grades 5 and 6 at St Joseph's College. However, in cross-examination, it emerged that the complainant had told the police that the abuse had continued throughout 1967 and almost all of 1968. In cross-examination, the complainant agreed that he only changed his version, as to when the abuse ceased, when the police told him that the applicant was not at the school after 1966.

47 Counsel for the applicant pointed out that the complainant also told the police that he felt relieved when he was in Form 1 and Form 2 (in 1967 and 1968), because he had attended cadet training on Wednesdays, so that he would be spared the abuse by the applicant on that day. In cross-examination, he again admitted that his recollection to that effect was wrong.

48 In addition, the complainant originally claimed to have a recollection of an occasion in 1969 when the applicant approached him and asked to see him after school. The complainant said that he had grown by that time, and he told the applicant to 'fuck off'. In cross-examination, he accepted that that recollection must have been the product of his imagination. Counsel for the applicant has pointed out that the 'imagined recollection' went further, because the complainant had recalled that that incident (in 1969) had been the catalyst for his class teacher in that year (Brother Flint) making his life a misery thereafter. In addition, the complainant had told the police that when he was expelled by Brother Carey in 1969, he said to Carey that he was leaving, and that he 'wasn't going to cop Tyrrell fucking me every day'. Again in cross-examination he accepted that that was not correct, because the applicant had already left at the end of 1966, and therefore the applicant could not have been abusing him in 1967, 1968 or 1969.

49 In re-examination, the complainant explained his erroneous recollection of the incident in 1969, in which he told the applicant to 'fuck off', as being the product of a recurring nightmare. Counsel for the applicant submitted that that concession, by the complainant, should have had a profound effect on the jury's deliberations, as, in effect, the complainant had mistaken a vivid nightmare he had experienced for a recollection of a real event.

50 In particular, counsel contended that, as a consequence of those matters, the jury had no rational basis upon which it could determine whether any of the evidence given by the complainant constituted a true memory by him of events that had occurred, as distinct from his recollection of imagined events, or events that were the subject of nightmares experienced by him. He submitted that the events, that were described by the complainant to the police, but which turned out to be false memories, had contained a number of vivid and specific details recounted by the complainant. Thus, the fact that the complainant was able to give evidence of vivid and specific recollections of the events, that were the subject of the charges, did not provide a safe basis for the jury to conclude that the memories, thus recounted by the

complainant, were true memories, as distinct from being the product of his imagination or nightmares.

51 Counsel for the applicant further noted that all the offences were alleged by the complainant to have taken place during extra classes, arranged by the complainant's mother, after school hours. However, there was no evidence corroborating the complainant's account that the extra classes were ever arranged. The complainant originally explained to the police that his need for tutorials arose because of the profound effect that his grandfather's death had on him and on his school work. However, at trial, he acknowledged that that was an error, because his grandfather passed away subsequently, when he was 14 years of age.

52 Counsel for the applicant further contended that the evidence, given by the complainant in support of charges 11, 12 and 13, was inherently improbable, in light of the evidence given by Dr Keck. Counsel noted that the description given by the complainant as to the actions performed by the applicant, and, in particular, the use of his fist as distinct from his fingers, was quite distinct from the description given by the complainant of the actions performed by the applicant in respect of the incidents in which he described the applicant as having penetrated his anus with his finger, and which were the subject of charges 1 and 8. Accordingly, counsel contended that the evidence of Dr Keck should have given the jury even greater cause to doubt the reliability of the evidence of the complainant, not only in respect of his evidence relating to charges 11, 12 and 13, but also generally.

53 Counsel further contended that the complainant's account was inherently improbable. In particular, it was unlikely that the applicant's offending would have gone undetected, in light of the complainant's evidence as to the frequency with which the applicant abused him. The evidence of witnesses indicated that there were a number of recreational activities that took place at the end of school, so that other students and members of staff would have been at the school at those times.

54 In addition, counsel submitted that the jury was required to take into account the evidence given by the applicant, which, it was contended, was not materially impugned in cross-examination, and the jury was also obliged to take into account the fact that the applicant did not have any previous convictions, nor had he incurred any convictions subsequent to the events alleged by the complainant.

55 Finally, counsel noted that forensic disadvantage, suffered by an accused, may contribute to a conclusion that a conviction is unsafe and unsatisfactory. He submitted that, as a result of the substantial period, between the events described by the complainant and the trial, the applicant had lost the opportunity to test the circumstances surrounding the complainant's allegations. In particular, the complainant's mother would have been able to give evidence on the critical question, whether an arrangement was made for extra tutelage for the complainant after school hours, which was a point of fundamental conflict between the evidence of the applicant and the evidence of the complainant. In addition, Brother Carey might have been able to contradict the complainant's testimony of having complained to him about having been abused each day. Medical evidence might have been available which might have cast doubt on the complainant's account as to the type of abuse that he suffered. Further, counsel for the applicant submitted, the police had failed to make important inquiries, including of the complainant's brother, who might have been able to shed light on the question whether the complainant was late home, by more than half an hour, each Monday, Wednesday and Friday during the period of the alleged abuse.

Respondent's submissions

56 In response, senior counsel for the respondent, noted that the acquittal of the applicant on charge 4 was explicable by the inconsistency between the complainant's evidence in chief, and in cross-examination, as to where the incident that was the subject of that charge took place. Counsel acknowledged that the same error was made by the complainant in relation to the incident that was the subject of charge 3,

upon which the applicant was convicted. Counsel accepted that if the Court were to consider that the two verdicts were inconsistent, that would support a finding that the verdict on charge 3 was unsafe. However, she contended, it would not affect the findings of guilt by the jury on the other charges.

57 Counsel for the respondent contended that the fact, that the complainant gave his evidence as to the events that were the subject of charges 11, 12 and 13 as a series of offences, did not mean that the jury was obliged to either accept or reject his evidence on each of the three incidents. Each of those events, described by the complainant, involved distinct acts and distinct occasions. The jury had been instructed by the judge that it must consider each charge separately.

58 In addition, counsel submitted that there were particular aspects of the complainant's evidence, in relation to charge 11, which might have caused the jury not to be satisfied beyond reasonable doubt of the applicant's guilt of that charge. In particular, it emerged during cross-examination that the complainant had told the police that the applicant had squeezed his left testicle which caused him such pain that he passed out, and he had also described (to the police) the penetration as involving the applicant's whole fist being shoved into his anus. In evidence in chief, the complainant had not mentioned that the applicant had squeezed his testicle, or that he had passed out. Further, the complainant's account to the police, that the applicant had penetrated his anus with his fist, may have caused the jury to not accept that evidence, in light of the expert evidence given by Dr Keck as to the injuries which would have ensued if that had occurred.

