SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gray* [2017] QCA 311
PARTIES:	**R** **v** **GRAY, Stephen Anthony** (appellant)
FILE NO/S:	CA No 316 of 2016 DC No 2112 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 27 October 2016 (Butler SC DCJ)
DELIVERED ON:	19 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2017
JUDGES:	Sofronoff P and Fraser JA and McMeekin J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the complainant was admitted to Boystown when he was about 12 years old – where the appellant was a teacher at Boystown – where the complainant gave evidence that the appellant repeatedly assaulted the complainant during the complainant's time at Boystown – where the assaults were said to involve the appellant having the complainant sit on his lap while the appellant grinded against him – where the complainant gave evidence that on one occasion the appellant had the complainant perform oral sex on him – where the complainant gave evidence that on another occasion the appellant inserted his finger into the complainant's anus – where the complainant gave evidence that on another occasion the appellant sodomised the complainant – where the complainant gave evidence that this offence took place during a swimming carnival – where a witness gave conflicting evidence that the appellant was no longer working at Boystown at the time of the relevant swimming carnival – where the appellant was charged with three counts of indecent treatment and one count of carnal knowledge – where the appellant was convicted after trial on all four counts – where the appellant argues that there were aspects of the complainant's case that were implausible, including that

the offending took place behind a glass partition in a library – whether it was open to the jury to return guilty verdicts despite inconsistencies in the complainant's case

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was charged with sodomising the complainant – where the particulars of the charge specified that the offending took place in the "office in the library" – where the complainant gave evidence that the offending took place in the library, rather than in the office – where the prosecution acknowledged, at trial, that the evidence of the complainant did not conform to the particulars – where the precise location of the offending was not contended at trial – where the trial judge gave a direction that the particular was not consistent with the evidence but that the jury had to focus upon whether the elements of the charge had been proved beyond reasonable doubt – whether the trial judge's direction on this point was a misdirection because it implied that the particulars did not matter

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the complainant gave evidence that he was sodomised by the appellant – where the complainant gave evidence that this offence took place during a swimming carnival – where a witness gave conflicting evidence that the appellant was no longer working at Boystown at the time of the relevant swimming carnival – where the appellant was convicted for sodomising the complainant – whether the trial judge should have given a specific direction regarding the appellant's alibi evidence

BCM v The Queen (2013) 88 ALJR 101; [2013] HCA 48, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: K M Hillard with D J Younger for the appellant
G J Cummings for the respondent

SOLICITORS: Wallace O'Hagan Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The complainant is a man born in 1968. He is of Aboriginal descent. When he was in Grade 2, he was removed from the care of his parents and placed in the care of foster parents. When he was in Grade 7, he and his brother committed a break and enter offence and were sent to an institution – Boystown. It

was there that he met the appellant, Stephen Anthony Gray. He was a library teacher and social science teacher. He was also a cricket and rugby league coach. He had a small office in the library.

[2] The complainant said that very soon after his admission to Boystown, the appellant began his sexual assaults. The complainant said that:

> "…he used to always have his hands on me and just cuddle me all the time and then he just took it too far when he got me in the library.
>
> … he'd usually just start just rubbing my back and all that stuff and then started whispering in my ear and – had his tongue in my ear, then putting his hands on my ass."

[3] The complainant remembered what happened on the first such occasion. He said:

> "He was reading a book to me. He said come closer, sit on my lap and I'll read it to you. And then he'd start putting his hands on me and rub me… he started whispering to me…
>
> Then – because he was sitting on my lap – got me to sit on his lap. And then I found, you know, just sitting on his lap, the next minute I feel something hard getting underneath me.
>
> …
>
> Rubbing my back up against him and grinding. And he's getting hard.
>
> …
>
> Just sort of a bit of a moaning."

[4] The complainant said that he had sessions in the library once or twice a week and that this kind of assault happened every time.

[5] He explained that:

> "As the time went on he'd pull his old fellow out and wanting me to suck his penis and that."

[6] The following exchange occurred in his evidence:

> "Was there a time that you did suck his penis?---Yep.
>
> Yeah. Tell us about those times when you sucked his penis?---I fucking latched onto it and bit it.
>
> You latched onto it and bit it?---Yeah.
>
> Tell us about that time when you latched onto it and bit it?---Because he wanted to put it in my mouth. As soon as he put it in my mouth I just fucking went… I didn't bite him hard on it [indistinct] just let him – don't do that again.
>
> Did he react to that?---Of course he did."

