SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBZ* [2018] QCA 16
PARTIES:	**R** **v** **CBZ** (appellant)
FILE NO/S:	CA No 258 of 2016 DC No 150 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Mackay – Date of Conviction: 31 August 2016 (McGill SC DCJ)
DELIVERED ON:	27 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2017
JUDGES:	Fraser, Philippides and McMurdo JJA
ORDERS:	**1. Application for leave to adduce fresh evidence granted.** **2. Appeal allowed.** **3. Conviction on count 1 set aside and sentence on that count quashed.** **4. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where the appellant was convicted by a jury of one count of sexual assault – where a new witness claimed the complainant had deliberately sought the new witness to give perjured evidence – where the witness's affidavit was apparently credible or capable of belief – whether there was a significant possibility the jury would have acquitted the appellant had the fresh evidence been before it at trial *Criminal Code* (Qld), s 668E(1) *Gallagher v The Queen* (1986) 160 CLR 392; [1986] HCA 26, considered *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35, applied

Nicholls v The Queen (2005) 219 CLR 196; [2005] HCA 1, cited
R v Condren; Ex parte Attorney-General [1991] 1 Qd R 574, cited
R v Kleimeyer [2014] QCA 56, cited
R v Spina [2012] QCA 179, cited
R v VI [2013] QCA 218, considered
Van Beelen v The Queen (2017) 91 ALJR 1244; [2017] HCA 48, applied

COUNSEL: S W McLennan for the appellant
J A Wooldridge for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** After a trial in the District Court the appellant was convicted of sexual assault (count 1). The jury found the appellant not guilty of rape (count 2) and assault with intent to rape the same complainant (count 3). The appellant abandoned the original ground of his appeal that the conviction on count 1 was unsafe and unsatisfactory. The appellant relied only upon the ground in the amended notice of appeal that there was a miscarriage of justice by reason of the fact that fresh evidence from a witness, Mr BR, was now available. The appellant applied for leave to adduce that evidence. For the following reasons that ground of appeal should be accepted, the conviction should be set aside, and there should be an order for a new trial.

Evidence about count 1

[2] The appellant was married to the complainant's daughter in 2004. They separated in 2013. There were two children of the marriage. The complainant's daughter had two children from a previous relationship.

[3] The complainant's family owned a hairdressing business. They used a warehouse for the storage of stock. The appellant and his brother were employed in the business. The complainant gave the following evidence. On a hot summer day in about 2004 the complainant, the appellant, an office administrator (BM), and the appellant's brother were at the warehouse. Whilst the complainant was walking in the warehouse towards a door leading to outside, the appellant came up beside her, pulled the top of her dress down to expose her breasts, and said, "Great tits". The appellant's brother was standing about five metres away in a different doorway. They both laughed. The complainant pulled her dress up again and told the appellant that if he ever did that again she would kick him in the nuts. The complainant immediately left the warehouse and drove quickly away in her car. Before the assault she had been talking to BM in the office. BM had followed her as she walked through the warehouse towards the door and was behind the complainant at the time of the assault. The complainant estimated that the distance between them was about seven metres. Later on the same day, probably in the afternoon, the appellant told the complainant that he would kill her if she told anyone anything.

[4] In cross-examination the complainant initially did not accept that on two occasions when she spoke with police, after the alleged threat by the appellant to kill her, she

had not told police of that threat. However the respondent accepted that it could be inferred from her further answers in cross-examination that her police statement did not include a statement that the appellant had threatened to kill her. When she spoke with police on two occasions in 2014 she probably did not mention that BM had witnessed the assault. (On the complainant's evidence she had known since the night of the offence that BM said she had witnessed the assault.) The complainant asked BM to give a statement after the complainant spoke to the prosecutor in conference. The complainant accepted that BM and the appellant disliked each other.

[5] Both parties formally admitted that the complainant first complained to police about any of the charges in the indictment on 30 March 2014. She did not complain about the appellant threatening to kill her in 2004 and 2005 because the appellant would have killed her. The complainant did not complain to police about the appellant sexually assaulting her when police were called following a complaint against the appellant by the complainant's husband. She was too ashamed to do so. When the complainant's daughter and the appellant separated for a few months around Christmas 2008 and early 2009 the complainant called the police when the appellant came to her home but the complainant did not tell her daughter that the appellant had sexually assaulted her. The complainant told her daughter about the appellant having offended against her only after her daughter and the appellant separated.