59 Counsel for the respondent also submitted that the applicant's acquittal on charge 13 was explicable, because the quality of the complainant's evidence on that charge was quite different to his evidence on charge 12. In particular, the complainant was not able to give any evidence as to the time or location of the incident that was the subject of charge 13. By contrast, the complainant gave clear evidence that the incident, that was the subject of charge 12, occurred in the upstairs hall. In addition, the complainant's evidence about the events, that were the subject

of charge 13, was not detailed. On the other hand, his evidence in relation to charge 12 had some precision and detail as to the location, the nature of the act performed by the applicant, and the fact that he defecated as a result of the penetration of his anus by the applicant.

60 Finally, counsel for the respondent contended that the jury might have taken a merciful view in acquitting the applicant of the four charges, while still convicting him of ten serious criminal offences. The fact that the applicant was acquitted on those four charges did not mean that the jury must have held the view that the complainant was not credible or reliable as a witness.

61 Counsel further noted that the prosecution case depended upon the credibility and reliability of the complainant, and whether the jury was satisfied that he was a witness of truth. The jury was able to assess the complainant's evidence, having observed him under cross-examination for a period of three days. The fact that there were some inconsistencies in his evidence was not surprising, given the passage of time since the events that he described. The fact that the trial occurred fifty years after the alleged offending would involve some disadvantages, but those disadvantages affected not only the accused, but also the prosecution. Nevertheless, counsel contended, this Court has recognised that, notwithstanding a very long period of delay in cases such as this, it still remains possible for an accused to receive a trial that is not unacceptably fair. In that respect, the judge gave the jury a comprehensive direction and warning concerning the forensic disadvantage to the applicant resulting from the lengthy period of delay.

62 Counsel contended that the fact that the applicant was acquitted on four charges did not necessarily imply that the jury regarded the evidence of the complainant as being either untruthful or unreliable, in relation to those charges, or generally. The jury had been instructed to give separate consideration to each of the charges, and that it might only convict the applicant if satisfied beyond reasonable doubt of the guilt of the applicant on that charge based on the evidence relevant to the charge.

63 Counsel for the respondent further submitted that it was understandable that there were discrepancies between the statement that the complainant first made to the police and in his evidence. The complainant stated that when he first went to the police station, he wished to obtain some counselling, but the police instead took a statement from him. It is therefore understandable, she submitted, that the complainant may have been initially confused as to the length of the period over which the abuse of him by the applicant occurred. Counsel contended that there were aspects of the incidents, related by the complainant, that were the subject of each of the charges on which the applicant was convicted, which would have been impressed on his mind, so that the jury could be confident that his recollection of those events was real, and not the product of a nightmare or imagination. In particular, the event that was the subject of charges 1 and 2 was the first incident in which the applicant assaulted him. The next incident — that was the subject of charge 3 — occurred two days later. The incident that was the subject of charges 5, 6 and 7 occurred in the science room, which was a different location to the previous incidents. In addition, the offending was different, and it was the first occasion on which the applicant had engaged in oral sex with the complainant. The incident that was the subject of charge 8 was the first offence committed by the applicant after the complainant had had surgery, for his undescended testicle, at the beginning of 1966. The incidents that were the subject of charges 9 and 10 followed close upon that event. Finally, she submitted, the incident that was the subject of charge 12 would have stood out in the complainant's memory, because, as a result of it, he lost control of his bowels, and he was punished by the applicant for doing so.

64 Counsel for the respondent further contended that the complainant only had one false memory, namely, of the incident in 1969 in which he told the applicant to 'fuck off', and which he later realised was the product of a nightmare.

65 Finally, counsel for the respondent contended that it was a matter of speculation as to whether the complainant's mother and brother could have given evidence that was relevant to the trial. In his evidence, the complainant stated that his family was

dysfunctional. His father drove interstate trucks, and was given to engaging in heavy drinking. The complainant's mother suffered from ill-health, and spent a lot of time in bed. The complainant stated that his brother was generally not at home when he himself arrived home after school. Accordingly, it was submitted, it was a matter of speculation as to whether either of those two persons might have been able to assist the applicant's case, if they had been available to give evidence.

Ground 1 — analysis and conclusions

66 The first ground of appeal is based on s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic), which requires that the Court allow an appeal if it is satisfied that the verdict of the jury is 'unreasonable or cannot be supported having regard to the evidence'.

67 The principles, that are applicable to that ground, were discussed by the High Court in *M v The Queen*.[1] Mason CJ, Deane, Dawson and Toohey JJ, in their joint judgment, stated:

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

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1 (1994) 181 CLR 487.

contrary, the court must pay full regard to those considerations.[2]

68 The precept, that the appellate court conduct its own independent assessment of the evidence that was before the jury, was reiterated by the High Court in *SKA v The Queen*.[3] In undertaking that task, the appellate court is required to weigh any competing evidence that might tend against the verdicts reached by the jury.[4]

69 In this application, counsel for the respondent placed substantial reliance on a passage from the judgment of Hayne J (with whom Gleeson CJ and Heydon J agreed) in *Libke v The Queen*[5] in which his Honour stated:

> 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.[6]

70 It is important to bear in mind that, in that passage, Hayne J did not restate the test in terms that were more stringent than that in which it was expressed in *M*. Rather, by emphasising that the question is whether the jury 'must' have entertained a doubt about the appellant's guilt, Hayne J gave emphasis to the essential test, to be applied by the appellate court, as to whether it was 'open' to the jury to be so satisfied beyond reasonable doubt.

71 In *R v Baden-Clay*,[7] the High Court emphasised the stringent nature of that test. The Court stated:

> It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'. Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that

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2 Ibid 492–3 (citations omitted).

3 (2011) 243 CLR 400, 406 [14], 409 [22] (French CJ, Gummow and Kiefel JJ).

4 Ibid 409 [24].

5 (2007) 230 CLR 559.

6 Ibid 596–7 (citations omitted).

7 (2016) 258 CLR 308.

> respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.[8]

72 In *R v Klamo*,[9] this Court summarised the relevant principles in the following terms:

> The approach required of appellate courts in considering the 'unsafe and unsatisfactory' ground involves the following steps:
>
> (1) The court of criminal appeal must ask itself whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.
>
> (2) In considering that question, the appeal court must bear in mind that the jury has the primary responsibility of determining guilt or innocence and has had the benefit of seeing and hearing the witnesses.
>
> (3) In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.
>
> (4) 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.[10]

Whether verdicts inconsistent

73 The starting point, in considering ground 1, is the submission by counsel for the applicant that the guilty verdict on charge 3 was inconsistent with the verdict of acquittal on ground 4, and that the guilty verdict on charge 12 was inconsistent with the verdicts of acquittal on charges 11 and 13. As mentioned, counsel for the applicant relied on that proposition as a distinct basis upon which to impugn the applicant's convictions on charges 3 and 12, and, more generally, in support of his contention that the jury's verdicts on each of the charges, upon which he was found guilty, were unreasonable and could not be supported having regard to the

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8 Ibid 329 [65] (citations omitted).

9 (2008) 18 VR 644. See also *Badem (a pseudonym) v The Queen* [2016] VSCA 200 [40]–[47].

10 *R v Klamo* (2008) 18 VR 644, 653–4 [38]. See also *O'Reilly v The Queen* [2015] VSCA 19 [82]; *Meade v The Queen* [2015] VSCA 171 [11].

evidence.