[7] The appellant's assaults became more serious. The complainant described an occasion on which the appellant sodomised him.

"… It was from the swimming carnival, taking stuff back to the thing, and – because I'm still wet from the thing, and he had a towel and he was just drying me down.

What happened after he dried you down?---Said take your clothes off so you can put other clothes on – dry clothes on. And that's when I bent over, and that's when he went to slide it in me.

Tell me about that. How did he slide it in you?---I was bent over. The next minute I feel this thing – I feel the fucking thing going into me, and that's when I lashed around.

What was going into you? Could you see?---Well, he used to stick his fucking finger up my arse a fair bit, so I knew it was more than his finger.

All right. Well, we'll get to the sticking finger into the arse very soon, but let's go back to this incident where you said that he fucked you in the arse. Okay?---Well, he didn't actually fuck me. He just tried to put it in me and that's - - -

Yeah?--- - - - when I fucking reacted.

Yeah. Well, did he get any of it in you?---I think he must have just got the head or something in there, because it fucking hurt."

[8] The appellant had other proclivities:

"… I'm pretty sure it was getting late – a little bit later in the year. It would've been the summertime.

And where were you when this happened?---Everything happened at the library.

So it was not the office, it was in a library?---In his office – his office is in the library, anyway.

So you – sorry – so, just to clarify - - -?---Everything happened, it was in his office.

In his office?---Never in the – never in the library. Only time it ever happened in the library was when I attacked him.

All right. So the last - - -?---When he put the penis in my arse.

I see. But the one that you were telling me about did not happen in the office was the one when he put his penis in your bum - - -?---Yeah.

- - - and when you assaulted him?---Yeah.

But all the others happened in the office?---All happened in the office.

I've got that. Thank you. So let's just go back to him sticking his finger inside your bum that first time, okay? You said it happened in the office. And you thought it was later in the summertime. Tell me how that started?---Same thing, like, sitting me on his lap. And he'd be groping me and put his hands up my shirt. The next time, he was sliding his hands down through my – down in my pants and all that,

> you know, trying to finger me, trying to get me hard and all that sort of stuff. And as I was telling you, he turned me [indistinct] facing him. That's when he stuck the finger in my arse."

[9] These assaults resulted in the appellant being charged with four counts. Count 1 concerned the first occasion of sexual assault of indecent dealing in the library. Count 2 related to the appellant putting his penis in the complainant's mouth. Count 3 was the indecent dealing involving the appellant's insertion of his finger. Count 4 was a charge of carnal knowledge against the order of nature by sodomising the complainant, a boy under the age of 16 years.

[10] The Crown called a witness, Paul Smith, who had been the director of Boystown during the period when the complainant was living there. He said that there was a swimming carnival once a year. By reference to a newsletter produced at the facility he was able to recall that in 1983 the carnival took place on 2 March. It was also confirmed that the appellant left the staff of the institution a month before that.

[11] The appellant did not give evidence and called no evidence. He was convicted on all charges.

[12] He appealed against his convictions upon five grounds but has abandoned two of these. Ground 5 was that the verdicts of the jury were unreasonable or could not be supported having regard to the evidence. In his written outline, the appellant submitted that the verdicts were unreasonable because of:

> a. Inconsistent accounts of when and where the offending occurred;
>
> b. Implausible accounts where the conduct was alleged to occur near other children and/or in a glassed office within the library;
>
> c. Where there was reasonable doubt on count 4 because of either 'alibi' evidence;
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> d. Where the evidence did not come up to proof on the tying up count (count 2);
>
> e. Where the evidence did not come up to proof on the biting evidence;
>
> f. Doubts on counts 4 (as set out herein) ought to have caused doubt on the remaining counts;
>
> g. The complainant's memory and reliability issues;
>
> h. Considerable delay in a complaint being made; and
>
> i. The non-responsive and argumentative responses by the complainant when challenged as to credit and/or reliability.

