SUPREME COURT OF VICTORIA
COURT OF APPEAL

S APCR 2015 0129

THOMAS LYDGATE (A PSEUDONYM)[1] Applicant

v

THE QUEEN (No 2) Respondent

JUDGES:	REDLICH, WHELAN and PRIEST JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	8 February 2016
DATE OF JUDGMENT:	9 March 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 33
JUDGMENT APPEALED FROM:	*R v [Lydgate]* (Unreported, County Court of Victoria, Judge Sexton, 15 December 2014 (Conviction))

CRIMINAL LAW – Appeal – Conviction – Sexual offences – Indecent act with a 16 or 17 year old child under care, supervision or authority – Applicant was previously principal of complainant's school – Sexual acts occurred after accused had resigned as principal – Whether victim remained under accused's 'care, supervision or authority' – Applicant found guilty of three charges but acquitted of 14 others – Whether verdicts inconsistent – *Crimes Act 1958* ss 49(1) and 49(4).

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr P J F Higham	Grigor Lawyers
For the Crown	Mr B F Kissane QC	Mr J Cain, Solicitor for Public Prosecutions

[1] To ensure that there is no possibility of identification, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the applicant.

REDLICH JA
WHELAN JA:

1 On 15 December 2014 the applicant was found guilty by a jury on three charges of committing an indecent act with a child aged 17 who was under his care, supervision or authority. The jury acquitted him of 14 further charges in relation to sexual activity with the same complainant. The sole issue in the trial was whether at the time of each charged offence the child was under the 'care, supervision or authority' of the applicant. The applicant now seeks leave to appeal on the ground that the verdicts on the three counts of which he was convicted were unsafe and unsatisfactory because the finding that the child was under his care, supervision or authority at the time of those offences is inconsistent with the verdicts of not guilty on the remaining 14 charges. The application was argued on the basis that if leave were granted the appeal itself would be determined forthwith.

2 The applicant was the principal of the school attended by the complainant in 2012. In that year the complainant was in year 11 and, at the relevant time, was 17 years of age. In about November, the applicant and the complainant began exchanging text messages and having phone calls which were personal and unrelated to school matters. The complainant did not discourage this contact and she participated in it. But she also informed a teacher at the school, who had the role of mentor with her, of at least some of what was passing between them. As a result, on 8 December 2012 the school council suspended the applicant while the matter was investigated.

3 The applicant and the complainant continued their contact, notwithstanding a meeting between the complainant's mother, the complainant and the applicant at a coffee shop later in December 2012 when the complainant's mother asked them both to cease all contact. The interchange between the two of them became increasingly intimate over the summer school holiday period, although no physical sexual contact occurred during that time. For much of that time the complainant was in India with her family and a friend.

4 On 22 January 2013 the applicant resigned his position as principal of the school. The complainant learnt that the applicant would not be continuing as principal whilst she was still in India.

5 The complainant returned to Australia on 27 January 2013. By this time both her parents and her mentor at the school were actively trying to prevent contact between her and the applicant. Despite the difficulties put in their way, the contact by text, emails and phone calls continued.

6 The first physical sexual contact between the applicant and the complainant occurred on 9 February 2013 at a cinema. This was referred to as the 'cinema' incident. It was the subject of the three charges on which the applicant was convicted. The only matter in issue at the trial on these charges was whether at that time the complainant was under the applicant's care, supervision or authority.

7 After the cinema incident the complainant attempted to break off contact with the applicant. For a period of some weeks she did not contact him herself and she rebuffed his attempts to contact her. She sent him a long text message terminating the relationship, which was referred to during the trial as the 'goodbye' text.

8 According to the complainant's evidence, contact with the applicant resumed after she mistakenly sent a text message intended for someone else to the applicant on 17 March 2013.

9 Thereafter, a series of sexual encounters occurred at various locations, the first of which was on 22 March 2013. These encounters were the subject of the 14 charges on which the applicant was acquitted. Again, the only issue at the trial in relation to those charges was whether at the time of the sexual encounters the complainant was under the applicant's care, supervision or authority.

Relevant statutory provisions

10 The offences of which the applicant was convicted are provided for in s 49 of the

Crimes Act 1958. That section relevantly provides:

> (1) A person must not wilfully commit … an indecent act with … a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority.
>
> Penalty: Level 6 imprisonment (5 years maximum).
>
> …
>
> (4) For the purposes of subsection (1), and without limiting that subsection, a child is under the care, supervision or authority of a person if the person is —
>
> (a) the child's teacher …

11 Amongst the charges of which the applicant was acquitted were charges of sexual penetration of a 16 or 17 year old child. This is an offence under s 48 of the *Crimes Act 1958*. Relevantly, the requirement that the child be under the care, supervision or authority of the person charged is the same.[2]

Proposed ground of appeal

12 There is only one proposed ground of appeal. It is as follows:

> 1. The verdicts were unsafe and unsatisfactory
>
> Particulars of ground: the verdicts of guilty are inconsistent with the verdicts of not guilty, returned by the jury in respect of charges on the same indictment, in respect of the same complainant, where the sole issue for consideration in respect of all the charges was whether the complainant at the time of the agreed sexual activity was under the applicant's care, supervision or authority.

13 In *Janes v The Queen*[3] this Court articulated the relevant issue in relation to the proposed ground. The Court said:[4]

> A complaint that a verdict is unsafe and unsatisfactory is to be resolved according to the principles spelled out in *M v The Queen*. The essential question is, was it reasonably open to the jury to be satisfied of the applicant's

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2 One of the counts of which the applicant was acquitted was a charge of attempted sexual penetration contrary to ss 321M and 48(1) of the *Crimes Act 1958*.

3 [2015] VSCA 133.

4 Ibid [5]–[6] (footnotes omitted) (emphasis in original).

> guilt beyond reasonable doubt. In determining whether it was *open* to the jury to be satisfied of his guilt beyond reasonable doubt, the essential inquiry is whether the jury must, as distinct from might, have entertained a doubt about the applicant's guilt. The court must carry out its own independent assessment of the evidence. But it is insufficient for the applicant to show merely that there was material which might have led the jury to entertain a reasonable doubt.
>
> An inconsistent verdict may render a conviction unsafe and unsatisfactory. Six propositions concerning inconsistent verdicts were distilled by Gaudron, Gummow and Kirby JJ in *MacKenzie*. The present case involves alleged factual inconsistency. Establishing inconsistency between verdicts is the applicant's obligation. Since the supposed inconsistency arises in the jury's verdicts on different charges in the indictment, the applicable test is one of logic and reasonableness. Thus, if there is a proper way by which the two verdicts may be reconciled, and there is some evidence to support the verdict of guilty claimed to be inconsistent with the acquittal, it is not this court's role to substitute its own opinion of the facts for one which was open to the jury. In cases such as the present, it is necessary always to bear in mind that the jury may have followed the direction to consider each charge separately, or may have taken a 'merciful' view of the facts.

14 This case also involves alleged factual inconsistency. The test is one of logic and reasonableness. If there is a proper way by which the verdicts may be reconciled, and there is some evidence to support the guilty verdicts, any appeal on the proposed ground must be dismissed.

Case Stated prior to trial

15 The relevance of evidence of the relationship while the applicant was the complainant's principal was controversial and its admissibility was objected to by the applicant.

16 Prior to empanelment and before ruling on the objection, the trial judge reserved six questions of law for determination by the Court of Appeal. The first two of those questions were as follows:

> 1. Can the prosecution rely on evidence of the qualities or attributes of a former relationship of the kind listed in ss 48(4) and 49(4) of the *Crimes Act 1958* (a standing relationship) to prove that at the time of the offending, the complainant was under the care, supervision or authority of the accused (an ad hoc relationship), for example by establishing that an accused was in a position to exploit or take advantage of the influence that grew out of a former relationship?

2. Is the temporal proximity of the sexual activity to the former relationship relevant in determining whether:

   (a) evidence of a former relationship of a kind listed in ss 48(4) and 49(4) of the *Crimes Act 1958* (Vic) (a standing relationship) is admissible to prove the element of care, supervision or authority?

   (b) this element of care, supervision or authority is proved?

17 The questions were answered by this Court before empanelment.[5]

18 Tate JA observed that the references in the questions to a 'standing relationship' and an 'ad hoc relationship' were to the earlier analysis of similar issues by this Court in *R v Howes*.[6] That case concerned a teacher, but the legislation at time did not include s 48(4).

19 Tate JA answered the first question as follows:[7]

> The prosecution cannot rely *solely* on a former standing relationship to prove that a complainant was under the care, supervision or authority of an accused at the time of the offending. Thus, the prosecution cannot rely solely on the former standing relationship of Principal and student that existed between Lydgate and the complainant to prove that the complainant was under the care, supervision or authority of Lydgate during the time of the sexual activity between them, that is, after he resigned. The former standing relationship cannot serve as a substitute for the relationship of care, supervision or authority that must exist *at the time of the offending*.
>
> However, the existence of a former standing relationship will always be relevant to the question of whether an ad hoc relationship of care, supervision or authority exists at the time of the offending, within the meaning of s 55 of the *Evidence Act 2008* (Vic). This is so because the existence of a former standing relationship will always raise an assessment of the probability that an ad hoc relationship was later established, when compared to circumstances where there had been no former standing relationship. That is, the existence of a former standing relationship means that the later establishment of an ad hoc relationship is more probable, at least to some degree, than it would have been if there had been no earlier standing relationship.
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> The critical issue is not one of relevance but of admissibility and of probative value.

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5 *Lydgate (a pseudonym) v The Queen* [2014] VSCA 144.

6 (2000) 2 VR 141.

7 [2014] VSCA 144 [12] (emphasis in original).

> Depending on the evidence of the nature of the relationship *during the time of the offending*, a former standing relationship may be admissible to prove that a complainant was under the care, supervision or authority of an accused at that time. If a judge on a *voir dire* concludes, on the basis of independent evidence about the circumstances between an accused and a child after the standing relationship has come to an end, that the circumstances are capable at law of establishing that the child is, at the time of the offending, under the care, supervision or authority of the accused, then the prosecution should be entitled at trial to rely on evidence of the former standing relationship to prove that when the sexual activity took place the child was under the care, supervision or authority of the accused, for example, by exploiting the influence that grew out of the former standing relationship. To admit evidence of the former standing relationship without applying a threshold test on a *voir dire* as a safeguard would be to extend the offences under s 48 and s 49 of the Act beyond their statutory boundaries.