[6] The complainant agreed that there were Family Court proceedings on foot between her and the appellant. She denied that those proceedings were about who had custody of the youngest two children, said that the proceedings were about the appellant wanting money, and that the children were not mentioned. (The appellant tendered an amended initiating application in the Family Court of Australia by which the appellant sought a financial order by way of property settlement and parenting orders under which the two youngest children live with the appellant part of the time and the complainant's daughter part of the time.) The complainant denied that she had been interviewed by or heard the name of a psychologist appointed by the Family Court to interview other members of the complainant's daughter's family. (The complainant's daughter agreed in cross-examination that the Family Court appointed-psychologist spoke with the complainant and produced a report as a result of that psychologist's interviews with the complainant and others.) The complainant denied having become aware in early 2006 that the appellant was accusing the complainant of sexual harassment. When the complainant was asked whether she told her treating psychiatrist in April 2006 that the appellant was now making accusations that she sexually harassed him, the complainant initially said that she probably did tell her psychiatrist that but then subsequently denied having done so and said that she told her psychiatrist that the appellant was sexually harassing her. (The psychiatrist gave evidence in the defence case that the complainant did not ever make any complaint to him that the appellant was sexually harassing her and the complainant told him that she thought the appellant was now making accusations that the complainant sexually harassed him so as to stop the complainant's daughter from leaving him.)

[7] The complainant was also cross-examined about her evidence in support of the more serious offences charged in counts 2 and 3. The respondent did not contest the submission for the appellant that some of the complainant's evidence about those alleged offences was capable of being regarded by the jury as reflecting adversely on the reliability or credibility of her evidence.

[8] BM gave evidence of an occasion between 2004 and the beginning of 2006 when she was at the warehouse. BM said that she saw the appellant pull down the complainant's top as the complainant was getting into her car. The appellant's brother was present at a nearby shipping container and both he and the appellant laughed. Because of BM's position she could not see the complainant's breasts. In cross-examination BM agreed that she spoke with police in March 2014 about a different matter involving the appellant and she did not tell police about this incident at the warehouse.[1] BM was outside the shipping container and not really at the access door (as the complainant had stated in her evidence). BM gave evidence on a Monday. The complainant rang her on the preceding Friday to tell her that she had given her evidence in court on that day.

[9] GN, who was called to give evidence of a preliminary complaint by the complainant, gave evidence that on an occasion in Bundaberg, which she thought was in 2004, when the complainant and the appellant came into the salon where GN was working, the complainant was stressed, upset, and unsteady on her feet. The appellant's brother gave evidence in the Crown case that he worked at the warehouse in about 2005 and he did not recall there being any incident between the appellant and the complainant. In cross-examination he denied that he had witnessed an incident in which the complainant's top was pulled down by the appellant, exposing her naked breasts. The complainant's daughter gave evidence that in a telephone conversation in March 2005 the complainant told her that the appellant had tried to rape her. The complainant's daughter gave evidence about the state of the appellant's pubic hair which contradicted the evidence on the same topic given by the complainant under cross-examination about her evidence on count 3.

[10] The appellant gave evidence in which he denied that he had engaged in any of the conduct the subject of the three charges. He gave evidence that the complainant had sexually harassed him and on occasion during a trip to Bundaberg he awoke to find the complainant on top of him with her breasts in his face.

Additional evidence

[11] The appellant applied for leave to adduce evidence in the appeal in the form of an affidavit by BR. The affidavit included statements to the following effect. BR had known the complainant since about 2005 to 2006 when he started an apprenticeship as a hairdresser for her company. He knew the appellant in the same period because the appellant worked for the company in a managerial role. He was not a friend of the appellant's and their working relationship was difficult at times. BR left the company some months after he completed his apprenticeship in about 2010. After BR heard in 2014 that the appellant had been charged with a number of criminal offences the complainant contacted him. The complainant told BR about the criminal charges. BR could recall only that the charges related to the appellant touching a child of the complainant (from a previous relationship). The complainant told BR that the appellant was trying to take the salons but he would not get anything. The complainant wanted to change the children's surnames. The complainant wanted the appellant put in jail and asked BR if he would give a statement to the police. BR deposed that the complainant said to him, "When you write your statement, make sure you over-exaggerate it". BR said he did not have time to write any

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1 The respondent challenged the appellant's submission to this effect but the appellant's submission is supported by the evidence of BM at Transcript 2-25-2-26, especially 2-26 line 29.

statement. The complainant offered to write it for him and said that he could just sign it.