[13] The principles that are applicable when it is said that the verdict of a jury is unreasonable, or that it cannot be supported having regard to the evidence, are well established. The Court must conduct an independent assessment of the sufficiency and quality of the evidence and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence. Because the jury is the body which is entrusted with the primary responsibility for determining guilt or innocence, and because the

jury has had the benefit of having seen and heard the witnesses, the jury's verdict must be given special respect and legitimacy. Setting aside of a jury's verdict on the ground that it is unreasonable is a serious step which must not be taken without particular regard having been given to the advantage enjoyed by the jury over a Court of Appeal. Nevertheless, even if there is evidence upon which a jury could convict, the conviction must be set aside if it would be dangerous in all the circumstances to allow the verdict of guilty to stand.[1]

[14] The written outline did not state in what respects the complainant's accounts were inconsistent or implausible. Nor did the written outline identify the evidence or what it was that supported the remaining sub-paragraphs quoted above. The outline promised that oral argument would furnish this information. In oral argument it emerged that there were four submissions to support these nine particulars of unreasonableness. The first contention was that the jury's verdict on count 4, the sodomy charge, was unreasonable because the complainant's evidence tied the event to a swimming carnival. The appellant's counsel argued that there was an "alibi" because the offence was said to have been committed when the complainant was in grade 10, that is to say in 1983, but the appellant had left the institution a month earlier.

[15] It was difficult to follow why this raised a point about an alibi. It was common ground at trial that the appellant had left a month before the swimming carnival on 2 March 1983. No doubt the jury was entitled to take into account this circumstance as impinging upon the complainant's credit.

[16] The learned trial judge directed the jury about significance of this inconsistency as submitted by the prosecutor. His Honour said:

> "She made submissions to you about the swimming carnival and said, well, he explained that he wasn't certain whether he was in grade 9 or grade 10, and he wasn't certain whether it was the swimming carnival. That he said he was wet, that – she said, well, there's a swimming carnival each year, and that the pool was used on other occasions and it could have been one of those other occasions. But she referred to the evidence of the complainant about how he said the defendant used the towel to dry him, and that was consistent with what he said about having been swimming beforehand. And she made submissions to you about what he said about assaulting the defendant, and said, well, you'd accept that that – that some assault did occur. She said you'd find all of that, from the detail of the account he gave and the way in which he gave it, that his certainty as to what he remembered, that it was a reliable account and a truthful one."

[17] The appellant's oral submission was that the jury ought to have acquitted because there was "clear evidence about when [the appellant] left the school … in February".

[18] Of course, there has never been a criminal trial in which there has been no inconsistency at all between the evidence of a key prosecution witness and some other proven facts. That is why we have juries to resolve such conflicts by a

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1 *SKA v The Queen* (2011) 243 CLR 400 at [11] – [14]; *BCM v The Queen* (2013) 88 ALJR 101 at [31].

verdict. Mere demonstration that such an inconsistency exists establishes nothing for the purposes of an appeal.

[19] The second argument in support of this ground was that:

> "… there are implausible aspects of the conduct where there was a glass partition and children were in the library nearby reading their books."

[20] On the complainant's evidence three of the offences occurred in a place in which the commission of the offences might have been seen by some of the other boys kept at the institution.

[21] The jury could not but have realised that on the complainant's account even the victim of his predation did not complain at the time; it is hardly surprising that none of the complainant's peers failed to do so. The complainant said that they all knew what was going on. In any event, as sad experience in this Court shows, men who prey upon children commonly commit their offences brazenly.

[22] The third matter that was raised in support of this ground was that the evidence of the complainant was not specific about timing. It was never made clear why the complainant's failure to identify the specific dates of the offences, which were merely examples of many other uncharged offences, could have mattered. No particulars had been sought or provided.

[23] The final argument raised in support of this ground was that the complainant had suffered a head injury and that his memory had been affected. The complainant said in evidence:

> "I don't remember a lot of things."

[24] However, he also said:

> "No, the [memories of Boystown are the] few things I never forgot [indistinct] yeah, I've been [indistinct] for 30-odd fucking years. Lucky you caught him here."

[25] The complainant also said:

> "I know a fucking penis went up my arse."