20 Tate JA answered question 2 as follows:[8]

> a) No. The temporal proximity of the alleged sexual activity to the former standing relationship is not relevant in determining whether evidence of a former standing relationship is admissible to prove the elements of care, supervision or authority. This is because, in determining admissibility, a judge will consider only whether the circumstances at the time of the offending are capable at law of giving rise to an inference that the child was, at that time, under the care, supervision or authority of the accused. The temporal proximity to the former standing relationship will not be in issue.
>
> b) Yes. Temporal proximity can assist in the proof at trial. If a judge determines that the evidence of the former standing relationship is admissible, the temporal proximity of the former standing relationship will be relevant to proof at trial of the elements of care, supervision or authority at the time of the offending. This is because an accused is more readily able to take advantage of, or exploit, a former standing relationship if there has been no gap between the former standing relationship and the period of sexual activity. Conversely, the longer the gap between the former standing relationship and the time of the sexual offending, the less probative value will attach to the evidence of the former standing relationship.

21 In describing the prosecution case against the applicant, Tate JA referred specifically to charges 1, 2 and 3 in the context of the issue about temporal association. She observed that the DPP proposed to rely upon the fact that[9]

> the conduct giving rise to charges 1, 2 and 3 all allegedly occurred on 9 February 2013, 18 days after [the applicant] resigned, and 13 days after the

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8 Ibid.

9 Ibid [63].

complainant returned from a family holiday in India during which the complainant had been on a school camp.

22 On the issue of temporal proximity generally, Tate JA articulated the DPP's position as follows:[10]

> The DPP submitted that, in general, the more proximate in time the former standing relationship is to the sexual activity, the greater the probative value of the evidence of the former standing relationship and its attributes and qualities to determine if, at the time of the offending, the child was under the supervision, care or authority of the accused. He accepted that at some stage the existence of the former standing relationship would become so remote from the sexual activity that evidence of the former standing relationship would have no probative value and would be inadmissible.

23 In relation to that issue Tate JA concluded:[11]

> However, if a judge determines that the evidence of the former standing relationship is admissible, the temporal proximity of the former standing relationship will be relevant to proof at trial of the elements of care, supervision or authority. This is because an accused is more readily able to take advantage of, or exploit, a former standing relationship if there has been no gap between the former standing relationship and the period of sexual activity. Conversely, the longer the gap between the former standing relationship and the time of the sexual offending the less probative value will attach to the evidence of the former standing relationship.

24 Beach JA, with whom Maxwell P agreed, answered the questions slightly differently to Tate JA, although the differences in the current context do not seem to us to be significant.

25 Beach JA answered question 1 as follows:[12]

> The question of whether the prosecution can, in the first instance, rely upon evidence of the qualities or attributes of a former relationship to prove that at the time of the relevant sexual activity the complainant was under the care, supervision or authority of the accused falls to be determined by determining whether the particular piece or pieces of evidence sought to be admitted could rationally affect (directly or indirectly) the assessment of the probability of the existence of the alleged fact that at the time of relevant sexual activity the complainant was under the care, supervision or authority of the accused. The mere proof that an accused was in a position to exploit or take advantage

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10 Ibid [71].

11 Ibid [74].

12 Ibid [103].

of an influence that might have grown out of a former relationship could not, without more, establish that the complainant was under the accused's care, supervision or authority after the former relationship ended.

26 In addressing question 2, Beach JA said:[13]

> Question 2 asks about the relevance of the temporal proximity of the sexual activity to the former relationship between the accused and the complainant. For myself, I see no relevant distinction between part (a) of question 2 and part (b) of question 2. That said, if the Crown seeks to establish the relevance of a former relationship in the way I have discussed above, then logic would suggest that, absent evidence to the contrary, the closer the former relationship in time to the relevant sexual activity, the more likely a conclusion that the evidence of the former relationship is relevant to the question of whether the complainant was under the care, supervision or authority of the accused at the time of the relevant sexual activity.

27 Beach JA's answer to question 2 was:[14]

> If a former relationship is sought to be made relevant to the issue of whether the complainant is at the time of relevant sexual activity under the care, supervision or authority of the accused then, absent evidence to the contrary, temporal proximity between the former relationship and the sexual activity is, depending upon what other evidence is called, likely to be relevant. Ultimately the question, however, comes down to whether or not proof of the former relationship, at whatever time it was in fact in existence, could rationally affect (directly or indirectly) the assessment of the probability of the existence of the alleged fact in issue — being whether the complainant was at the time of relevant sexual activity under the accused's care, supervision or authority.

28 Thus, in substance, this Court held that evidence of the former relationship was admissible if it was probative of the relationship at the time of the alleged offending, and that temporal proximity was potentially relevant to probative value in that close temporal proximity was likely to increase the probative value.

29 Consequent upon this Court's decision, evidence of the former relationship was ruled admissible by the trial judge, and was led and relied upon by the prosecution at trial. There is now no challenge to the admissibility of that evidence.

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13 Ibid [104].

14 Ibid [105].

The issue on the proposed appeal

30 The only issue in relation to all of the charges at trial was whether at the time of each sexual encounter the complainant was under the applicant's care, supervision or authority. None of the relevant facts were controversial.

31 The applicant contends that the verdicts on charges 1 to 3 cannot be reconciled with the verdicts on charges 4 to 17 in a way which is logical and reasonable. Thus, the relevant question is whether it was open to the jury on the evidence to reach different conclusions on the only matter in controversy, being whether the requisite relationship existed, in relation to charges 1 to 3 on the one hand, and the balance of the charges on the other.

32 Before addressing the submissions in more detail it is necessary to review aspects of the conduct of the trial. Given the verdicts and the proposed ground of appeal, the critical evidence is that concerning the periods between the resignation and charges 1 to 3 (22 January 2013 to 9 February 2013) and between charges 1 to 3 and the commencement of offending in relation to the other charges (9 February 2013 to 22 March 2013).

<u>The conduct of the trial</u>

Matters in issue and not in issue

33 A broad outline of the uncontroversial facts is as follows.

34 What might be described as 'inappropriate' contact between the applicant, then the principal of the school, and the complainant, then a year 11 student, began in November 2012. At least some of those inappropriate contacts were passed on by the complainant to her mentor at the school. The school council suspended the applicant on 8 December 2012.

35 A meeting was held between the complainant's mother, the complainant and the applicant on 12 December 2012 at a coffee shop. The complainant's mother asked

that all contact between the two of them cease. The applicant agreed to that and purported to delete the complainant's phone number from his phone, but in fact the contact between the two of them resumed immediately after the meeting and continued thereafter.

36 Between 28 December 2012 and 27 January 2013 the complainant was on a trip to India with her family and a friend. Contact between the applicant and the complainant continued throughout that period although there were practical difficulties in maintaining contact. The complainant was told by the applicant that he would not be continuing as principal of the school before she returned to Australia on 27 January 2013.

37 The complainant attended a school camp for year 12 students shortly after her return from India. The messaging between the applicant and the complainant had become sexual in nature by this time. The complainant sent the applicant a photo of herself (a 'selfie') in her underwear. The applicant wrote a letter for the complainant which the complainant sent to the principal who had replaced the applicant. These events occurred shortly prior to the cinema incident which was the subject of charges 1 to 3. We deal with the evidence concerning the period between 22 January 2013 and 9 February 2013 in more detail below.

38 The cinema incident, which was the basis of charges 1 to 3, upon which the applicant was convicted, occurred on 9 February 2013. The details of what occurred are not relevant.

39 In February and March 2013 the complainant attempted to end the relationship with the applicant. It was in that context that she wrote the 'goodbye' text on 22 February 2013. Again, we deal with the evidence concerning the events during this period in more detail below.

40 Contact between the applicant and the complainant resumed after 17 March 2013. The complainant's evidence was that this occurred when she mistakenly sent a text

message meant for a friend to the applicant.

41 There were then a series of sexual encounters which were the subject of the charges upon which the applicant was acquitted. The details of the sexual activity is not relevant but the chronology is as follows:

- 22 March 2013: charge 4 — indecent act — the 'blessing night' incident;
- 2 April 2013: charges 5–7 — sexual penetration — 'drain area' incident;
- 5–6 April 2013: charges 8 and 9 — sexual penetration — applicant's house;
- 7 April 2013: charges 10 and 11 — sexual penetration — applicant's house;
- 9–10 April 2013: charge 12 — sexual penetration — applicant's car;
- 19 April 2013: charge 13 — indecent act —applicant's house;
- 2 May 2013: charges 14–17 — sexual penetration and attempted sexual penetration — 'sports rally day' incident.

42 The defence accepted at the trial that the complainant was under the applicant's care, supervision or authority until 22 January 2013. In a document entitled 'Response of the Accused to the Summary of Prosecution Opening and Notice of Pre-trial Admissions Pursuant to s 183 *Criminal Procedure Act 2009*', the defence position was put as follows:

> The defence accepts that a relationship of care, supervision or authority subsisted when [the applicant] was principal at the school. However, upon the resignation of [the applicant] there was no extant relationship of teacher and pupil. From that time onwards the complainant ceased to be under his care, supervision or authority. Thereafter, and as identified in the counts, [the applicant] embarked on a three-month relationship with the complainant. Whilst this may well have been morally reprehensible and professionally forbidden, absent the relationship of care, supervision or authority it was not a crime.

This position was confirmed by counsel for the applicant on the hearing before us.

43 When the complainant left for India with her family and a friend she and the applicant were hopeful that he would be able to continue as principal. Her last text message to him before leaving included the following:

> We fly back on the 27th jan :) :) You'll see me in a few days time after that on 29th (school starts for us) and at camp if you're going to come??? (when you get the all clear to come back and be my principal!) you have to please tell me how all that goes please!!!

44 The applicant's reply included:

> I sooo hope I can still be your principal!!! I will certainly let you know as soon as I can!!

45 The complainant in her evidence explained that contact whilst she was in India was difficult but intermittent contact with the applicant was maintained.

46 The complainant said that before she returned from India the applicant informed her that he was not going to be the principal at the school any more.

Evidence in relation to the period from 22 January 2013 to 9 February 2013

47 Very shortly after her return from India the complainant went on a year 12 camp. Because she had no reception on her mobile phone she was unable to keep in contact with the applicant during the three day period of that camp. At the end of the camp the complainant learnt that teachers at the school and her parents were aware of her continuing communications with the applicant and as a result her parents changed the SIM card on her mobile phone. The contact between the two of them nevertheless continued.