74 The principles, as to inconsistency of verdicts, have been discussed in a number of authorities, including the decisions of the High Court in *MacKenzie v The Queen*[11] and *MFA v The Queen*.[12]

75 Where the inconsistency is said to be based on jury verdicts on different counts, the test is one of logic and reasonableness. Essentially, the applicant must satisfy the Court that no reasonable jury, which had applied its mind properly to the facts of the case, could have arrived at the conclusion as to those verdicts.[13] In determining that question, it is important to bear in mind that, as in the present case, the jury is ordinarily directed that it must give separate consideration to each charge. That direction is regularly accompanied in this State — and it was in this case — by a specific direction that the jury may accept or reject the evidence of a witness in whole or in part, and that the acceptance, rejection, or non-acceptance, of a particular aspect of a witness's evidence does not necessarily mean that the jury must accept or reject the whole of that witness's evidence.[14]

76 In considering whether a jury's verdicts are inconsistent, it must be borne in mind that, in a criminal trial, particular emphasis is placed on the onus of proof borne by the prosecution, so that an acquittal on a charge on the indictment does not necessarily mean that the jury found the relevant witness's evidence, on that charge, to be unsatisfactory or untruthful. In *MFA*, Gleeson CJ, Hayne and Callinan JJ stated:

> A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does

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11 (1996) 190 CLR 348 ('*MacKenzie*').

12 (2002) 213 CLR 606 ('*MFA*').

13 *MacKenzie* (n 11) 366 (Gaudron, Gummow and Kirby JJ) citing *R v Stone* (UK Court of Criminal Appeal, Unreported, 13 December 1954, Devlin J).

14 *MFA* (n 12) 617 (Gleeson CJ, Hayne and Callinan JJ).

> not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. … factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others.[15]

77 It follows, therefore, that the acquittal by a jury of an accused person on one charge does not necessarily reflect a view that the jury considered the complainant to be untruthful or unreliable.[16]

78 In addition, it is recognised that a jury may consider that, although a number of offences have been charged against an accused, '… justice is met by convicting an accused of some only'.[17] As King CJ observed in *R v Kirkman*:[18]

> Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty.[19]

79 It follows, from the foregoing, that an applicant who relies on inconsistencies as a ground of appeal, or as an aspect of a ground of appeal, bears a heavy onus of persuasion.[20]

80 The question, then, is whether, pursuant to those principles, the verdicts convicting the applicant on charges 3 and 12 are inconsistent with the verdicts of acquittal on charges 4, 11 and 13.

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15 Ibid 617 [34].

16 Ibid 617–18 [35].

17 Ibid 617 [34].

18 (1987) 44 SASR 591.

19 Ibid 593.

20 *Inia v The Queen* [2017] VSCA 49 [74]. See also *Pillay v The Queen* (2014) 43 VR 327, 331 [26].

81 It is not readily apparent how the jury's verdict of guilt, on charge 3, may be reconciled with the jury's acquittal of the applicant on charge 4.

82 In his evidence in chief, the complainant stated that the incidents, that were the subject of both charges 3 and 4, occurred upstairs in the hall behind a stage. In cross-examination, the complainant gave contradictory evidence, stating that each of those two incidents (and the incident that was the subject of charges 1 and 2) took place in Brother Rahill's room. That contradiction may have given the jury cause to doubt the complainant's account of the incidents that were the subject of both charges 3 and 4, but it was not a sufficient basis upon which to differentiate between the two charges.

83 The evidence given by the complainant, in respect of each of those two incidents, was similar. The evidence that he gave, in respect of the incident that was the subject of charge 4, was perhaps less detailed, and less specific, than his evidence in respect of the incident that was the subject of charge 3. The complainant was quite specific that the second incident (that comprised charge 3) occurred on the first Friday after the incident that was the subject of charges 1 and 2. On the other hand, he was less certain about the day on which the third incident (that was the subject of charge 4) occurred. In his evidence in chief, he said it was on 'a Monday'. In cross-examination, when he was asked whether the third occasion took place 'the following Monday', he responded 'I believe yes'.

84 However, that difference, between the complainant's version of events in respect of charges 3 and 4 respectively, was not substantial. We do not consider that, as a matter of logic and reasonableness, a jury could on that basis differentiate sufficiently between the evidence that was adduced by the complainant in respect of those two charges, so as to be satisfied beyond reasonable doubt of the guilt of the applicant on charge 3, in circumstances in which it had failed to reach that level of satisfaction in respect of the evidence given by the complainant in support of charge 4. Giving due weight to the unique advantage of the jury in observing the complainant when he gave evidence in relation to those two charges, nevertheless

we are persuaded that the jury could not reasonably have arrived at the conclusion that the applicant was guilty of charge 3, in circumstances in which it was not satisfied of his guilt on charge 4.

85 On the other hand, the jury's verdict on charge 12, convicting the applicant, may be reconciled with the verdicts of the jury, acquitting the applicant on each of charges 11 and 13.

86 In his evidence in chief, the complainant was requested to describe the incident, that was the subject of charge 11, 'step by step', stating as best he could 'the sequence of events'. In response, the complainant described each of the acts of sexual abuse committed on him by the applicant, and which constituted the acts that were the subject of that charge. In cross-examination, he agreed that when he described that incident to the police, he said that at the commencement of the incident, the applicant had taken hold of, and squeezed very tightly, his left testicle causing him to see bright lights and colours. That aspect of the complainant's description of the incident, that was contained in his police statement, but which was omitted from his evidence in chief, could hardly be described as a trivial aspect of the incident, or as a mere detail, or a matter that was peripheral to the incident. The failure of the complainant to recount that matter, when describing the incident that was the subject of charge 11, may well have caused the jury to have reservations concerning the reliability of the evidence of the complainant concerning that charge. Certainly, it provides a reasonable explanation why the jury was not satisfied, beyond reasonable doubt, as to the evidence of the complainant on that charge. In light of the complainant's omission of that matter from his evidence in chief, it could not be maintained that the jury's verdict on charge 11 was inconsistent with its verdict on charge 12.

87 The complainant's description of the incidents, that were the subject of charges 12 and 13, was quite short. However, in describing the incident that was the subject of charge 12 the complainant had a specific memory that, after the applicant had penetrated his anus with his arm, the complainant involuntarily defecated, as a

result of which the applicant belted him and made him clean up the mess. By contrast, the complainant could not say where the incident, that was the subject of charge 13, occurred. When asked as to the location of the incident, he said 'I'm not sure'. He briefly described the incident. When he said he was bent over, the prosecutor asked 'And bent over what?' The complainant responded 'Well in the change rooms of the football room, I would've been bent over the rubdown table and the one in the hall, I don't recall what it was. I'm not sure what it was'.

88 In those circumstances, the jury was entitled to conclude that there was a relevant difference in the evidence of the complainant in respect of the incident that was the subject of charge 12, on the one hand, as compared with his evidence in respect of the incident that was the subject of charge 13. That difference was sufficient to provide an appropriate explanation for the different verdicts delivered by the jury in respect of those two charges. Accordingly, we are not persuaded that the jury verdicts, on those charges, are mutually inconsistent.