[26] The learned trial judge emphasised to the jury that the sole evidence implicating the appellant was the evidence of the complainant. He instructed them that before they could convict they had to be satisfied beyond reasonable doubt on the evidence of the complainant alone that the offences had been committed. He reminded the jury that the offences had happened over 30 years ago and gave a *Longman*[2] direction. He pointed out that the complainant was a boy at the time and that memories can fade. He reminded them of the mental problems associated with the complainant's head injury as well as the problems that might have arisen by reason of his admitted alcoholism. He told the jury that, as the complainant had admitted, he had had to "rebuild" his memory.

[27] No re-directions were sought.

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2 *Longman v The Queen* (1989) 168 CLR 79.

[28] None of these arguments, taken singly or together, are capable of sustaining this ground of appeal which, in my opinion, must be rejected.

[29] Ground 2 was based upon a particular of count 4, the charge of sodomy, which placed the commission of the offence in the "office in the library". The evidence of the complainant deviated from the particular by placing the commission of the offence in the library rather than in the office which was part of the library.

[30] The learned trial judge received a note from the jury inquiring whether the particulars specified were correct. The prosecutor, Ms Balic, acknowledged that, to that extent, the evidence of the complainant did not conform to the particulars.

[31] The precise place of the commission of the offence, whether in the body of the library or in the appellant's partitioned office within the library, in either of which place the commission of the offence would have been visible to the other boys using the library, was never a matter of contention at the trial. Not only is this plain from a reading of the evidence in chief and cross-examination of the complainant, but it also emerges starkly from an actual acknowledgment by the appellant's trial counsel when the jury's note had been received. The following exchange occurred:

> "HIS HONOUR: … Nothing turns on that, does it, Mr Taylor (appellant's counsel)?
>
> MR TAYLOR: I'd actually missed that fine detail. There needs to be an amendment of the particulars. I suppose formally it would be a ---
>
> HIS HONOUR: Yes.
>
> MR TAYLOR: Because the particulars were based on the evidence that was expected."

[32] Later, the appellant's counsel said:

> "MR TAYLOR: Your Honour, I have no resistance to the contention that particulars can be amended to reflect the evidence as it comes out at trial. The concern I have is that at what point that can be done, and I just – I just hadn't turned my mind to it. Your Honour is correct, the evidence is pretty clear.
>
> HIS HONOUR: Yes. And what I would say to them is that it's unnecessary for the prosecution to prove that. What they have to prove are the elements of the offence. If I'm wrong on that you've got an appeal point, but I think that's all I can do.
>
> MR TAYLOR: Yes, your Honour. And I – I don't want to be accused of sitting on my hands to preserve an appeal point. What I might do is I might have to turn my mind to it a little bit further and make sure that I don't run that concern."

[33] Counsel informed his Honour that he would consider the matter. It was never mentioned again.

[34] The learned trial judge instructed the jury that the evidence was that the offence had occurred in the library proper and not in the office. He told the jury that the particular provided by the Crown was not consistent with the evidence, but the jury

had to focus upon the elements and whether they had been proved beyond reasonable doubt.

[35] The point is entirely without merit and should be rejected.

[36] Ground 3 related to the so called "alibi". The written outline of argument submitted:

> "The trial miscarried as a result of the absence of specific direction and a new trial ought to be ordered."

[37] As I have already said, there was no question of alibi. It was common ground between the parties that the offence could not have been committed on 2 March 1983 because, by that time, the appellant was no longer a member of staff at Boystown. Consequently, if the offence had been committed it must have been committed either at the swimming carnival in the previous year or on another occasion associated with the use of the swimming pool. Undoubtedly, this inconsistency in timing was a matter that could legitimately be raised for the consideration of the jury when it was assessing the complainant's credit. Accordingly, the appellant's counsel made a submission based upon that inconsistency and the Crown responded. The learned trial judge reminded the jury of the explanation for the inconsistency offered by the Crown Prosecutor. He equally reminded the jury of the emphasis placed upon this discrepancy by the appellant's counsel. The point was made unmistakably by each counsel and was the subject of specific direction by the judge. When pressed to articulate some further specific direction about "alibi" that the learned trial judge ought to have given but which he had failed to give, the appellant's counsel was unable to do so. This ground ought to be rejected.

[38] The remaining two grounds, grounds 1 and 4, were abandoned.

[39] In my view this appeal ought to be dismissed.

[40] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the order proposed by his Honour.

[41] **McMEEKIN J:** I agree that the appeal should be dismissed for the reasons given by the President.