48 The complainant gave evidence that on one occasion she sent a photograph of herself in her underwear to the applicant. Her evidence was that she did that 'just after I came from India'. Her school mentor gave evidence about that photograph as well. The mentor's evidence was as follows:

> So that was on 3 February. Now, going forward a couple of days, Tuesday,

> 7 February did [the complainant] tell you something? – – – Yes, she told me that she had sent a picture of herself to [the applicant] in her underwear and that she felt guilty because she couldn't satisfy him any other way and that she – – –
>
> I'll stop you there? – – – Yes.
>
> Did you see the picture? – – – Yes.
>
> Where did you see the picture? Not the location, the device? – – – On her iPhone.
>
> What did the picture show? – – – She was wearing black underwear and a black bra and it was a mirror image of herself without her head in the shot.
>
> When you say that [the complainant] told you that she'd sent a picture, was she physically in your presence – – - ? – - - Yes.
>
> – – – or was this by way of an email or message? – – – She was in my classroom.

49 The complainant also gave evidence that she delivered a letter to the replacement principal shortly after she returned from India.[15] The complainant's relevant evidence was as follows:

> Did you have any contact with [replacement principal] or [the mentor]? – – – Yes, — I think at the start of the year I sent [the replacement principal] a letter.
>
> What was the letter about? – – – it was something to do with that my — I think something to do with my interactions with [the applicant] was ok or something about like not — he wasn't grooming me or something, yeah.
>
> How did you come to write that letter? – – – He wrote the letter for me and I sent it.
>
> When you say he wrote the letter – – – ? – – – He — yeah, go on.
>
> – – – do you mean he physically wrote the letter? – – – He typed it out and sent it by email and then I printed it out.
>
> He sent it by email to you? – – – Yes.
>
> Do you know when that was? – – – I think it was in maybe February.
>
> What did you do with the letter? – – – I then gave it — I handed that in to [the replacement principal].

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15 In the hearing before us the applicant's counsel said the letter had been hand delivered around 7 February 2013.

50 That letter read as follows:

> Dear [replacement principal]
>
> I need you to read this letter it's important and it's my exact feelings on this whole matter and I want it to be added to the report that [the mentor] wrote please.
>
> I've had a little more time to think about things now and some space to think my own thoughts without being bombarded by the thoughts of others and I've come to some slightly different conclusions.
>
> Although I indicated it in the letter that [the mentor] wrote I actually don't believe that [the applicant] was doing those things — grooming. I really don't think that or believe that at all. Therefore the letter shouldn't state that I do!
>
> If the school thinks that about his actions and his friendship with me then I guess that's their choice but I don't think that and want my thoughts and opinion here taken into account in any action against [the applicant].
>
> Thank you for helping, yours sincerely, [the complainant].

51 The first physical contact between the complainant and the applicant after her return from India was the occasion on 9 February 2013 when they arranged to meet at the cinema complex.[16] The complainant attended the complex with her sister and her sister's friend. The complainant left the cinema twice during the film and met the applicant in an empty cinema where the sexual contacts which were the subject of charges 1 to 3 occurred.

Evidence in the relation to the period between 9 February 2013 and 22 March 2013

52 Immediately after the cinema incident the complainant's parents found notes she had made on her mobile phone which she had not deleted. She had compiled the notes for the purpose of preparing a message to the applicant. She attempted to explain away the notes but her parents were unconvinced and took the phone away from her.

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16 No other meeting is referred to in the evidence and on the hearing of the application counsel for the applicant confirmed that this was the first meeting after the resignation.

53 The complainant attempted to maintain contact with the applicant using other phones. The school mentor discovered her using a friend's phone and confronted her. She gave the mentor an excuse which the mentor discovered was false.

54 At this point the complainant decided that the situation was too stressful for her and that she could not go on with the relationship. On 22 February 2013 the complainant sent the applicant a text message saying 'goodbye'. The text began:

> I know this isn't the text you wanted i never wanted to do this but im a little obligated to and i need to move on and in order for me to do so i need to say those heartwrenching words — goodbye …

55 The text then went on to express love for the applicant. The text said that nothing had changed but 'I just cant contact you anymore'.

56 The complainant's parents had her phone analysed and they delivered data from the phone, including in excess of 1,000 text messages between the complainant and the applicant, to the police on 20 February 2013.

57 For a period of some weeks thereafter, until 17 March 2013, the complainant did not contact the applicant and she rebuffed the applicant's attempts to contact her. The applicant left a ring for the complainant in the letter box of her home which, the complainant said in her evidence, she threw in the rubbish bin. The applicant sent the complainant a music CD which was intercepted by the complainant's father. The complainant said she never had possession of the CD but that she saw it. The applicant arranged for his own daughter to contact the complainant via Facebook to ask whether she had received the CD. The complainant's mother answered the applicant's daughter asking that there be no further contact. The applicant approached the complainant and her mother in the car park of a shopping centre on 13 March 2013. Both the complainant and her mother gave accounts of that incident which, in our view, revealed that the complainant did all she could to avoid contact with the applicant on that occasion. The applicant repeatedly attempted to approach the complainant in response to which her mother, repeatedly, told the applicant to 'back off'. The day before the incident in the car park the applicant had left a

voicemail message for the complainant saying 'You're cute'. The complainant had immediately told her mother and her sister.

58 According to the complainant's evidence, on 17 March 2013 she sent a text message which she intended to send to a friend to the applicant. From that point on communication between the applicant and the complainant resumed, and was frequent and intimate.

59 On 22 March 2013 the incident, referred to as the 'blessing night', which was the basis of charge 4 (indecent act) occurred. This was the first of the 14 charges of which the applicant was acquitted. As the only issue was whether the complainant was under the applicant's care, supervision or authority at the time, the jury must have had a doubt on that issue as at 22 March 2013. The rest of the incidents which formed the basis of the other charges occurred between 2 April 2013 and 2 May 2013. The jury obviously had the same doubt in relation to those incidents.

Closing addresses

60 The prosecution closing address was founded on the premise that the question of whether the complainant was under the care, supervision or authority of the applicant at the time the alleged sexual activities took place was to be answered by considering the entire circumstances of the relationship from the beginning. At the commencement of her final address the prosecutor asked rhetorically how the jury should go about determining whether the requisite relationship existed at the time of the alleged offences, and then answered by submitting:

> The prosecution suggests to you that you look at the circumstances of their relationship before the sexual activity took place, and then see how it is connected to the circumstances of the relationship after when the sexual activity commenced, and after he resigned as principal.

61 The prosecution submitted that what they described as the 'former relationship' and the 'sexual relationship' were 'very closely connected or intertwined — they're almost on a continuum'. This was a submission put to the jury many times

throughout the course of the final address.

62 The prosecutor addressed the evidence under eight topics. Broadly those topics concerned conduct by the applicant:

- to persuade the complainant to act against her parents' wishes;
- to engage in sexual talk and then sexual activity;
- to distinguish her from other 17 year old girls;
- referring to his position as principal;
- persuading her to tell him of her movements;
- isolating her from her mentor;
- persuading her not to give up on the relationship; and
- persuading her to act against her teachers, her friends and to break school rules.

63 The prosecutor went through the evidence by reference to those eight topics, commencing in every case in the period prior to the applicant's resignation as principal and then moving into the period of sexual activity. The prosecutor said:

> You'll see that the categories or classes span both when he was the principal and after he ceased being the principal.
>
> …
>
> And not only that he influenced her, but he was able to influence her by virtue of the authority which arose out of him being a principal in that principal-student relationship, that prior relationship in 2012, up to 22 January 2013. In other words, he exercised his influence over [the complainant] in a variety of ways and did so by exploiting or taking advantage of their previous relationship when he was principal and she was a student, to maintain or renew the relationship with [the complainant] in terms of the sexual relationship.

64 The prosecutor particularly referred to the photograph of the complainant in her underwear, in early February 2013, and to the letter to the replacement principal. In relation to the photograph, the prosecutor said:

> [The complainant's] evidence was that in early February 2013 [the applicant] asked her what she was wearing, via text message, and asked that she send him a photo. And she said something to this effect. At first she didn't want to do it but ended up taking a photo of herself in her underwear from the neck down and sent it to him. … [The mentor], when she gave evidence, she said that she had herself seen that photo then she made a reference to it being a mirror image, with the bras and pants. She says that she saw that photo on 7 February 2013.
>
> The sending of the photo by [the complainant] to [the applicant], I suggest to you, demonstrates his exercise of authority, showing the power to influence her conduct after his resignation as principal in January 2013, a couple of weeks earlier before 7 February 2013, which is the date that [the mentor] said she'd seen the photograph.

65 In relation to the letter to the replacement principal, the prosecutor submitted, almost at the end of her address:

> That letter, I suggest, is an example of [the applicant] exercising influence over [the complainant] stemming from his previous position of being an authority over her when he was principal, and you'll note that the letter, February 2013, is in fairly close proximity to the dates in charges 1 to 3, 9 February 2013, is the date that those sexual activities took place.

66 Whereas the prosecutor presented the facts to the jury as being 'almost on a continuum', counsel for the defence was concerned to emphasise the differences in the nature of the relationship at different times. He began by contrasting the nature of the relationship in 2012 at the beginning, which he characterised as a 'crush' or 'obsession' on the complainant's part of which the applicant was unaware, and the relationship six months' later in May 2013 when they were having what he described as 'an affair'. The defence submission was encapsulated as follows:

> At the time of the sexual activity, [the complainant] was not under the care, supervision or authority of [the applicant]. And in support of that, the defence asks you to consider that [the complainant] was a willing participant in the sexual activity, that she was an autonomous sexual actor, able to make decisions, that she was a person who had agency over her actions, she was able to earn them. She was exercising and engaging choice, making decisions of her own free will.

67 Counsel for the defence was concerned to emphasise the need to consider the charges separately and to 'echo' (in advance) what counsel knew the trial judge would tell them about separate consideration.

68 Counsel for the defence emphasised to the jury the importance of timing. He said:

> Timeline is clearly of great importance here.

69 In contrast to the manner in which the prosecutor approached the evidence, counsel for the defence addressed the evidence by reference to separate temporal periods: prior to the resignation, from the resignation and the complainant's return from India to the cinema incident, from the cinema incident to the resumption of contact on 17 March 2013, and from the resumption of contact to the 'blessing night' and the sexual interactions thereafter.

70 Specifically in relation to charges 1 to 3 counsel for the defence put to the jury the following:

> Consider whereby they meet at the [cinema] — these are charges 1–3 on 9 February. Consider that meeting. Consider the messages sent thereafter and ask whether they are the words of a young person who is in control of her actions, or ask whether they are the words of a young person who is only acting thus because of the exercise of authority by [the applicant].