Whether verdicts were unreasonable

89 Having reached those conclusions, we turn, then, to the principal basis of ground 1, that the verdicts of the jury were unreasonable and could not be supported having regard to the evidence. As we have noted, in order that that ground be sustained, this Court must conclude that it was not open to the jury to be satisfied beyond reasonable doubt of the applicant's guilt.

90 At the trial, the prosecution case relied, wholly, on the evidence of the complainant. There was no other evidence which materially supported the complainant's account of the offending. Thus, the jury's verdicts, on each charge, depended significantly on its assessment of the credibility and reliability of the evidence of the complainant on those charges, in light of, and notwithstanding, the evidence of the applicant, Brother McCabe and Dr Keck, and the evidence that the applicant had no previous or subsequent convictions.

91 The assessment of the credibility and reliability of the complainant's evidence was a matter for the jury, in the context of all of the evidence. In a case such as this, the jury was in a substantially more advantageous position than the Court to make an assessment of the complainant's evidence, and particularly of his credibility. That assessment was one that the law reserves, primarily, for a jury. In the present case, the complainant was cross-examined by experienced senior counsel for a period of two days. During that time, the jury had the singular opportunity to observe the complainant as a witness, and to assess the evidence he gave, as it was tested by a detailed and searching process of cross-examination.

92 In his final address to the jury, senior counsel for the applicant reminded the jury, in some detail, of a number of the matters that have been relied on by counsel for the applicant in this application. In doing so, senior counsel submitted to the jury that those matters should, at the least, have caused the jury to have a doubt as to whether the complainant was telling the truth. He did not seek to submit to the jury that the complainant's erroneous evidence, that the abuse continued in 1967 and 1968, and his evidence, that he confronted the applicant in 1969 and told him to 'fuck off', rendered the complainant's evidence unreliable, because the complainant had been unable to distinguish between his nightmares and reality. Rather, he contended that 'the only rational explanation' for those inconsistencies 'is that he has made up the allegations'. Having addressed the jury in relation to a number of different matters, which he contended reflected adversely on the complainant's credibility, counsel put to the jury:

> Now, each of those … matters … are matters which in our respectful submission would cause you to question whether (the complainant) is a witness of truth and cause you to have a reasonable doubt as to the allegations that he makes. And as if to try and justify all of those errors that he made or what we say are lies … .

93 By its verdicts, the jury, having had the opportunity to observe the complainant under detailed, lengthy and incisive cross-examination, was satisfied that the complainant was a truthful and reliable witness, as to the charges on which it returned a guilty verdict, notwithstanding a number of matters raised by counsel for

the applicant, and concessions made by the complainant that parts of the account, that he had previously given to the police, concerning the offending of the applicant, could not possibly be correct.

94 In the present application, counsel for the applicant did not contend that the jury could not reasonably have concluded that the complainant was truthful in his evidence. Rather, counsel for the applicant contended that the jury could not reasonably have been satisfied as to the reliability of the evidence given by the complainant. In advancing that submission, counsel relied, substantially, on the same matters that were put to the jury in final address as matters going to the complainant's credibility.

95 In his charge to the jury, the judge gave the orthodox direction that in assessing the witness's evidence, the jury was to consider whether the witness was both truthful and reliable. The focus of the defence case, at trial, was on the credibility of the complainant. Nevertheless, the jury fully understood that its role involved the assessment, not just of the truthfulness of the evidence of the complainant, but also of his reliability. While credibility and reliability are different concepts, they are not entirely discrete. In determining the issues raised under ground 1, it is necessary to bear in mind that the jury, having heard full argument in relation to the credibility of the complainant, nevertheless concluded that it was satisfied, beyond reasonable doubt, as to the truthfulness and reliability of the complainant's evidence in respect of the charges on which the applicant was convicted.

96 However, as the High Court has emphasised, that does not absolve this Court from undertaking its own assessment of the truthfulness and reliability of the complainant's evidence, and of all the evidence in the case, in order to determine whether it was open to the jury to convict the applicant on the charges on which it returned a guilty verdict. Indeed, s 276(1)(a) of the *Criminal Procedure Act* makes it clear that this Court has an obligation to review findings of fact made by a jury in a criminal trial if called upon to do so.

97 We turn, then, to the specific matters that were raised on behalf of the applicant, and which were relied on in support of the submission that the jury could not reasonably have been satisfied, beyond reasonable doubt, as to the reliability of the evidence of the complainant in respect of the charges on which the applicant was convicted.

Inconsistencies in complainant's evidence

98 As counsel for the applicant has contended, there were a number of inconsistencies between the account, initially given by the applicant to the police, and the evidence that he gave at trial. In considering those inconsistences, the context in which the complainant made his initial statement to the police was relevant.

99 In his evidence in chief, the complainant said that about one year after his mother had died, he attended the funeral of a school friend about two weeks before 2 September 2015. At the funeral there was some discussion which prompted him to go to the police. In cross-examination, he elaborated on that evidence. He said that at the funeral there was some discussion about sexual abuse perpetrated on another boy by another teacher at the school. During that discussion the complainant became 'a bit uneasy', and to deflect any suspicion that he was the student who was the subject of the abuse, he 'threw another young guy under the bus and said I thought that he had been (abused)'.

100 As a consequence of that discussion, the complainant attended Geelong Police Station on 2 September 2015. Two days later, on 4 September, he attended at the Sexual Assault Centre in Spring Street, West Geelong. He said that when he went to the Geelong Police Station on 2 September, he did not think he would be making a statement at that stage, but he wanted to see about having some counselling. However, he was told that that was not how the matter was to proceed, and that he had to make a statement as 'a starting point for something to happen'. The complainant said that at the time that he made the statement, on 4 September, he

was not in a good frame of mind. He had not previously told anyone about the abuse of him by the applicant. When the police officer asked him questions, his 'head just felt like it was exploding'. He started to tell the policewoman about the matters that were done to him and '… it just kept going'.

101 In re-examination, the complainant said that he made the decision to go to the police on the morning of 2 September 2015. When asked whether, at that stage, he had thought about the details of the offences that he had described to the jury, he said:

> Only really the main — the events, the actual sexual events, not the little bits and pieces around the outside of it. It was really — because I suffer from some fairly severe nightmares over a few of the events in particular and have for most of my life.

102 The complainant further said that he went to the police station because he had been suffering from the nightmares, and that he had had very little sleep since the day of the funeral. When he went to the police station he just wanted to talk to someone, and that was how he was directed to the Centre Against Sexual Assault, where his statement was taken.

103 The jury was entitled to accept the evidence given by the complainant as to the circumstances in which he first attended the police, and made his first statement to the police. In light of that evidence, the jury was entitled to accept that, when the complainant first spoke to the police, there may well have been errors in his recollection of the abuse that he alleged had been perpetrated upon him.

