

COURT OF APPEAL

**SOFRONOFF P
PHILIPPIDES JA
DAUBNEY J**

**CA No 225 of 2017
DC No 88 of 2016**

THE QUEEN

v

STERNBERG, Warren Neil

Appellant

BRISBANE

TUESDAY, 8 MAY 2018

JUDGMENT

SOFRONOFF P: The appellant was charged with two offences of indecent dealing with a child under the age of 16 and two counts of rape of the same child. A jury found him guilty on all four charges. He now appeals on the ground that the jury's verdict was unreasonable and that it cannot be supported by the evidence. He bases this ground upon certain inconsistencies between the evidence of the complainant and the evidence of two witnesses who were in the house when the offences were alleged to have been committed. Those inconsistencies mean, the appellant submits, that the jury could only have been satisfied of his guilt if "they completely accepted the evidence of the complainant" and had "discounted the evidence" of the other two witnesses. However, he submits, there was no rational basis upon

which to discount the evidence of either of those two witnesses. It follows, so the argument runs, that the verdicts were both unreasonable and unsupported by the evidence.

That submission is misconceived. The trial was a short one. The Crown led evidence from the complainant and from two of the people who had been at the house at which the complainant was living and where the offences allegedly took place. There was also evidence from two witnesses concerning preliminary complaint and some evidence given by the complainant's father. This appeal does not turn upon the evidence of the latter three witnesses and they can be put to one side.

The complainant was 15 in 2015. She had several siblings. Her mother and father had separated and her father had remarried a woman who had her own children. The complainant did not get on with her stepmother and, on the evidence, she was very unhappy at home. In July 2015, the complainant told her school chaplain that she had been raped by the appellant. Police interviewed her the next day. In the recorded interview which was tendered at the trial, the complainant said that her father and his wife had gone to the Gold Coast for a four day event. Her stepmother's sister, Christal, agreed to look after the couple's children while the parents were away. She was accompanied by her own children and by the appellant, with whom she had a relationship at the time.

On the date that the offences were committed, the appellant drove the complainant, the complainant's brother and Christal's youngest son to the young boy's auntie's place, where he was to stay. They then returned to the complainant's home. The appellant, Christal and Christal's nephew, Dylan, who was aged about 16, began drinking scotch and Cokes. Christal said in her evidence that she and the appellant drank about five of these. Dylan's evidence was less quantitative but more qualitative. His evidence to his own condition was that, "Let's just say I wasn't that pissed and not acknowledge what I was doing." He said that the appellant was, "About the same stage as me."

The complainant told police that she had been watching a movie on a television in her room. There is conflicting evidence about which movie she was watching. She said that it was Billy Madison. Christal and Dylan said that it was Happy Gilmore.

As the complainant explained, both movies had “the same characters and stuff” so this difference in their recollection is hardly critical. The complainant said that the appellant came into her room and he began, “Touching my boobs and my vagina.” She described these acts in more detail. She said that he then took off her clothes and put his fingers in her vagina, then he inserted his penis. He withdrew it without ejaculating. He had only pulled his pants down around his ankles and he pulled these back up and told her that she had to tell nobody about what had happened, otherwise “they” would get into trouble. He then left. She remained in the room crying. She was woken on the next morning by the appellant but on her evidence she ignored him. On subsequent occasions she said he again tried to fondle and to kiss her. In cross-examination the complainant accepted that earlier in the evening Dylan had come into her room and had watched the movie with her for a time. She said that he then left and the appellant entered. She denied that Dylan and the appellant had ever been in the room together.

She accepted that she had told police three times that the offences had been committed in January 2015. In fact, they must have been committed in April of that year because it later became clear that it was in that month that her father and his wife had attended a particular event on the Gold Coast.

Christal’s evidence was that she was drinking in the lounge room that night. She said that she and the appellant had been drinking most of the night. She was unable to say how much the appellant had to drink because, “He wasn’t in the lounge room with me for most of the night.” She was aware that the complainant was in her own room and that Dylan had been in there also, but she could not say for how long Dylan had been there. She did not know how long the appellant stayed in the complainant’s room, but said that, “He was in there most of the night.” She recalled entering the room and seeing the appellant, Dylan and the complainant on the lower bunk bed watching the movie. Some time later she recalled that she went to the room again and saw the appellant asleep on the bed. Dylan and the complainant were there watching a movie. She told the appellant to get up and go to bed.

He awoke, but she did not see him leave. She and Dylan went outside to smoke cigarettes. When she returned, the appellant was still asleep and she told him to go to bed. She waited for him to leave the room. In cross-examination she volunteered that on this occasion she noticed that the appellant was sleeping under the covers on the complainant's bed. Dylan gave evidence that he had joined the complainant to watch the movie and that the appellant had come in and had sat down to watch the movie also. Dylan said that he left after about five minutes and went to play his Xbox.