71 When counsel for the defence moved on to the other sexual encounters he posed similar questions by virtue of the communications and circumstances existing at those respective times.

72 His conclusion was in the following terms:

> So in conclusion, I urge you to consider all the facts, I urge you to consider the timeline, I urge you to look at the communications and what you know from the live evidence.
>
> … I ask you to entertain at least the possibility, at least the possibility, that in fact [the complainant] was enjoying this. She was enjoying this affair, she was enjoying the relationship, she was participating in it with her eyes open, she was making choices because that is something that she wanted, not as a result of any exercise of authority but because of free choice.

The judge's charge

73 There are no complaints as to the judge's charge which had been carefully settled with counsel before the charge commenced. It is necessary to briefly refer to some aspects of the directions to the jury.

74 The judge emphasised that the relevant issue was whether the complainant was under the applicant's care, supervision or authority 'on the occasion of each sexual act taking place'. She directed the jury:

> It is sufficient if you are satisfied beyond reasonable doubt that there was an ongoing relationship of care or supervision or authority between [the applicant] and [the complainant] and that that relationship existed on the day on which the sexual act and the particular charge you are considering took place.
>
> …
>
> … you must look at the state of the relationship and if it existed at the time of each sexual act. Obviously where a number of sexual acts took place on the one occasion, the evidence as to care or supervision or authority will almost certainly be the same for those charges. But generally for each charge, the issue must be considered.

75 After summarising the prosecution address, which had emphasised asserted continuity in the nature of the relationship, the judge gave the jury further directions in that particular context. Relevantly, she said:

> I direct you that in considering the former relationship of care, supervision or authority between [the applicant] and [the complainant] whilst [the applicant] was principal, the only way you can use that evidence is as part of the circumstances from which the prosecution asks you to draw the inference or [reach] the conclusion that there was a new relationship after he was no longer principal when the sexual activity took place. Now, put another way, you must not simply reason that because there was a former relationship of care, supervision or authority, [the applicant] must be guilty of the offences. That former relationships cannot be used as a substitute for a relationship that must be proved by the prosecution to exist at the time of the alleged offending.

76 The judge expanded upon and repeated that direction, referring to the need for there to be a 'new relationship' on two further occasions, before concluding as follows:

> I reiterate that it is not sufficient for proof of this element to be satisfied. Merely that [the applicant] was in a position to exploit the former relationship. The question for you is always whether on the whole of the

> evidence, the prosecution have satisfied you beyond reasonable doubt that at the [time] of the sexual activity in each charge, [the applicant] did exploit the influence that grew out of the former relationship and have satisfied you the influence was of such a nature, quality and extent that [the applicant] created a new relationship placing [the complainant] in his care or supervision or authority.

77 The trial judge rightly emphasised that the former relationship of principal and student which had ended should not be used as a 'substitute' for evidence of the relationship at the time of the sexual activity, and that the jury should not reason that, merely because the applicant had been the complainant's principal, they should conclude the requisite relationship existed at the time of the sexual activity. Although the parties had agreed that her Honour should direct the jury that it was incumbent upon the prosecution to prove a 'new' relationship, such a direction goes beyond what this Court said were the applicable principles on the Case Stated. To the extent the trial judge departed from what this Court had previously said, the effect of her directions was to impose a greater burden upon the prosecution. Obviously, no complaint is made in that regard by the applicant. The question for the jury however was whether the attributes of care, supervision or authority existing within the teacher student relationship had continued to exist in the relationship which existed at the time of each charged offence.

Submissions on the application

78 Counsel for the applicant submitted that, by reference to the directions the jury were given, the jury must have found beyond reasonable doubt that a new relationship of care, supervision or authority had been established 'afresh' as at 9 February 2013 while at the same time not being satisfied that that relationship existed on 22 March and thereafter. Significantly, counsel for the applicant accepted that it had been open to the jury to find that the requisite relationship existed at the time of charges 1 to 3, but he submitted that there was no basis for distinguishing the position which had existed then from that which existed at the time of charges 4 to 17. It was submitted that 'apart from proximity to the point in time of the applicant's resignation as principal' there were no cogent reasons for finding that a

relationship created 'afresh' on 9 February 2013 did not exist in March, April or May. The prosecution had never drawn any such distinction as their case had been that the requisite relationship was present throughout. It was submitted that the exercise of choice and free will was present on 9 February and later, and that the flow of communications between the applicant and the complainant was constant, or, if anything, increasing over the period of the alleged offending. It was submitted that in their communications the applicant had not used his position as principal to influence the complainant.

79 Counsel for the applicant referred to the letter to the replacement principal and to the 'selfie' photograph of the complainant in her underwear. In relation to the letter it was submitted that that was part of an attempt by the applicant to maintain his position as principal and did not relevantly bear upon the relationship between the applicant and the complainant. It was submitted that the 'selfie' photo did not advance the prosecution case.

80 Counsel for the applicant submitted that the events after the cinema incident on 9 February 2013, including the 'goodbye' text and the rebuffed attempts at contact, could not found a conclusion that a relationship which had been created by 9 February 2013 no longer existed in March.

81 Senior counsel for the respondent submitted that the references made by the trial judge to a 'new' relationship had been prompted by the perceived need to emphasise to the jury that the existence of the former relationship was not in itself a proper basis for a conclusion as to the existence of the requisite relationship at the time of the alleged offending. It was nevertheless clear to the jury that the prosecution case was that the evidence of the former relationship was relevant to the nature of the relationship at the time of the alleged offences. The trial judge explained to the jury that that was the prosecution case.

82 In support of the submission that the requisite attributes of the relationship existed as at 9 February 2013, senior counsel for the respondent referred to the

evidence of the former relationship, the text messages and other communications between the complainant and the applicant after 22 January and before 9 February, and the letter to the replacement principal and the circumstances in which that letter was written.

83 The respondent emphasised that the trial judge had directed the jury that they must give separate consideration to the charges and submitted that the three counts upon which the applicant had been convicted could clearly be differentiated from the other counts. They were closest in time to the period when the applicant was the principal and the effect of his previous authority could properly have been seen as waning over time (as this Court had suggested on the Case Stated). There was a significant gap between the sexual encounter which was the subject of charges 1 to 3 and the next encounter which was the subject of charge 4. During that gap the complainant had attempted to break off the relationship with the applicant and had not communicated with him for several weeks.

Analysis

84 In our view the concession by counsel for the applicant that it was open to the jury to find that the requisite attributes of the relationship existed as at 9 February 2013 was properly made. That sexual encounter was close in time to the period when the applicant had been the complainant's principal. The close proximity in time to the period when he had been her principal was open to be seen as significant, as this Court itself had suggested on the Case Stated. It was their first meeting since his resignation.

85 Further, in relation to the 9 February encounter there were two incidents very close in time to 9 February which were open to be seen as clear exercises of authority over the complainant by the applicant. The first was the 'selfie' photograph where the evidence was, on one view, that the complainant was prevailed upon by the applicant to do something she did not want to do. The second was the letter to the replacement principal which the applicant wrote for her and which purported to be

in the complainant's own words and to disavow the influence of others.

86 The jury was not bound to analyse the position on 9 February in this way, but it was open for them to do so.

87 As to the asserted inconsistency with the acquittals, in our view, the verdicts are not only logical and reasonable, but are consistent with a careful and cautious approach by a jury undertaking a separate analysis of each of the sexual encounters, as counsel for the applicant at the trial urged them to do and as the trial judge directed that they must do.

88 The sexual encounters on and from 22 March 2013 were open to be seen as significantly further removed in time from the period when the applicant had been principal than that on 9 February 2013. The potentially waning effect of a former relationship was a factor this Court expressly adverted to in the Case Stated. It was also open to the jury to conclude there was an absence of relevantly similar exercises of authority, as represented by the 'selfie' photo and the letter to the replacement principal, close to 22 March 2013.

89 Perhaps more importantly, the encounters on and from 22 March occurred after what was open to be seen by the jury as a significant break in time and a significant change in the nature of the relationship. The complainant broke off the relationship and for several weeks rebuffed the applicant's attempts to contact her, co-operating with her parents' attempts to keep him away. The defence case was that the complainant was a young, autonomous woman exercising her free will. Her actions in breaking with the applicant, ceasing contact with him, and rebuffing his attempts to contact her, were open to be seen by the jury as the exercise of her free will, and as an indication that she was no longer under the authority he formerly had over her. When the relationship resumed there was a stronger basis for assessing the complainant as an autonomous young person making her own decisions, as counsel

for the defence characterised her at trial, than there had been on 9 February 2013.

90 The verdicts on charges 1 to 3 were open on the evidence. They can be reconciled with the verdicts on charges 4 to 17 in a manner which is both logical and reasonable. The matter was arguable and leave to appeal should be granted, but the appeal should be dismissed.

PRIEST JA:

Introduction

91 In my opinion, the applicant's convictions on three charges of committing an indecent act with a child aged 17 are inconsistent with his acquittals on other charges. The convictions must be set aside.

92 My reasons follow.

Convictions and ground of appeal

93 On 15 December 2014, the applicant was found guilty by a jury in the County Court of three charges of committing an indecent act with a child aged 17, 'KE', who was under his care, supervision or authority[17] (charges 1, 2 and 3). With respect to fourteen other charges relating to the same complainant, the jury acquitted the applicant. Those charges included a further two charges of committing an indecent act with a 16 or 17 year old child (charges 4 and 13); eleven charges of sexual penetration of a 16 or 17 year old child under care, supervision or authority[18] (charges 5, 6 to 12, and 14 to 16); and one charge of attempted sexual penetration of a 16 or 17 year old child under care, supervision or authority (charge 17).

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17 *Crimes Act 1958*, s 49(1).

18 *Crimes Act 1958*, s 48(1).

94 The applicant seeks leave to appeal against his conviction on charges 1, 2 and 3. In a ground formulated as follows, the applicant contends that, due to inconsistency with the acquittals, the verdicts of guilty are unsafe and unsatisfactory:

> The verdicts were unsafe and unsatisfactory
>
> Particulars of ground: the verdicts of guilty are inconsistent with the verdicts of not guilty returned by the jury, in respect of charges on the same indictment in respect of the same complainant where the sole issue for consideration in respect of all the charges was whether the complainant at the time of the agreed sexual activity was under the applicant's care, supervision or authority.