104 The question remains, however, whether the jury could reasonably accept that that explanation accounted for a number of fundamental inconsistencies between, on the one hand, the account first given by the complainant to the police, and, on the other hand, in some instances, the evidence given by the complainant in court, and, in other instances, objective facts established by the evidence.

105 The first, and significant, inconsistency arose from the circumstance that the applicant, in fact, ceased to teach at St Joseph's College at the end of 1966.

106 In his evidence in chief, the complainant stated that the offending took place while he was in Grades 5 and 6, in 1965 and 1966, at the college. In cross-examination, he agreed that initially he told the police that the abuse had taken place in 1965, 1966, 1967 and almost all of 1968. The complainant further agreed that the police told him that the applicant was not at the school beyond 1966. It was put to the complainant that until the police pointed that matter out to him, he was prepared to let the police know that the offending had gone on for a period of four years. The complainant responded:

> Because I'd thought it just had gone on a lot longer than it actually had.

107 That contradiction in the complainant's account, of itself, was not insubstantial. When the complainant first spoke to the police, he recalled ongoing abuse committed by the applicant for a period of two years after the applicant had been his class teacher, when that abuse could not in fact have occurred. That is, the complainant's memory, when he spoke to the police, was not that the abuse ceased after the applicant was no longer his teacher. Rather, on the account he first gave to the police, the abuse continued when the complainant was being taught by other teachers in his secondary years.

108 Of itself, the fact that the abuse ceased when the applicant was no longer the complainant's teacher is a matter that, it might be expected, would have stood out in the complainant's memory. The fact that it did not do so raised a substantial question about the truth and reliability of the complainant's evidence. However, the matter is of even more significant moment. On the account given by the complainant to the police, and in evidence, he was subjected to frequent, degrading and appalling abuse at the hands of the applicant. The complainant said that during the two years of 1965 and 1966, there were 142 occasions on which the applicant sexually abused him. If the complainant's evidence were true, during that period, he was subjected to sheer torment on a regular and relentless basis. In those circumstances, when the applicant left the school at the end of 1966, the complainant must have felt enormous relief. The departure of the applicant from the school

would have been an unforgettable landmark in his young life, a watershed in his school years. The fact that the complainant did not recall that event, but, rather, recalled that the abuse continued in the ensuing two years, was a most significant discrepancy in his evidence. In our view, it could not reasonably be accepted that the explanation given by the complainant — that he thought that the abuse went on longer than it actually did — could account for that discrepancy.

109 The inconsistency was of even greater dimension for some further reasons. First, when the complainant first spoke to the police, he said that during Form 1 and 2 (that is 1967 and 1968) he was a member of the school cadet corps. The cadets had training each Wednesday after school. The applicant told the police that he had a clear recollection that there was no sexual abuse of him by the applicant on Wednesdays. In cross-examination, he said that he had a distinct recollection of thinking that it was a relief that, because he had cadets on Wednesdays, the abuse of him by the applicant was confined to Mondays and Fridays. Clearly — as the complainant agreed in cross-examination — that recollection was significantly incorrect.

110 Secondly, when the complainant first spoke to the police, he told them that in 1969 he had grown bigger. He said to the police 'I reckon he (the applicant) might have found someone else there which I was obviously pleased about'. Plainly that recollection was also incorrect.

111 Further, in the same context, the complainant also told the police that at about Easter of 1969, the applicant came up to him and asked to see him after school. The complainant told the police that he responded to the applicant as follows:

> I told him to fuck off and he went through the usual religious rant about respect him and respect that and he went off.

112 In cross-examination, the complainant agreed that that incident must have been something that he had completely imagined. In re-examination, he gave the following explanation for that part of his evidence:

> I was — been suffering from all my life since from a heavy series of bad nightmares, and in one of them that's recurring, I still have had it since I've made the statement, is that in that nightmare, I told him to fuck off.

113 The explanation, so given by the complainant, for that discrepancy, strains credulity. The complainant's account of the incident — when he told the applicant to 'fuck off' — was of itself quite extraordinary, in light of the point that we have already discussed, namely, that two years earlier, the applicant had left the school in circumstances which, if the complainant's account of the abuse sustained by him was truthful, must have been indelibly imprinted on his memory.

114 Further, the account given by the complainant to the police, of that incident, did not stand in isolation from the rest of the narrative that he gave to the police. For, he then proceeded to say the following to the police:

> From that moment, well the next morning, Brother Flint made my life a misery, Brother Flint was like the other Brothers' gangster, he dished out their discipline. Flint was my class teacher and was in charge of my actual class.

115 Thus, the complainant not only described an incident which he subsequently attributed to a nightmare, but he also directly connected that incident to the conduct towards him by his then class teacher, Brother Flint, stating that that conduct started 'from that moment … the next morning'. The complainant gave no explanation for that erroneous aspect of his memory. He did not attribute it to a nightmare. Rather, it was inextricably linked to the incident that he related in 1969, and in that way was connected also to the erroneous statement made by the complainant to the police that the abuse had continued up to the end of 1968.

116 The third matter, that arises out of the fact that the applicant left the college at the end of 1966, concerns the account given by the complainant, to the police, of the circumstances in which he left the college. He told the police that when Brother Carey, the principal of the school, expelled him from the school at about Easter 1969 he said the following:

> I told Carey I was leaving, that I wasn't going to cop Tyrrell fucking me every day.

117 In cross-examination, the complainant agreed that in saying that to Carey, he was stating that he was then being sexually assaulted by the applicant. Again, as the applicant had already left the school more than two years previously, that account, given by the complainant to the police, could not be correct.

118 Finally, in this context, it emerged in cross-examination that when the complainant first told the police about the incident in the sports change room which occurred when Brother McCabe entered, he said to the police that that occurred when he was in second form, in 1968. It was that incident that was the subject of charge 14, on which the applicant was acquitted. That error, as to the dates, did not stand in isolation. Rather it was connected with, and arose out of, the erroneous account given by the complainant to the police of the period over which the offending took place.

119 The complainant's account, that that incident occurred in 1968, was, clearly, inconsistent with the objective facts. Further, it was contradicted by the evidence of Brother McCabe. At the trial, the judge gave the prosecutor leave, pursuant to s 38 of the *Evidence Act 2008*, to cross-examine Brother McCabe in the course of the examination in chief of him. Under cross-examination, Brother McCabe remained consistent in his account.

120 In that context, it was significant that there was evidence that when the complainant first spoke to the police, he said that he believed that McCabe was then deceased. In cross-examination, the complainant denied that he said that to the police. However, Detective Senior Constable Smith, who took the statement from him, made a note that 'he (the complainant) stated he believed that McCabe would be deceased now'. Detective Smith agreed that she would not have written that note unless the complainant had said that to her. The fact that the complainant nominated McCabe as a witness to the incident that was the subject of charge 14, knowing or believing that McCabe was then deceased, was a further matter that ought to have given the jury, at the very least, reason to pause in reflecting on the credibility and reliability of the complainant's account.