[12] The complainant told BR that he had witnessed various things, including: the appellant grabbing the complainant by the wrist and dragging her out of the salon; the appellant pushing the complainant's daughter against a cupboard and slamming the door; the appellant slapping the complainant on the arse when they left the salon to get a coffee; BR saw bruising on the complainant's daughter's body and a scar on her head; and the scar was caused by the appellant throwing a chair at the complainant's daughter. BR told the complainant that he had not witnessed those things.

[13] BR had not seen any of the incidents which the complainant raised with him. When he told her, "I don't remember that", the complainant would say, "Yes you do love, you were there". The complainant was very insistent that he had seen things which he had not seen. She wanted BR to agree with her that those things had happened. He did not tell the complainant anything he thought would assist her. So that the conversation would finish he agreed to sign a statement that the complainant told him she would email to him. He did not intend to sign a false statement. About 20 minutes after the conversation BR sent a text message to the complainant with words to the effect that he did not want to be involved.

[14] In about December 2016, BR told a former employee of the complainant's company of the basics of his conversation with the complainant. Subsequently that employee asked BR if he was willing to speak with the appellant's legal representatives. He was contacted by the appellant's legal representatives and spoke with them on a date which was after the appeal had been commenced. BR deposed that he felt a moral duty to provide the affidavit because of the forceful manner in which the complainant insisted he had seen things which he had not seen and specifically asked him to exaggerate.

The parties' submissions

[15] The appellant argued that the additional evidence was admissible under the bias exception to the collateral evidence rule: *Nicholls v The Queen*.[2] BR's evidence was admissible evidence of bias. That evidence revealed that the complainant had a financial motive to her biased wish that the appellant not have shared custody of her grandchildren. This bias was revealed by the complainant's request that BR provide an "over-exaggerated" statement, in which the appellant evidenced a request that he provide a dishonest statement. The bias was also revealed by the complainant offering to write a statement for BR to sign, which the complainant must have envisaged would contain false information, since BR had told the complainant that he had not witnessed the events she suggested to him.

[16] The appellant argued that the additional evidence was relevant, credible, and cogent and established a significant possibility that, if the admissible evidence at the trial together with the fresh evidence were before the jury, a jury acting reasonably would have acquitted the appellant: *R v VI*.[3] The evidence was devastating for the complainant's credit, demonstrating that she had strong familial and financial motivations to have the appellant jailed and was willing to suborn false evidence for that purpose. The jury would have acted upon the evidence of the complainant and BM in convicting the appellant of count 1. The fresh evidence would have thrown a

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2 (2005) 219 CLR 196.

3 [2013] QCA 218 at [64], [66], [68]; *Van Beelen v The Queen* (2017) 91 ALJR 1244 at [22], [23], [32], [75].

doubt upon the evidence of the complainant, thereby establishing a significant possibility that a jury, acting reasonably, would have acquitted the appellant. The appellant also argued that whilst the evidence did not prove that the complainant persuaded or cajoled BM to give false evidence, the knowledge that the complainant was the kind of the person who would attempt to do so would be relevant to a jury acting reasonably, in circumstances in which BM had not mentioned any indecent assault in the first statement she had provided to police and only BM and the complainant knew what had been said in the conversation which led to BM providing a further statement earlier in the week of the trial.

[17] The respondent noted that whilst an inference could be drawn that the matters in BR's affidavit were not known to the appellant at the time of his trial, to the knowledge of the appellant, BR was an employee of the business at which both the complainant and the appellant worked during the period of the alleged offences. Upon that basis the respondent argued that it was foreseeable to the appellant that BR might have knowledge of matters relevant to the appellant's defence, which focussed primarily on the complainant's credibility and her interactions with the appellant. In the absence of evidence of what enquiries, if any, were made of other employees of the business, the view was open that with due diligence the evidence in BR's affidavit would have been available to the appellant.