The sole issue at trial

95 So far as all seventeen charges were concerned, the applicant did not dispute that he had engaged in the sexual activity alleged. The sole issue for the jury was whether, at the time he indulged in the sexual activity with KE, she was under his care, supervision or authority. Given that KE was aged 17 years at the time consensual sexual activity took place — and that such sexual activity with her would otherwise have been lawful — the jury were not entitled to convict the applicant on any of the charges unless satisfied beyond reasonable doubt that, at the time that any particular sexual act or acts took place, the complainant was under the applicant's care, supervision or authority.

96 As I have said, the jury found the applicant guilty of three charges, relating to sexual activity on 9 February 2013. The sexual activity founding the other fourteen charges of which he was acquitted, occurred on seven separate occasions between 22 March and 2 May 2013.

Background to the relationship between the complainant and applicant

97 By way of background, in January 2012 the applicant commenced employment at a school that KE attended. She had been a student at the school for 13 years, having commenced there in kindergarten. Throughout 2012, the applicant was the principal of the secondary school campus at which KE was a year 11 student.

98 KE turned 17 years of age in August of 2012, whilst she was in year 11. The applicant turned 53 years in June of that year. Late in 2012, the applicant and KE began an inappropriate, but non-sexual, relationship, manifested by a large volume of electronic messages passing between them. In her evidence, KE said that she 'started to form a bit of a little schoolgirl crush'. Indeed, at a school camp in late September of that year, KE told a teacher who was mentoring her, 'CM', that she had a 'crush' on the applicant.

99 At around the time of a school party held toward the end of November 2012, KE and the applicant commenced communicating through text messages. That kind of communication between them was still on foot at the time of a valedictory dinner attended by the complainant and the applicant at the end of November, and was continuing at the time of a school fundraising barbecue on 6 December and a school presentation night on 7 December.

100 On 8 December 2012, the day after the school presentation night, the school council suspended the applicant's employment. The suspension occurred because the council had become aware of the relationship between the applicant and KE. It seems that on 2 December, via Facebook, KE sent to her mentoring teacher, CM, a number of messages that had been sent to her by the applicant. CM told KE that the applicant's messages were 'not appropriate', and, after consultation with colleagues, brought them to the attention of the chairman of the school council.

101 A day or so following his suspension, it was agreed that the applicant and KE's mother would meet. On 12 December 2012, the applicant, KE and her mother all met for coffee at a suburban shopping centre. The school year had finished for KE some ten days earlier, and, by the time of the coffee meeting, KE knew that the applicant had been suspended. KE's mother gave the applicant a Christmas present of confectionary. The applicant's suspension was discussed, and KE's mother said that she wanted communication between the applicant and her daughter to stop. KE's mother asked both the applicant and her daughter to delete each other's telephone numbers, and they purported to do so in her presence. KE had, however, retained

the applicant's number.

102 Thereafter, in violation of her mother's wishes, KE and the applicant continued to communicate. By this stage, the school year had finished for KE, and the text messages 'probably intensified' because they had more free time. They also spoke on the telephone. KE said that some time after the meeting, but before Boxing Day, the applicant told her in a message that he had 'fallen' for her. His messages 'just became more affectionate or there was more sexual innuendo to them'. In later messages he said he wanted to 'hug' or 'kiss' the complainant, and that he 'wanted to make love' to her.

103 On 22 January 2013, the applicant resigned from his position as principal of the school. When the applicant informed KE that he would not be her principal in year 12, she 'was quite sad', since she would have liked 'to see him more'. After the resignation, later in January, KE attended a compulsory school camp off campus designed to prepare students for year 12. During the camp, the acting principal, KE's parents and others, became aware that KE and the applicant were in continuing communication. As a result, KE's parents changed the SIM card on her mobile telephone and arranged a different number. KE became 'anxious' that her parents had changed the SIM, but she had retained the applicant's number and the two remained in communication.

104 Before turning to a consideration of the sexual activity which led to the mixture of convictions and acquittals, there are two further aspects of the evidence to which I should refer, since the respondent placed a deal of reliance upon them.

105 KE and her parents went on a holiday to India in late December 2012 and returned on 27 January 2013. By the time they returned, another principal had been appointed in place of the applicant. Upon her return, KE told CM, her mentoring teacher, that she had been in contact with the applicant whilst in India. The applicant had said that he loved her and his messages had become sexual in nature. As a result of what KE told her, CM wrote a 'report' and gave it to the school.

106 In her evidence, KE said that in 'maybe February' she sent the new principal a letter. She asked that the letter 'be added to the report that [CM] wrote'. KE's evidence was that the applicant had typed the letter and sent it to her by email. She then printed it, signed it and handed it to the new principal. In part, the terms of the letter asked the principal to read its contents because it was 'important' and contained 'my exact feelings on this whole matter'. The letter stated that KE did not believe that the applicant had been involved in 'grooming', and asked that KE's 'thoughts and opinions' be taken into account 'in any action against [the applicant]'.

107 The second aspect also arose out of what KE told her mentoring teacher, CM, upon her return from India. On 7 February 2013, KE told CM that she had sent the applicant a picture of herself in underwear. In her evidence, KE said that the photograph was of her torso, and that she was attired in underwear.

The events leading to the convictions

108 As I have mentioned, the applicant resigned on 22 January 2013. The events founding charges 1, 2 and 3 — which constituted the first sexual acts that took place between the applicant and KE — took place on 9 February 2013, some 18 days after his resignation.

109 Charges 1, 2 and 3 were particularised in the indictment as the 'cinema incident'. On 9 February 2013, KE informed the applicant by text message that she was going to see a movie with her sister and her sister's friend. As it transpired, the applicant also went to the cinema complex. KE and the applicant sent text messages to each other throughout the movie. In her evidence, KE said that the applicant suggested that she should 'take a bathroom break or something like that and he would try and find a cinema so [they] could see each other'. As a result, KE left the cinema she was in, and met the applicant in an unoccupied cinema. The applicant said, 'Hey, gorgeous', and kissed her 'just like a peck'. He then kissed KE with an open mouth, during which she 'was kissing him back' (charge 1); placed his hands on her thighs and around her bottom and was 'squeezing that' (charge 2); and touched her breasts

on the outside of her dress (charge 3).

110 KE then returned to the movie and sent a text message to the applicant telling him that her sister had not noticed she had gone. The applicant responded that she should return to him. KE did so, and 'the same type of thing happened'.

The acquittals

111 After the 'cinema incident', KE and the applicant remained in contact through text messages. KE's parents found a 'note' of her messaging the applicant on her telephone. They told her that she was to have no more communication with him and took her phone. Without her mother's permission, however, KE used her mother's telephone to send a text message to the applicant. The next day at school she used a friend's phone to message the applicant. When confronted by a teacher, however, KE denied that she was making contact with the applicant.

112 In her evidence, KE said that lying to friends and family about her relationship with the applicant 'was too stressful' for her. There then intervened 'a period of three to four weeks' when she did not contact the applicant. Communication between the two recommenced, however, after KE sent the applicant a text message by mistake. Thereafter the messages between them became more frequent.

113 Charge 4 was described in the indictment as the 'Blessing night incident'. KE gave evidence that during the evening of 22 March 2013, in the course of a social occasion attended by KE, she and the applicant arranged via text messages to meet outside some apartments. They got into the applicant's wife's car. Whist KE straddled the applicant's lap, they kissed and the applicant touched her breasts over her clothes. The activity in the car went on for 'maybe 15, 20 minutes', until KE indicated she should go back before people realised where she was.

114 Charges 5, 6 and 7 were referred to as the 'Drain area incident'. At about 3:00am on 2 April 2013, KE, without her parents' knowledge, climbed out of her bedroom window. She and the applicant had arranged to meet via email. They met, and the

applicant drove them in his car to a 'dodgy drain area'. KE and the applicant got into the back seat of the car. There they kissed and touched each other. The applicant touched KE's breasts, put his finger in her vagina (charge 5), put his tongue into her vagina (charge 6), and then once more put his finger into her vagina (charge 7). The applicant then drove KE home, and she climbed back in her bedroom window.

115 Charges 8 and 9 related to 5 April 2013, when the applicant's wife (so it was pleaded) 'was in Sydney'. KE and the applicant again arranged to meet via text messages. She again climbed out of her bedroom window and met the applicant. The applicant drove KE back to his house, and he took her to the main bedroom. They removed each other's clothes and kissed. The applicant put his finger into KE's vagina, and KE placed the applicant's penis into her mouth until 'he came'. This activity took place over 'one or two hours'. The applicant then drove KE home, and she climbed back in her bedroom window.

116 Charges 10 and 11 — described in the indictment as 'when his [the applicant's] children were looking for him' — related to events on 7 April 2013. KE climbed out of her bedroom window and met the applicant. They went to his home, and in the main bedroom they took each other's clothing off. The applicant put his finger (charge 10) and his tongue (charge 11) into KE's vagina. Later, the applicant drove KE home. The applicant subsequently told KE that, whilst he was driving her home, his children had become scared and noticed that he was not at home.

117 Charge 12 related to events in the applicant's car on 9 April 2013. The day after the activities founding charges 10 and 11, KE and the applicant again arranged via text message to meet. Early the next morning, KE climbed out her bedroom window and over the fence. She sat on the applicant's lap in the back seat of his car, they kissed, and he touched her breasts. The applicant then put his finger in KE's vagina.

118 In the course of her surreptitious sexual liaisons with the applicant, KE had been using the chair and downpipe to effectuate her egress from, and ingress back to, her

bedroom. Following the events founding charges 10, 11 and 12, KE's father discovered a chair in the backyard of the family home underneath KE's window. He also noticed marks on the downpipe. As a result of these discoveries, KE's father bolted her bedroom window closed.

119 Since, as a result of her window being bolted shut, KE and the applicant could 'no longer do the early morning thing', they decided that they would meet during her free periods at school. An arrangement was devised whereby KE would sit in a bathroom during her free periods until she received a text message from the applicant that he was waiting for her. KE would then exit the school building, climb the school fence and meet the applicant in his car.

120 Charge 13 — the 'Chocolate mousse incident' — related to an occasion on 19 April 2013 when KE left school during a free period and met the applicant, and they went to the applicant's home. The two kissed, and the applicant touched KE's breasts over her school uniform. The applicant drove the complainant back to school, and she climbed back over the fence at the back of the school.