121 In acquitting the applicant of charge 14, the jury had a reasonable doubt as to the evidence of the complainant in respect of that incident. The acquittal of the applicant, on that charge, was significant. On the complainant's account, it was the last incident in which the applicant sexually abused him. For that reason, on his account, it would have been memorable. Further, it was the only incident in which, according to the complainant, another person intruded into the room.

122 The fact that, in a case such as this, a jury might acquit an accused person of some of the charges on the indictment, does not, of course, mean that the jury must have had a reasonable doubt about the credibility or reliability of the complainant in respect of the matters that were the subject of the other charges on the indictment. However, in the circumstances of this case, the acquittal of the applicant on charge 14 was, for the reasons discussed, of some moment. In short, the jury's doubts concerning the incident that was the subject of charge 14, and the reasons for those doubts, ought to have weighed in favour of the applicant in the jury's overall assessment of the credibility and reliability of the complainant as a witness.

Improbabilities in complainant's evidence

123 In addition to the discrepancies in the complainant's evidence that we have discussed, there were a number of aspects of it which, on an objective view, were improbable.

124 On the account given by the complainant, on nearly each Monday, Wednesday and Friday, after school, he was subjected to abuse by the applicant in various parts of the school shortly after school hours. The evidence demonstrated that at the school a number of after school hours activities took place, including sporting activities and school cadets. Approximately 750 students attended the school at the time. On the complainant's account, during the two year period in which the applicant was at the school, he was abused by the applicant on 142 occasions. On his account, the only occasion upon which any person entered the part of the building, or the room, in which he was abused, was in the course of the incident that was the

subject of charge 14, and which we have just discussed. Certainly, it is possible that the applicant, on the complainant's account, could have exercised sufficient discretion and caution to evade detection. However, the fact that the abuse was so frequent, and so brazen, but went undetected, added to the improbabilities that were inherent in the account given by the complainant in his evidence.

125 In that context, we also observe that the complainant's evidence, that he kept count of the number of times he was penetrated by the applicant, and that that occurred 142 such times, of itself was quite improbable.

126 Further, counsel for the applicant was correct to point out that the evidence given by Dr Keck made it most improbable — if not impossible — that the offences that were alleged to have been committed, and which comprised charges 11, 12 and 13, could have involved anal penetration by the hand of the applicant without the complainant sustaining significant injury, which he did not. Of course, the complainant could not see what part or parts of the applicant's hand actually penetrated his anus. However, in his evidence, the complainant said that it felt as if it was the applicant's hand, and he described both the motion performed by the applicant (which he saw), and the feeling that he experienced, as equivalent to a forceful thrust of the fist. That description, by the complainant, of the applicant's actions, differed markedly from his description of the incidents in which, he said, the applicant had penetrated his anus with his finger (charge 1 and charge 8). The fact that the complainant suffered little injury — apart from reporting some blood spots on his underpants — added a layer of improbability to the evidence given by the complainant in respect of the incidents that were the subject of charges 11, 12 and 13. That improbability ought to have been considered by the jury to be a relevant factor in evaluating the credibility and reliability of the complainant's evidence, not only in respect of those charges, but also more generally in relation to the other charges.

127 A further point of improbability, concerning the evidence of the complainant, arose from his account of how, and for what reason, it was arranged that he receive extra tuition, after school hours, from the applicant. The evidence of the

complainant, as to that matter, was not directed to a peripheral issue incidental to the offending alleged by him. Rather, on the complainant's account, the extra tuition provided to him by the applicant, after school hours, constituted the setting in which each act of abuse took place. On the complainant's account, the arrangement for the extra tuition, to be provided by the applicant, gave the applicant with both the opportunity to abuse the complainant, and a means by which he might do so without arousing undue suspicion.

128 When the complainant first spoke to the police, he said that at that time his grandfather had passed away. The complainant had a difficult home life, and his grandfather had been his source of support and stability. He said to the police:

> Mum had a meeting with Tyrrell where she basically said that now my grandfather had died, that she wanted to make sure that my high grades continue and I had good guidance and discipline when I needed it.

129 In fact, at that time, the complainant's grandfather was alive. He passed away later in 1968. In his evidence in chief, when describing the domestic setting at the time, the complainant gave a different account. He said that his close relationship with his grandfather changed at that time, because his grandmother contracted liver cancer, and his grandfather spent nearly all of his time with his grandmother, and very little time with the complainant.

130 That inconsistency, of itself, may not have been sufficient to raise a doubt about the arrangement that the complainant said was made for him to receive extra tuition from Brother Tyrrell. However, it occurred in the context of an account given by the complainant, as to that arrangement, which of itself was inherently improbable.

131 The complainant said that at the beginning of 1965 his mother told him one day that she was going to see someone at the Christian Brothers school so that the complainant could have some mentoring to ensure that his grades were kept up to a level that it had been when he had input from his grandfather. The complainant's evidence was that after Easter in 1965, he accompanied his mother to the school. She rang a doorbell in front of the residence, that the applicant came out, the

complainant's mother told him why she was there, and the applicant responded 'Come inside and sit down. We'll have a talk'. The complainant further said that he remained outside while his mother spoke to the applicant. When they returned home, the complainant's mother said she had organised that the applicant would give him assistance in his tuition.

132 In assessing that aspect of the evidence, the jury was required to take into account, first, that the applicant was not then the complainant's teacher at the school, and, secondly, that the applicant had only recently commenced to teach at St Joseph's College. In those circumstances, it is somewhat improbable that the complainant's mother would have chosen to speak to a teacher at the college, who was new to the college, and who was not the complainant's class teacher in that year. The jury might have been entitled to consider that the complainant's evidence, concerning the actual arrangements, may not have been entirely accurate, given that it was a recollection of an event that occurred when he was a child. However, given the inconsistencies in the complainant's account, and the improbable aspects of it, the lack of any supporting evidence for that account was, in the context of the trial, quite significant.

133 The complainant's mother had passed away, so that the prosecution was not in a position to call her to give evidence as to the making of that arrangement. Further, it might be expected that if such an arrangement had been made, the principal of the school, Brother Carey, would have been acquainted with it. However, by the time of the trial Brother Carey had also passed away and was not available as a witness. We shall return to the aspect of forensic disadvantage shortly. However the point remains that the onus of proof was on the prosecution. As we have stated, the arrangement, for the additional tuition, was made by the complainant's mother with the applicant. The lack of any evidence to support it, and to verify the complainant's account of it, together with the applicant's denial of that arrangement, meant that the jury, acting reasonably, ought to have given weight to the inconsistencies and improbabilities in the account, given by the complainant, relating to the making of

that arrangement.

134 As we have noted, the complainant did not make a complaint, to anyone, concerning the abuse that he alleged was perpetrated by the applicant until 4 September 2015, when he spoke to the police in the circumstances that we have described. In his charge to the jury, the judge gave the directions, concerning lack of complaint, prescribed by s 52 of the *Jury Directions Act 2015*. The matters, that were contained in that direction, may account for the failure of the complainant to make a complaint to his mother, to his wife, or even to his friends. However, there were two particular events in the complainant's life in which the complainant might have been expected to have revealed the applicant's abuse of him, but did not do so.