[18] The respondent argued that the evidence of BR should be categorised as "new" or "further" evidence rather than "fresh evidence": *R v Spina*.[4] If the evidence was not fresh evidence it would be necessary for the appellant to bring itself within a residual discretion in exceptional cases to receive the additional evidence upon the footing that not to do so would lead to a miscarriage of justice.[5] The respondent acknowledged that on the face of BR's affidavit his statement was not inherently lacking in credibility but was apparently credible or capable of belief.[6] The respondent argued, however, that the evidence was not such as to give rise to a concern that there had been a miscarriage of justice. The evidence was not in the form of a retraction or recantation by the complainant of her evidence at trial or in the form of an inconsistent statement. It does not directly refer to an allegation which was before the jury at the trial. It concerned only matters relating to the complainant's credibility which had been raised in any event at the trial. The evidence did not impact upon the assessment of the veracity of BM's evidence at trial as there was no evidence to justify an inference that the complainant had cajoled BM to give evidence unfavourable to the appellant. There was nothing to suggest that BM's evidence was exaggerated. Accordingly, BR's evidence that the complainant had asked him to exaggerate his evidence of events which the complainant stated he had witnessed would be unlikely to carry significant weight with a jury. The circumstance that BM had not referred to the incident charged in count 1 when providing a statement in 2004 was not significant because her evidence at trial was the statement she provided related to a different matter which was not a criminal proceeding. For those reasons, the respondent submitted, upon the footing that BR's evidence was not fresh evidence, appellant intervention was not warranted, because, even accepting and acting upon the further evidence, a conclusion of guilty remained reasonably open so that no miscarriage of justice had been demonstrated.[7]

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4 [2012] QCA 179 [32]-[34].

5 *R v Condren; Ex parte Attorney-General* [1991] 1 Qd R 574 at 579; *R v Spina* [2012] QCA 179 at [34].

6 Cf *Gallagher v The Queen* (1986) 160 CLR 392 at 404 - 407.

7 *R v Kleimeyer* [2014] QCA 56 at [61].

The respondent submitted that if the Court concluded the evidence was fresh evidence the same result would follow, because, for the same reasons, the Court should not conclude that it was likely or that there was a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the fresh evidence had been before it at the trial.[8]

Consideration

[19] It is not suggested BR witnessed any act relevant to the charges against the appellant. There is also no suggestion that he was mentioned in any of the police statements. Nor is there a reasonable basis for thinking that the appellant should have known that there had been or was likely to have been a relevant communication between the complainant and BR. BR's potential evidence came to light only because the former employee to whom he spoke happened to be married to a barrister who (so the court was informed by defence counsel) shared chambers with defence counsel. There was no particular reason why it should have occurred to the appellant that his legal representatives should interview BR. It would be setting the hurdle too high to find that the appellant's legal representatives should have interviewed all of the appellant's co-employees on the off chance that one of them might disclose something of assistance to the defence. BR's affidavit should be regarded as "fresh evidence", being evidence which could not with reasonable diligence have been discovered at the time of the trial.

[20] The question the Court must ask itself is whether the unavailability of fresh evidence at the trial involved a miscarriage of justice: *Criminal Code*, s 668E(1). In *Gallagher v The Queen* Mason and Deane JJ considered that there will be a miscarriage of justice if, upon the admissible evidence at the trial together with the fresh evidence, there is a significant possibility that a jury acting reasonably would have acquitted the appellant.[9] Gibbs CJ considered that this test was a practical guide but emphasised the necessity to focus upon the question whether there was a miscarriage of justice.[10] Brennan J considered that the test was whether an acquittal was "likely" rather than "a significant possibility".[11] In *Mickelberg v The Queen*[12] Mason CJ and Deane J approved the majority view in *Gallagher* (Gibbs CJ, Mason and Deane JJ). Toohey and Gaudron said that the fresh evidence in combination with the evidence at trial must be such "that the jury would have been likely to entertain a reasonable doubt … (*Gallagher* per Brennan J) or, if there be a practical difference, that there is 'a significant possibility that the jury, acting reasonably, would have acquitted the [accused]'" (*Gallagher*, per Gibbs CJ and per Mason and Deane JJ)". In *Van Beelen*,[13] the High Court held that a majority in *Mickelberg v The Queen* had stated the applicable test as being whether "the court considers that

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8 *Mickelberg v The Queen* (1989) 167 CLR 259 at 273 (Mason CJ), 301 (Toohey and Gaudron JJ), citing *Gallagher v The Queen* (1986) 160 CLR 392. See also *Van Beelen v The Queen* (2017) 91 ALJR 1244 at [22], [23], [32], [75].