121 Charges 14, 15, 16 and 17 were particularised in the indictment as the 'Sports Rally Day incident'. On 2 May 2013, inter-school sports had been arranged. KE went to school in her sports uniform. KE again climbed over the back fence of the school, having arranged to meet the applicant. They travelled by car to the applicant's home. Once inside, KE removed her sports uniform and the applicant removed his clothes. They showered together, and the applicant gave KE a massage. During the following interlude they kissed. The applicant kissed KE's breasts, put his finger into her vagina (charge 15) and rubbed it, and penetrated her vagina with his tongue (charge 14). KE then put the applicant's penis in her mouth 'until he came' (charge 16). The two of them then had another shower, following which, while naked, they 'started touching each other again and kissing'. The applicant then rubbed against KE, and put his penis 'quite close' to her vagina, during which 'it might have gone in a little bit' (charge 17). Thereafter, KE dressed herself in her uniform, the applicant drove her back to the vicinity of the school and she climbed

the fence to get back into school grounds.

Inconsistent verdicts

122 Section 276(1)(a) of the *Criminal Procedure Act 2009* provides that this Court must allow an appeal against conviction if the appellant satisfies the court that 'the verdict of the jury is unreasonable or cannot be supported having regard to the evidence'. Inconsistent verdicts render convictions unsafe and unsatisfactory.[19] Much of the learning of the subject was gathered together and digested in the judgment of Gaudron, Gummow and Kirby JJ in *MacKenzie*,[20] where their Honours assayed six convenient propositions,[21] which I need not rehearse. The present application involves a contention of factual inconsistency between different verdicts, which requires the Court to apply a test of logic and reasonableness. In assessing a complaint of inconsistency between verdicts, this Court must be astute not simply to substitute its opinion of the facts for one which was open to the jury; so that, if there is a proper way by which the Court may reconcile the verdicts, so that it may be concluded that the jury performed their functions as required, that conclusion generally must be accepted.

123 Bearing those principles steadily in mind, in my opinion the applicant has made good his ground of appeal.

Discussion

124 Offences of the kind created by s 49 of the *Crimes Act 1958* exist to protect 16 and

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19 *MacKenzie v The Queen* (1996) 190 CLR 348, 357, 365 (Gaudron, Gummow and Kirby JJ).

20 Ibid.

21 Ibid 366–9. See also *R v Bacash* [1981] VR 923; *R v Nanette* [1982] VR 81; *R v Kirkman* (1987) 44 SASR 591; *R v Dell'Albani* (1990) 49 A Crim R 294; *R v Celebicanin & Nyiri* (1991) 53 A Crim R 374; *R v Appleby* (1996) 88 A Crim R 456; *R v Ware* [1997] 1 VR 647; *R v Harvey* [1997] 2 VR 121; *Jones v The Queen* (1997) 191 CLR 439; *MFA v The Queen* (2002) 213 CLR 606; *R v JA* [2008] VSCA 169; *R v Scott* (2009) 22 VR 41; *CJJ v The Queen* [2012] VSCA 196; *Carrott v The Queen* [2013] VSCA 90; *Andrew v The Queen* [2013] VSCA 333; *Amato v The Queen* [2013] VSCA 346; *Avery (a pseudonym) v The Queen* [2014] VSCA 86; *King v The Queen* [2014] VSCA 107; *Pillay v The Queen* (2014) 43 VR 327.

17 year old persons from sexual exploitation by those who, because of their special position of advantage vis-à-vis the young person, are capable of using that position to influence the 16 or 17 year old to take part in sexual activity. Absent one of the categories of relationship recognised by s 49(4) subsisting at the time sexual activity takes place, however, whether a 16 or 17 year old is under the care, supervision or authority of another will be a matter of fact and degree. It must, however, be borne steadily in mind — and, indeed, should be so obvious as to not require articulation — that any court trying charges such as those that the applicant faced must be astute to ensure that the evidence is capable of establishing that the particular 16 or 17 year old was indeed under care, supervision or authority in the relevant sense at the time that sexual activity took place. Should it be otherwise, accused persons run the risk of illegitimate conviction for serious offences because their conduct is thought to be morally dubious or offensive to community standards.

125 In the present case there could be little doubt that, had sexual activity occurred between the applicant and KE during 2012, KE would properly have been regarded as being under his care, supervision and authority. KE was, after all, a student at a school where the applicant was the principal, and s 49(4) of the *Crimes Act 1958* is expressed in mandatory terms — a 16 or 17 year old child *is* under the care, supervision or authority of a person if the person is 'the child's teacher'.[22] In my opinion, however, the evidence led at trial was not capable of establishing that the complainant was under the applicant's care, supervision or authority at the time that the sexual activity embraced by the first three charges on the indictment took place. To that extent, the applicant's convictions are inconsistent with his acquittals.

126 At the risk of repetition, the charges on which the applicant was convicted were laid under s 49 of the *Crimes Act 1958*. So far as relevant, s 49 provides:

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[22] No argument was put — and I need not pause to consider the matter further — that a school principal, who has no actual teaching role with respect to a particular student, is not to be regarded as 'the child's teacher' within the meaning of s 49(4)(a) of the *Crimes Act 1958*. I note, however, that in *R v Howes* (2000) 2 VR 141, which was decided prior to the enactment of s 49(4), Brooking JA (at 161 [63]) observed that a 'standing' relationship of care, supervision and authority might include that of a schoolteacher and a pupil *regularly taught by that teacher*.

> (1) A person must not wilfully commit, or wilfully be in any way a party to the commission of, an indecent act with or in the presence of a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority.
> …[23]
>
> (4) For the purposes of subsection (1), and without limiting that subsection, a child is under the care, supervision or authority of a person if the person is —
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> (a) the child's teacher;
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> (b) the child's parent, adoptive parent, foster parent or step parent;
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> (c) the child's legal guardian;
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> (d) a minister of religion with pastoral responsibility for the child;
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> (e) the child's employer;
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> (f) the child's youth worker;
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> (g) the child's sports coach;
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> (h) the child's counsellor;
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> (i) the child's health professional;
>
> (j) a police officer acting in the course of his or her duty in respect of the child;
>
> (k) employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison and is acting in the course of his or her duty in respect of the child.

127 It is thus readily apparent that, for the purposes of the offence created by s 49(1), s 49(4) spells out a non-exclusive set of circumstances in which a child *is* under 'care, supervision or authority'. As I have mentioned, the applicant resigned as principal of KE's school on 22 January 2013. From that time, he ceased to fall into the specific category of 'the child's teacher' in s 49(4)(a), or, indeed, any of the other specific categories spelled out in s 49(4). KE could not, therefore, be regarded as being under the applicant's care, supervision or authority because he fulfilled any of the roles prescribed by s 49(4). Thus, in determining whether the applicant's convictions are inconsistent with his acquittals, the central issue is whether the evidence available to the prosecution, taken at its highest, was capable of establishing that KE was, at the time the indecent acts took place on 9 February 2013, under some other more general category of care, supervision or authority.

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23 Subsections (2) and (3) concern consent, an issue presently of no relevance.

128 As I said in *Little*,[24] were I not bound by authority, I would incline to the view that — despite the presence of the usually disjunctive 'or'[25] — the expression 'care, supervision or authority' creates a genus or class, where each essential word in the expression is epexegetical one of the other. To repeat myself, my preferred view is that each word in the collocation explains or colours the meaning to be attributed to the others.[26] I recognise, however, that in *Howes*[27] — which was a charge of sexual penetration of a 16 or 17 year old child under care, supervision or authority pursuant to s 48(1) of the *Crimes Act 1958* — Brooking JA rejected the notion that the expression creates a genus,[28] an opinion with which Winneke P agreed. Winneke P observed:[29]

> I agree with Brooking JA that the words of the section do not create a genus; rather they should be given their ordinary grammatical meaning which, notwithstanding that they are to be read disjunctively, does not lead to the conclusion that more than one offence is thereby created. To give the words any other construction will be to circumscribe the meaning which was intended to be given to them by the Parliament. In my view, the words are apt to describe circumstances which are wider than those which demonstrate that the child complainant is, at the time of sexual penetration, actually or temporally under the care, supervision or authority of the accused (for example, baby-sitters or child-carers). The offence created by the section is also aimed at those who, by virtue of an established and on-going relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of that relationship. The words of the section cannot sensibly mean that, in a case such as the present, a child pupil ceases to be under the care, supervision or authority of his or her teacher when a teaching period concludes, or when school ceases for the day, or even when the school goes into temporary recess. …

129 Winneke P made plain that it is the capacity to exploit or take advantage of the influence that the person has over the 16 or 17 year old which creates the need to protect him or her from exploitation:[30]

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24 *Little (a pseudonym) v The Queen* [2015] VSCA 62, [45] ('*Little*').

25 See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, 2014), [2.29]–[2.30].

26 See *Deeley v Stirrey* [1932] VLR 159, 163 (Macfarlan J), 165 (Lowe J).

27 *R v Howes* (2000) 2 VR 141 ('*Howes*').

28 *Howes*, 157–8 [51]–[56].

29 Ibid 143 [4].

30 Ibid 144 [5].

> It remains, of course, a question of fact and degree in a particular case, whether the complainant, at the time of penetration, is under the care, supervision or authority of the accused. But where, in cases such as the present, that relationship is an on-going one, the question is not to be answered by narrowly construing the circumstances in which sexual penetration occurred; but rather by considering whether the special position of responsibility arising from the relationship of teacher and pupil continues to subsist between the parties at the time of such penetration. The relevant question is whether a relationship of the stated kind exists at the time of penetration, and not necessarily whether the accused is actually exercising or exploiting his position of advantage at that time. The responsibility arising from that relationship cannot be turned 'on and off' at the whim of the parties. Rather it will subsist so long as there exists a teacher/pupil relationship which gives rise to a capacity in the teacher to exploit or take advantage of the influence which the words creating the offence imply that he or she has over the pupil and so long as there exists the need, which the offence also implies, to protect the child from such capacity for exploitation; and this is so notwithstanding that the pupil may regard himself or herself as sexually mature. The purpose of s 48 is to impose restraint on the accused, not the victim. It is for this reason that the question whether, at the relevant time, the complainant was under the care, supervision or authority of the applicant, is not to be answered by evidence on the part of the complainant that she did not regard herself as being under the authority of the applicant at that time … .

130 *Howes* gave recognition to what were described as 'standing relationships' and 'ad hoc relationships'. Hence, a 'standing relationship' is a relationship that falls into traditional categories, such as schoolteacher and pupil taught regularly by the teacher, psychiatrist and patient receiving regular treatment, priest and person regularly receiving spiritual guidance, and the like, where the child is under the care, supervision or authority of the other person. The categories of relationships under s 49(4) are examples of — but are not exhaustive of — 'standing relationships'.[31] The term 'ad hoc relationship' has been used to refer to a relationship of care, supervision, or authority that comes into existence only on the day of the offence and endures only for a short time. An 'ad hoc relationship' may be used broadly to refer to temporary relationships that do not reflect a traditional or nominated category.[32] As Tate JA cautioned, however, the terms 'standing relationship' and 'ad hoc

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31 *Howes*, 161 [62]–[64], 165 [71] (Brooking JA); *Lydgate(a pseudonym) v The Queen* (2014) 242 A Crim R 419 ('*Lydgate*'), 423–4 [11] (Tate JA). See also *R v Macfie* [2000] VSCA 173, [20]–[21] (Winneke P and Chernov JA).