135 In 1976, the complainant came before the Parramatta District Court on criminal charges, including a charge of manslaughter and a charge of robbery. He pleaded guilty to those charges. At his plea, he was represented by counsel and a solicitor. Before the plea he gave details to his lawyers concerning his background, including the fact that his father was a drunk and violent man who subjected him to beatings. He did not, however, tell his lawyers about the abuse that he had received from the applicant.

136 Nineteen years later, in 1995, the complainant pleaded guilty, before the Melbourne County Court, to one charge of intentionally causing serious injury. The charge concerned an incident in which the complainant shot a man in the arm in the course of a dispute. The complainant was, again, represented by counsel and a solicitor. In cross-examination in the present case, he agreed that, at that time, he knew that it was relevant for his lawyers to obtain information about his background for the purposes of the plea in mitigation of sentence to be made on his behalf. However, although on that occasion he told the lawyers about the violence and drunkenness of his father and the environment in which he grew up, he did not tell them anything about the abuse that had been perpetrated on him by the applicant.

137 The two occasions upon which the complainant came before the courts, related to

serious criminal charges, in respect of which the complainant faced the prospect of being sentenced to substantial terms of imprisonment. He agreed in cross-examination that he understood, at the time, that it was important that he tell his lawyers of the matters relevant to his background that might be put in his favour in mitigation of sentence. The fact that, in those circumstances, the complainant did not tell his legal representatives of the abuse, to which he had been subjected by the applicant, may be explicable by the considerations that lie at the basis of the directions mandated by s 52 of the *Jury Directions Act 2015*. However, in light of the gravity of the charges to which the complainant pleaded guilty on each of those two occasions, and in light of the jeopardy that he then faced, the fact that he did not inform his legal practitioners of the abuse, that he alleged was perpetrated on him by the applicant, adds a further element of improbability to the account given by the complainant in his evidence in the trial.

138 The jury was required to take into account the evidence given by the applicant denying his guilt on each of the charges. In effect, in order to be able to convict the applicant, the jury was required to be satisfied, beyond reasonable doubt, that the applicant's evidence, in that respect, was untrue. Having read the transcript of the applicant's evidence, it may fairly be concluded that there was no significant inconsistency or contradiction revealed in the applicant's evidence as a result of anything that was put to him in cross-examination.

139 In assessing the evidence, the jury was also required to take into account the applicant's evidence as to the various institutions at which he had taught since commencing his career as a school teacher in about 1963, and his evidence that he had not committed any other criminal offence during his long career as a Christian Brothers schoolteacher.

140 The applicant gave detailed evidence as to his teaching career. His first appointment as a teacher was in Warrnambool. He then taught at St Joseph's College in Geelong between 1965 and 1966. Following that, he taught in East St Kilda and South Melbourne. Between 1971 and 1978, he was the principal of a

college at Clifton Hill, and the principal at St Monica's Primary School, Moonee Ponds. He also was director of St Kevin's College Junior School. During his time at St Joseph's College, he was responsible for supervising the students who lived at the college as boarders.

141 The fact that during that career the applicant did not commit any other offence, of the kind alleged against him, is quite significant. In the present case, the allegation was not that, during an association with the complainant as his pupil, the applicant ultimately succumbed to temptation and engaged in sexual conduct with the complainant. Rather, the account given by the complainant was that, from the very first day on which he attended upon the applicant for extra tuition, he was, almost immediately, sexually abused by the applicant. It needs to be borne in mind that, on the complainant's evidence, the abuse continued, relentlessly and continually, for at least the next two years, on the occasion of almost each meeting. The offending, thus described by the complainant, was committed by a person who, it would seem, was a practised and incorrigible pedophile. It bespoke the conduct of a person who had already had experience in engaging in abuse with students and other young people.

142 In that light, it is improbable that, after the applicant had abused the complainant in the manner described by the complainant, he underwent a dramatic transformation, and desisted from any further conduct of the kind described by the complainant. It is of course possible that given the complexity of this area of human functioning, other complainants might have been slow to emerge. However, that consideration is more the product of speculation than legitimate inference. In the circumstances in which the offending was alleged to have occurred in this case, the fact that the applicant was a long-standing teacher, with no other criminal record, was a matter of particular relevance for the jury to take into account in evaluating the probabilities of the offending alleged by the complainant.

143 As a related matter, the offending, alleged by the complainant, was particularly brazen and, indeed, quite reckless. At the time, the applicant was relatively new to the school. He did not know the complainant. He was unfamiliar with the school's

ethos. He did not know whether the complainant would be compliant, or whether he would defy the applicant's admonition not to tell anyone of the abuse. Apart from one meeting, the applicant did not know the complainant's mother. He was not to know whether, if the complainant confided in her about the abuse perpetrated on him by the applicant, the complainant's mother might or might not accept the complaint, and act upon it. The fact that, in those circumstances, on the complainant's account, the applicant, from the very outset, set upon and abused him, repeatedly, adds one further element to the improbabilities of the account given by the complainant.

Effect of delay: missing evidence

144 In determining whether a verdict of a jury is unsafe or unsatisfactory, so that the verdict is unreasonable, in the sense already discussed, it is relevant to take into account any forensic disadvantage occasioned to an appellant as a result of delay. In an appropriate case, the forensic disadvantage may 'underscore' the unsafe and unsatisfactory nature of the convictions in question.[21]

145 In the present case, the delay between the events that were the subject of the charges, and the trial, was considerable. The disadvantages to the applicant, resulting from that delay, were described to the jury during counsel's addresses, and the trial judge gave a thorough and detailed forensic disadvantage warning to the jury in relation to them.

146 In particular, the judge told the jury that that a delay was a matter of 'significant consequence' because of the impact that it had on the applicant's ability to defend himself. He told the jury that due to the delay an accused person, in the position of the applicant, had lost the opportunity to make inquiries close to or at the time of the incidents. The judge said that the applicant had lost the ability to explore the circumstances of the alleged offending in detail, and he noted that it had been

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21 *Greensill v The Queen* (2012) 37 VR 257, 282 [106]–[107].

argued on behalf of the applicant that such an exploration might have uncovered evidence which might have thrown into doubt the complainant's allegations or confirmed the applicant's denial of the allegations. The judge further told the jury that as a consequence of the delay the applicant had lost the means of testing the complainant's allegations. The judge noted that the complainant's mother might have been able to answer questions, for example, about the classes after school and the complainant's demeanor when he returned home from school on those days. His Honour also pointed out that the applicant could not call other potential witnesses who might have been able to shed light on the surrounding circumstances.

147 The judge further directed the jury that the delay had had the effect that the complainant could not identify the timing of the offences with accuracy, so that the applicant was not able to raise a defence that he had been doing something else on the day of an alleged offence. Finally, the judge pointed out to the jury that if the complaint had been made closer to the time of the alleged offending, the complainant could have been medically examined, so as to provide any evidence contradicting his allegations. The judge directed the jury that it must take those disadvantages into consideration when determining whether the prosecution had proven its case against the applicant beyond reasonable doubt.