9 (1986) 160 CLR 392 at 399 (Gibbs CJ) and 402 (Mason and Deane JJ). Dawson J expressed the similar test whether a jury might entertain a reasonable doubt (at 421). Brennan J disagreed with that test, endorsing "likely" instead of "a significant possibility" (*Mickelberg* at 270). See also, *R v VI* [2013] QCA 218 at [64], [66], citing; *Mickelberg v The Queen* (1989) 167 CLR 259, 273, 292, 301-302.

10 (1986) 160 CLR 392 at 399 (Gibbs CJ).

11 (1986) 160 CLR 392 at 421.

12 (1989) 167 CLR 259 at 301.

13 (2017) 91 ALJR 1244.

there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial."[14]

[21] If the fresh evidence is to be admitted it must be relevant, credible and cogent having regard to the evidence adduced at the trial.[15] If a jury accepted BR's evidence, the jury reasonably could conclude that, knowing that BM did not have any personal knowledge of the events discreditable to the appellant which the complainant suggested BR had witnessed, the complainant both sought to persuade BR to sign a statement testifying that he witnessed those events and asked him to "over-exaggerate" his statement against the interests of the appellant. If a jury did accept that evidence, the jury reasonably could conclude that the complainant quite deliberately sought to persuade BR to give perjured evidence adverse to the appellant. The fresh evidence is relevant as evidence of a bias by the complainant. That feature of the fresh evidence is unaffected by the fact that the fresh evidence is unrelated to the circumstances of the offence of which the appellant was convicted. It is common ground that evidence of the complainant being biased is relevant. The respondent did not submit that the fresh evidence is inherently unlikely or in any respect inconsistent with any of the evidence at the trial. Of course the evidence has not been tested and it would be a matter for the jury to decide whether it should be accepted, but on the face of BM's affidavit it is credible.

[22] The transcript of the complainant's evidence at the trial makes it clear that she wasted few opportunities to make her strong dislike of the appellant clear. So much is clear upon a reading of the transcript. The jury could not have been unaware of it. But it does not follow that the fresh evidence of bias is not cogent. In my view it is cogent. A conclusion that a witness is so biased as to render it unsafe to rely upon the witness's evidence does not necessarily follow from a conclusion that the witness strongly dislikes the accused. If the jury accepted the fresh evidence and concluded that that the complainant quite deliberately sought to persuade BR to give perjured evidence adverse to the appellant, the jury would be required to assess the credibility of the complainant and the reliability of her evidence in a very different context. The jury then might much more readily discount the complainant's evidence of the offence of which the appellant was convicted. The jury were not prepared to convict the appellant on the two more serious counts upon the evidence of the complainant. Although the complainant's evidence upon the remaining count was substantially corroborated by BM, the jury might conclude that the additional damage to the complainant's credibility wrought by the fresh evidence rendered it unsafe to place any weight on her evidence. It is also relevant that BM's evidence was inconsistent with the evidence of the appellant's brother. In this context, the lateness and circumstances of the production of BM's evidence created grounds upon which the jury might treat that evidence with caution. The fresh evidence might well have been enough for the jury to conclude that the prosecution had not excluded a reasonable doubt that the appellant was guilty of the offence of which he was convicted. The fresh evidence satisfies the "significant possibility" test.

[23] Particularly the nature and strength of the bias suggested by the fresh evidence and the fact that it is the complainant who is said to be biased justify the conclusion that the fresh evidence, when understood in the context of the evidence at the trial,

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14 (2017) 91 ALJR 1244 at [22], [23], [32], [75].

15 *R v VI* [2013] QCA 218 at [68].

reveals that there has been a miscarriage of justice such as to require that the conviction be set aside and a new trial ordered.

Proposed order

[24] I would grant the application for leave to adduce evidence in the appeal, allow the appeal, set aside the conviction, and order a new trial.

[25] **PHILIPPIDES JA:** I agree with the reasons given by Fraser JA and with the orders proposed by his Honour.

[26] **McMURDO JA:** I agree with Fraser JA.