32 *Howes*, 161[63] (Brooking JA); *Lydgate*, 423–4 [11] (Tate JA).

relationship' do not appear in the statutory text, and are not to serve as substitutes for that text.[33] The terms 'standing relationships' and 'ad hoc relationships' remain useful short-hand descriptions, however, providing their limitations are kept in mind.[34] As her Honour further observed, the words 'care', 'supervision' or 'authority' are words that connote a relationship between persons, particularly as qualified by the word 'under'.[35]

131 So far as the interpretation of the key expression is concerned, I venture to repeat what I said in *Little*:[36]

> In construing the general expression 'care, supervision or authority' in [s 49(1)] … it is legitimate, in my view, to look to the kinds of relationships and roles categorised in [s 49(4)] in order to give colour and meaning to the general expression. They provide a context in which the general expression is to be interpreted, and are descriptive of the kinds of relationships and roles to which [s 49(1)] is directed. The effect of [s 49(4)] is that a child will be under the care, supervision or authority of a person — without more — simply by virtue of the prescribed relationship existing at the time sexual penetration takes place. Each of the relationships specifically described are of a kind where, because of the position or role the person occupies with respect to the child, it is to be expected that he or she has will be able to exert some control over the child and thus have the capacity to exploit that position so as to accomplish sexual [activity]. The kinds of relationships embraced by the expression 'care, supervision or authority' must be informed by the kinds of relationships spelled out in [s 49(4)], and must be construed in that context.

132 I also adhere to my later observations in that case:[37]

> Self-evidently, not every child of 16 or 17 will be under the authority of another. It is clear that the offence in [s 49(1)] owes its existence to the desire to prevent the sexual exploitation of children by those who have a capacity to take sexual advantage of a child (or children) as a result of their relationship or position relative to the particular child. That is, the offence is targeted at those who, because of their relationship with a child, are able to take advantage of the influence over the child which grows out of that relationship. The putative offender must occupy a position of responsibility with respect to the child. In my opinion — and conscious of the dangers of endeavouring to substitute, or provide synonyms for, the statutory formula

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33 *Lydgate*, 423–4 [11].

34 Ibid.

35 Ibid.

36 *Little*, [55].

37 Ibid [62].

> — as a matter of ordinary language a child cannot be regarded as being *under the authority* of a person unless that person has the power to command or influence the thinking or behaviour of the child. Whether the necessary relationship exists — in this case 'authority' — is a matter of fact and degree; but, a person is not criminally liable for the sexual penetration of 16 or 17 year old child unless the relationship is extant at the time sexual penetration takes place.

133 Prior to the jury being empanelled in the present case, the trial judge reserved six questions for this Court's determination.[38] Thus, in *Lydgate*,[39] Tate JA distilled a number of propositions from earlier authorities which, with respect, I regard as correct.[40] Beach JA, with whom Maxwell P agreed, also advanced a number of propositions bearing on the interpretation of s 49.[41]

134 In *Lydgate*, the first question posed was:

> Can the prosecution rely on evidence of the qualities or attributes of a former relationship of the kind listed in [s 49(4)] of the *Crimes Act 1958* (a standing relationship) to prove that at the time of the offending, the complainant was under the care, supervision or authority of the accused (an ad hoc relationship), for example by establishing that an accused was in a position to exploit or take advantage of the influence that grew out of the former relationship?

135 With respect, I agree with the answer Tate JA gave to that first question. Part of her Honour's answer was as follows:[42]

> The prosecution cannot rely *solely* on a former standing relationship to prove that a complainant was under the care, supervision or authority of an accused at the time of the offending. Thus, the prosecution cannot rely solely on the former standing relationship of Principal and student that existed between Lydgate and the complainant to prove that the complainant was under the care, supervision or authority of Lydgate during the time of the sexual activity between them, that is, after he resigned. The former standing relationship cannot serve as a substitute for the relationship of care, supervision or authority that must exist *at the time of the offending*.
>
> However, the existence of a former standing relationship will always be relevant to the question of whether an ad hoc relationship of care, supervision

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38 See *Criminal Procedure Act 2009*, s 302.

39 See n 31 above.

40 *Lydgate*, 436–7 [49].

41 Ibid 451 [97].

42 Ibid 424 [12] (emphasis in original). See also 437–8 [50]–[53].

or authority exists at the time of the offending …

136 I do not take Beach JA (with whom, as mentioned, Maxwell P agreed) to have reached a materially different conclusion with respect to the first posed question. His Honour answered it thus:[43]

> The question of whether the prosecution can, in the first instance, rely upon evidence of the qualities or attributes of a former relationship to prove that at the time of the relevant sexual activity the complainant was under the care, supervision or authority of the accused falls to be determined by determining whether the particular piece or pieces of evidence sought to be admitted could rationally affect (directly or indirectly) the assessment of the probability of the existence of the alleged fact that at the time of relevant sexual activity the complainant was under the care, supervision or authority of the accused. *The mere proof that an accused was in a position to exploit or take advantage of an influence that might have grown out of a former relationship could not, without more, establish that the complainant was under the accused's care, supervision or authority after the former relationship ended*.

137 It seems to me that both Tate JA and Beach JA were at pains to make clear that, although a former relationship of care, supervision or authority (arising from the applicant's position as principal and KE's position as student) might be relevant in determining whether an 'ad hoc relationship' had arisen at the time of the charged sexual activity, the existence of the former relationship could not serve as a substitute for the relationship of care, supervision or authority that must exist at the time of the charged sexual activity, and, without more, could not establish that the complainant was under the applicant's care, supervision or authority after the former 'standing relationship' ended. With that in mind, I return to a consideration of the facts.

138 Although no sexual activity occurred between them in 2012, there seems little doubt that the beginnings of the relationship between KE and the applicant are to be found in November 2012, when they commenced sending text messages to each other. At that time, KE had, as she said in her evidence, a 'schoolgirl crush' on the applicant. As inappropriate and morally dubious as it might have been for a school principal to have that kind communication with a 17 year old student, clearly no

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43 Ibid 452 [103] (emphasis added).

crime was committed.

139 Thereafter, on 8 December 2012, the applicant was suspended by the school council. That fact was well-known to KE and to her parents. Within a day or so following the applicant's suspension — and after the school year had ended — KE and her mother met the applicant. Over coffee, KE's mother told the applicant the relationship between her daughter and him had to stop. It must have been obvious to KE that the applicant was no longer responsible for her care or supervision as a student of the school, or that he had any authority over her.

140 Any doubts that she might have harboured must have been dispelled by subsequent events. As I have mentioned, the applicant resigned from his position as principal of the school attended by KE on 22 January 2013. When she was informed that the applicant would no longer be her principal in year 12, KE 'was quite sad'. Thus, in my view, KE would have been well aware that the applicant no longer had any authority over her by dint of his position (or loss of position) at the school. Perhaps more importantly, the prescribed relationship of teacher and student recognised by s 49(4)(a)[44] was brought to an end. Thus, if KE was thereafter to be regarded as being under the applicant's care, supervision or authority, that situation could only arise as a result of some species of 'ad hoc relationship' of the kind contemplated by this Court in *Howes* and *Lydgate*.

141 Moreover, at the compulsory school camp in late January 2013, the acting principal, KE's parents and others, became aware that KE and the applicant were in continuing communication, leading to KE's parents changing the SIM card on her mobile telephone and arranging for a different number. Again, KE must have been fully cognisant of the fact that the applicant had no authority over her, and that her parents unequivocally wanted her to end any relationship that she had with him. KE, as she said, became 'anxious' that her parents had changed the SIM. She had, however, retained the applicant's number so as to remain in communication with

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44 See n 22 above.

him.

142 The first sexual activity — and the only sexual activity which resulted in conviction — occurred on 9 February 2013, after these events had unfolded, and at a time when KE could not have failed to appreciate that the applicant was no longer responsible for her care or supervision, and had no authority over her. Her parents and others had made so much plain. Further, the first sexual activity occurred in a cinema complex, a setting completely divorced from the kind of environment in which the applicant might in the previous year have been said to have had responsibility for KE's care, supervision or authority.

143 There is, in my view, no relevant difference between the circumstances that obtained when the first sexual activity took place, and the later sexual activity, other than, perhaps, a temporal disconnection. As I have mentioned, following the 'cinema incident', KE and the applicant remained in contact through text messages. KE's parents once more told her that she was to have no communication with the applicant and they removed her phone. Undeterred, however, KE used her mother's and a friend's telephone to send text messages to the applicant. Despite a lull of three of four weeks, KE then re-established contact with the applicant.

144 During the hearing in this Court, counsel for the respondent placed specific reliance on the contents of the written case. In the written case, the respondent submitted that 'the jury could form a different view of the nature of the relationship between the applicant and the complainant over time that it existed'. Whilst the first sexual activity was 'the closest in time to when he was the principal', this was not, the respondent submitted, 'the sole difference in the relationship at different times'. The jury were able to assess the many messages passing between KE and the applicant to make an assessment of the relationship. Further, so it was submitted, the jury might have thought the 'grooming letter' showed that the applicant continued to have some authority over KE. Indicators of the applicant's continuing 'authority or control' over the complainant after his resignation included, first, he acted against her parents' wishes; secondly, he engaged in 'sexual talk and then

sexual activity of the increasingly intimate nature'; thirdly, he engaged in a relationship and later in sexual activity 'by distinguishing her from other 17 year old girls'; and, fourthly, he had 'underlying authority', by virtue of having earlier been her principal. It was submitted that, whilst the prosecution case 'was that the evidence supported these four factors commencing within the student-principal relationship and continuing throughout', nonetheless 'the jury may have assessed each of those factors as applying differently at different times'. Finally, the respondent submitted that the jury may have considered the break in communication a significant factor. It was open to the jury to have been satisfied that the relationship of care, supervision or authority existed at the time of the first incident, but fail to be satisfied of the existence of such a relationship later on. It was argued that the jury may have considered the evidence regarding the 'break' in the relationship 'as the complainant exercising free will or rejecting any authority held by the applicant and thus terminating the relationship of care, supervision or authority'.