148 The law proceeds on the assumption that juries do take into account, and adhere to, directions, such as those given by the judge to the jury in this case. It is the common experience of trial judges that juries are astute, and conscientious, in adhering to such directions.

149 Nevertheless, as the judge told the jury, there were a number of important respects in which the capacity of the applicant, to defend himself against the allegations made by the complainant, was materially compromised by reason of the delay that had occurred between the events described by the complainant and the laying of the charges against the applicant.

150 As already discussed, the unavailability of the complainant's mother was

relevant to a central issue in the case, namely, whether an arrangement was made between the complainant's mother and the applicant for the applicant to provide extra tuition to the complainant. If the jury had a reasonable doubt concerning that aspect of the case, then the evidence of the complainant would have been irretrievably damaged. In light of some of the inconsistencies and improbabilities in the complainant's account about that aspect of the case, the absence of the complainant's mother, as a witness, was significant.

151 Similarly, the fact that Brother Carey was no longer available to give evidence in the case was a matter of some importance. In his evidence, the applicant denied that at any time he had occasion to stay after school hours to assist a student in his studies. He also denied that he ever met with a mother of a student, other than at parent/teacher interviews. Brother Carey, if available, would have been a relevant witness in relation to those issues. In particular, he would have been able to give evidence as to whether it was a practice of school teachers, at the time, to provide extra tuition, and he would also have been able to give evidence as to whether parents of students would have had access to the school, and to the teachers, other than at parent/teacher interviews. Brother Carey would also have been an important witness in relation to the circumstances in which the complainant was expelled from school in 1969.

152 Finally, as noted by the judge, due to the long delay, and the unavailability of witnesses, persons such as the complainant's mother, and his brother, were not available to answer questions relating to matters such as how the complainant presented when he returned home from school on the days on which he alleged he had been abused by the applicant. The absence of those witnesses, and the possibility that other evidence might no longer be available or knowable due to the long period of delay, was of particular importance in the case. Where the defence was able to identify relevant objective facts — such as the correct date of death of the complainant's grandfather, and the fact that the applicant ceased to teach at the college at the end of 1966 — those facts significantly contradicted or undermined the

evidence of the complainant in important respects. Thus, the forensic disadvantage to the defence, arising from the delay, was by no means theoretical.

Conclusions on Ground 1

153 Each of the matters, that we have discussed in respect of ground 1, are matters of moment. Taken together, in our view, it is inevitable that they raise a reasonable doubt about the evidence of the complainant. In combination, the matters which we have discussed have a greater force than the sum of the individual issues standing alone. The concatenation of those matters, working together, raise a serious doubt in the minds of each member of this Court as to the proof of the guilt of the applicant beyond reasonable doubt.

154 Ultimately, as we have mentioned, the prosecution case depended, solely, on the evidence of the complainant. The jury had the advantage of seeing and hearing the complainant give evidence, and be cross-examined by experienced and skilled senior counsel over a period of two days. Giving full weight to the advantage of the jury in that respect — an advantage which was not inconsiderable — nevertheless we are of the firm view that the advantage so enjoyed by the jury, in seeing and hearing the evidence of the complainant, is not capable of resolving the substantial doubt experienced by this Court as to the guilt of the applicant.

155 In those circumstances, we are persuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty of the offences on which he was convicted. Accordingly, the verdicts of the jury, in respect of those charges, were unreasonable and cannot be supported having regard to the evidence. It follows that ground 1 of the application must succeed. Accordingly, the application for leave to appeal should be granted, and the appeal against conviction allowed.

Ground 2: the delay in prosecuting the applicant resulted in an unfair trial

156 By reason of our conclusions in respect of ground 1, it is not necessary for us to

determine ground 2 of the application for leave to appeal against conviction.

157 Before the commencement of the trial, counsel for the applicant applied to the trial judge for a permanent stay of the proceeding on the basis that the delay, in the prosecution of the applicant, had deprived him of the opportunity to have a fair trial of the charges against him. The judge, having heard extensive argument in relation to the application, ruled against it. By ground 2, counsel for the applicant did not seek to impugn the ruling so made by the trial judge. Rather, counsel submitted that, as a consequence of the delay, in light of the nature of the evidence given at the trial, the applicant's capacity to meet the case made against him by the prosecution was such as to constitute a miscarriage of justice.[22]

158 In support of ground 2, counsel for the applicant relied, substantially, on the matters that we have discussed in respect of ground 1, relating to the forensic disadvantage to the applicant as a result of the delay. As we have noted, that disadvantage was substantial. In the context of ground 1, it underscored, or gave particular moment to, the issues that arose concerning the credibility and reliability of the evidence of the complainant, which, in combination, had the effect that the convictions were unsafe and unsatisfactory. Without expressing a concluded view in relation to ground 2, it is sufficient to reiterate our observations under ground 1, that the delay, and the consequential unavailability of witnesses who might otherwise have been relevant, patently had a detrimental effect on the fairness of the trial, notwithstanding appropriate and thorough directions given by the judge to the jury in that respect.

Conclusions

159 In reaching the conclusion, under ground 1, that the application for leave to appeal, and the appeal, be allowed, we emphasise that we are mindful that it was the jury which was entrusted with the responsibility of determining whether the

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22 See *R v Demirok* [1976] VR 244, 251.

applicant was guilty of the offences with which he was charged. We are also mindful of the important advantage that the jury had of seeing and hearing the witnesses give evidence before it.

160 However, the law reserves to this Court the important responsibility of reviewing the evidence that was put before the jury, and, in doing so, of determining whether, on that evidence, it was open to the jury to be satisfied, beyond reasonable doubt, of the guilt of the accused on the charges on which he was convicted. In undertaking that task, it must not be overlooked that the applicable standard of proof — that of proof beyond reasonable doubt — is the highest standard in our justice system, and it is a linchpin of our system of criminal justice.

161 The circumstances of this case were most unusual. As we have noted, the prosecution relied solely on the evidence of the complainant . His evidence did not derive any relevant support from other evidence in the trial. There were a number of fundamental inconsistencies between the account that the complainant gave to the police and the evidence that he gave at the trial. In addition, there were serious discrepancies between his version of the events, and the facts that were conclusively established by the evidence.

162 There were also a number of specific aspects of the account given by the complainant, in his evidence, which were improbable. The lengthy delay of more than 50 years was of itself extraordinary. Significantly, it had the effect that important evidence and witnesses were not available.

163 In light of those matters, and having carefully reviewed all the evidence in the trial, we have reached the conclusion that it was not open to the jury to be satisfied, beyond reasonable doubt, of the charges on which the applicant was convicted.

164 For those reasons, the applicant should be granted leave to appeal against his convictions on ground 1, the appeal should be allowed, and the conviction and sentences of the applicant on charges 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12 of the indictment quashed. In lieu thereof, there should be judgment and verdicts of acquittal.