145 In the course of oral submissions, counsel for the respondent was asked to set out the indicia from the evidence showing that a relationship of care, supervision and authority subsisted as at 9 February 2013. Counsel principally relied on three things: first, evidence of the former relationship of principal and student; secondly, the nature and content of the messages passing back and forth between the complainant and the applicant; and, thirdly, the circumstances of the preparation and delivery of the 'grooming letter', and the sending of the 'underwear photograph'.

146 I do not accept the respondent's submissions. Most miss the point. Many rely on invalid syllogism. None is intellectually very satisfying.

147 As I have mentioned, the respondent submitted that the jury were entitled to form a different view of the nature of the relationship over the time that it existed. Summarising the matters alluded to above, the respondent argued that, as at 9 February 2013, the indicators of the applicant's continuing 'authority or control' over KE — the departure from the statutory language should be noted — were:

- first — and this was the main thrust that underpinned all of the respondent's submissions — by virtue of having previously been her principal, the applicant had 'underlying authority' over KE;
- secondly, the applicant acted against the wishes of KE's parents;
- thirdly, the applicant engaged in sexual talk (and then sexual activity) of increasingly sexual nature, and that the relationship could be inferred from the nature and content of the messages passing back and forth;
- fourthly, the applicant engaged in a relationship and then sexual activity by 'distinguishing KE from other 17 year old girls';
- fifthly, KE sending the applicant a photograph of herself in underwear; and
- sixthly, the circumstances surrounding the 'grooming letter'.

148 Before proceeding, the way in which the prosecutor put the case to the jury in her final address is instructive. She said:[45]

> … The prosecution says that what emerges from all of the evidence in this case *is the [applicant's] exercise of authority showing the power to influence [KE's] conduct, both whilst he was the principal and after his resignation* on 22 January 2013. *It clearly influenced [KE] in the following ways* …
>
> The first, to act against her parent's wishes; second, to engage in sexual talk and then sexual activity of the increasingly intimate nature; [three] to engage in a relationship and later in sexual activity by distinguishing her from other 17-year-old girls; [four] by reference to his position as principal, *thereby underlying his authority*.
>
> You'll see that the categories or classes span both when he was the principal and after he ceased being principal. There are another four classes or categories that I suggest you may derive some assistance from in terms of the evidence: by reference to his position as principal; to tell him of her movements so that he could orchestrate meetings between them; to isolate her from her mentor, [CM]; to not give up on the relationship and to act against her teacher's and friend's wishes and break school rules.

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45 Emphasis added.

149 It may be observed from the prosecutor's address that her concentration was on the applicant's suggested 'exercise of authority', showing his 'power to influence' KE's conduct, and the clear influence of KE's conduct in the enumerated ways.

150 As was made clear in *Lydgate*, the existence of the former relationship of principal and student could not serve as a substitute for the relationship of care, supervision or authority that needed to exist at the time of the charged sexual activity, and, without more, could not establish that the complainant was under the applicant's care, supervision or authority after the former 'standing relationship' ended. The applicant had ceased to be principal of KE's school on 22 January 2013. Prior to that, in December 2012, the applicant had been suspended because of his interaction with KE. Shortly thereafter, KE's mother had made it clear, in effect, that KE was no longer to be regarded as subject to the applicant's authority. Thus, so it seems to me, the mere fact that there had previously been some 'underlying authority' arising from the former relationship of principal and student, without more could not establish that KE was under the applicant's care, supervision or authority at the time sexual activity occurred on 9 February 2013. And in my opinion, the 'more' is not to be found in the second to sixth matters relied upon by the respondent, whether taken alone or in combination.

151 Counsel for the respondent submitted that the jury may well have thought that the complainant had manifested her free will and rejection of authority by voluntarily desisting from contact with the applicant over a four week period in February and March 2013. It is fallacious, however, to regard the complainant's attitude or state of mind as relevant to a determination of whether she was under the applicant's care, supervision or authority at the critical time. KE's attitude or state of mind is irrelevant. The respondent's submission should not be permitted to obscure the fact that whether KE was under care, supervision or authority is not to be answered by whether she may have regarded herself as sexually mature, or by whether she did not regard herself as being under care, supervision or authority at a

particular time. So much flows from the observations of Winneke P in *Howes*.[46]

152 Turning to the second of the indicia relied upon by the respondent, as a matter of logic I am unable to see that the fact that the applicant acted against the wishes of KE's parents might go in proof that she was under his care, supervision or authority at the relevant time. Rather, so it seems to me, the intervention of KE's mother tells against such a proposition. By no stretching of the facts might it fairly be asserted that the applicant was exercising any degree of responsibility with respect to KE at the time that the events in the cinema complex unfolded.

153 Next, I detect nothing in the messages passing between the applicant and KE which might suggest that the complainant was under the applicant's care, supervision or authority. Instead, a fair reading of the messages suggests an evident degree of mutuality. Granted, it might be said that the content of the messages gradually became more intimate and sexually charged, but that fact does not establish that KE was under care, supervision or authority. In my view, they fail to demonstrate any capacity or power to command or influence KE's thinking or behaviour in any relevant respect.

154 So far as the submission that the applicant 'distinguished' KE from other 17 year old girls is concerned, I am not sure that I understand what that argument was meant to convey. He certainly evinced a wish to have an amorous relationship with her rather than any other 17 year old. In my view, however, the fact that the applicant manifested a desire for a relationship with KE to the exclusion of other 17 year old girls could not establish the necessary condition of care, supervision or authority.

155 With respect to the evidence of KE sending the photo of herself in her underwear to the applicant — a matter upon which the respondent placed significant reliance — in my opinion there was nothing in the circumstances of that which went in proof

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46 See [129] above.

that KE was under care, supervision or authority. In her evidence, KE was asked about 'the last communications' that she had with the applicant before police became involved. She said that she sent him 'mainly texts and stuff', but said that she did once send a photo (and agreed with the prosecutor's suggestion that it was sent on 3 February 2013). When asked by the prosecutor how that came about, KE stated:

> I think he asked me something like what I wearing (sic.) or something like that and he said, 'I'd love to see a photo', or something like that and at first I didn't really want to do that but then I eventually sent him a photo.

156 I am unable to divine from this evidence — alone or taken with the other evidence — that the complainant sent the photo because she was under care, supervision or authority.

157 As I followed the respondent's submissions in this Court, the centrepiece of the case was the 'grooming letter'. It must be said that the letter was, however, the subject of scant analysis by the prosecutor at trial. Towards the end of her final address, the prosecutor said:[47]

> You will be pleased I'm nearly coming to the end but there is another piece of evidence that I want to refer you to. That is the letter that [KE] wrote to [the new Principal]. [KE] gave evidence that the [applicant] sent her a letter by email for her to pass on as her own to [name], the new principal, that [the applicant] wasn't grooming her. [Transcript reference.] [KE] said she thought that that occurred in February 2013. It's an exhibit and you have a copy that you can read at your leisure.
>
> But in the course of the letter it says, 'Although I indicated in the letter that [KE's teacher mentor] wrote, I actually don't believe that [the applicant] was doing those things – grooming. I really don't think that or believe that at all. Therefore the letter shouldn't state that I do.'
>
> And then it goes on and she signs the document.
>
> That letter, I suggest, is an example of [the applicant] *exercising influence* over [KE], *stemming from his previous position of being an authority* (sic.) *over her when he was principal*, and you'll note that the letter, February 2013, is in fairly close proximity to the dates in Charges 1 to 3, 9 February 2013, is the date that those sexual activities took place.

158 So that a complete picture emerges, I should also refer to the evidence concerning

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47 Emphasis added.

the circumstances in which the letter was produced. The evidence was silent as to KE's reasons for printing and forwarding the letter. KE said the following it in answer to the prosecutor:

> After your return from India, [the applicant] was no longer your principal. Correct?---Yes.
>
> Who was the principal in place of [the applicant]?---[Named new principal].
>
> Did you have any contact with her or [named teacher mentor]?---Yes, I think – I think at the start of the year I sent [the new principal] a letter.
>
> What was the letter about?---It was something to do with that my – I think something to do with my interactions with [the applicant] was okay or something about like not — he wasn't grooming me or something, yeah.
>
> How did you come to write that letter?---He wrote the letter for me and I sent it.
>
> When you say he wrote the letter … do you mean that he physically wrote the letter?---He typed it and sent it by email and then I printed it out.
>
> He sent it by email to you?---Yes.
>
> Do you know when that was?---I think it was in maybe February.
>
> What did you do with the letter?---I then gave — I handed that in to [the new principal].
>
> Was the letter signed or unsigned?---By myself?
>
> Yes?---Yes, it was signed.

159 Despite the reliance placed upon the letter in this Court, I am able to see nothing from the evidence concerning the circumstances in which the letter was produced — and nothing in the terms of the letter itself — which could found an inference that it resulted from KE being under the applicant's care, supervision or authority in any manner contemplated in law.

160 Indeed, as I have endeavoured to convey, in my view much of the respondent's case relies on arguments which suffer from the vice of invalid syllogism. Thus, so it seems to me, much of the respondent's case boiled down to no more than this: first, young people under care, supervision or authority will have a relationship with another and do other things contrary to their parents' or guardians' wishes, and will have intimate communications with that other (including, for example, the giving of

intimate photographs); secondly, KE had a relationship with the applicant (and did other things) contrary to her parents' (and others') wishes, and had intimate communication with him; thirdly, therefore, KE was under care, supervision or authority. Such 'reasoning', in my view, offends logic.

161 Once the whole of the evidence is put into perspective and properly analysed, in my view it is not capable of establishing that KE was under the applicant's care, supervision or authority when sexual activity took place on 9 February 2013. The proscribed statutory relationship of teacher (or principal) and student[48] had come to an end, and the evidence could not found an inference that a new 'ad hoc relationship' had emerged. There was no material difference in the circumstances that obtained on 9 February 2013, and those that obtained at the time when the later sexual activity — the subject of the acquittals on charges 4 to 17 — took place. It simply was not open to the jury to find that KE was under the applicant's care, supervision or authority when the activity founding charges 1, 2 and 3 occurred. In that way, the verdicts of guilty are inconsistent with those of not guilty.

162 For the forgoing reasons, the convictions cannot be permitted to stand.

Conclusion

163 I would grant the application for leave to appeal against conviction; allow the appeal; set aside the convictions on charges 1, 2 and 3; and order a judgment of acquittal on those charges.

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48 See n 22 above.