He returned to the room some time later and saw that the appellant and the complainant were still there watching the movie. He left again. After some time he returned once more and observed that both of them appeared to be asleep. He then joined Christal outside for a cigarette. Dylan had said that he had been in the room with the complainant and the appellant for a short time and that he had visited the room on two more occasions. He did not say that he had remained there on those occasions.

The complainant's evidence was that Dylan had been in the room at an earlier point and had then left. She gave no evidence that he had returned to the room again but nor was she asked whether that had happened. As I have said, Dylan had said that they had been together for a short time but she denied that Dylan and the appellant had ever been in the room together with her. On his evidence the evening had begun by him and the complainant watching TV and the appellant entering the room and, for a short time, their being together until Dylan left. There is a conflict between the evidence of the complainant and Dylan to that extent. In any case, on Dylan's evidence as well as according to the evidence of Christal, the appellant was alone with the complainant for significant periods of time that night. The complainant said that after the appellant had raped her, he immediately left her room.

Dylan's evidence sheds no light upon the movements of the appellant after the offence. Christal said that the appellant finally left the room only after she had told him to go to bed, and that she waited until he had left before leaving herself. The complainant's evidence was clear enough and might even have been regarded by the jury as cogent and precise concerning

the acts constituting the offence. The appellant does not dispute this. She had been wrong when she placed the offence in January rather than in April. When pressed in cross-examination about this mistake, she was candid about her error and forceful about why she might have recalled incorrectly, and the cross-examination went as follows:

“Surely you would have remembered an event such as this to the point where you would have – wouldn’t have made a mistake, not once, but three times as to when it happened?---Well, I remember what happened and how it happened. It doesn’t mean I’m going to remember dates and months.

You did well at school, didn’t you, when you attended school?---Yes, I did.

And you would know the difference between telling the police that an event happened three months after it happened and the date or the month, you would know was vital, wasn’t it, and yet, you said January?---Well, sorry that my life was pretty hard and I was trying to remember things from the top of my head in a hard situation and I mixed it up. Sorry about that.

But you remembered a lot of other things, didn’t you?---I remember the – the stuff that I remember. Like, my brain is going to remember every damn thing. You’ll never remember every damn thing. You’ll remember select things, so you can’t go saying shit like that.”

It was put to the complainant that her allegations were no more than an attempt to gain sympathy for herself in a situation in which her father appeared to be more sympathetic to the needs of his new wife than to her. The cross-examination was as follows:

“I’m suggesting to you that because of the background or what had happened at home, you wanted to create a dramatic event to draw sympathy to yourself. That’s what you did?---Bull crap.

You wanted to get away from Cassandra and her children?---Yeah, so putting some – fucking up someone else’s life in order to benefit my own is exactly what I’d do. Yep, that’s fucking wonderful. You’re a fucking toss. I have created a scenario in order to get out of a house when I could run away. I didn’t have to be there. I was just there because I had nowhere else to go. So creating some shitty situation like that, making a big deal about it, going through all this court stuff, getting screwed around over four times and yet still coming here, makes you still believe that I’m lying? And me going through all this effort and all this trouble for something that I’m lying about, I’m suggesting it does not make any sense.”

The jury might well have thought that, in her evidence, the complainant was making a lot of sense. This is a case in which the applicable principles are not in dispute. The case concerns

the significance of some of the facts. The minor premise in the appellant's argument, on appeal, is that there was "no basis on which to disregard the evidence" of either Christal or Dylan, but there were ample bases upon which the jury could have discounted that evidence. The appellant has correctly acknowledged that the complainant's evidence was consistent throughout the substance of the offending acts. Absent any other factors, it was evidence upon which a jury could safely convict the appellant. The evidence of Christal and Dylan did not preclude acceptance of her evidence because their evidence was capable of being regarded as unreliable. Dylan was certainly intoxicated that night and Christal was probably intoxicated.

As far as they knew that night was an ordinary night when nothing significant had happened. The night only became remarkable when the complainant alleged that she had been raped by the appellant. As she herself correctly emphasised, one's brain is not going to "remember every damn thing". Whether it was she who is right about Dylan's presence and about the appellant's departure, or whether it was Christal who was right or, for that matter, whether they were all wrong, the jury had seen and heard the complainant give clear and uncontradicted evidence of the commission of the offence.

They were plainly right to reject, as they must have done, the ludicrous suggestion that she had invented her allegations in order to get her out of an unhappy household. The title of the movie, the circumstances of the appellant's departure from the bedroom, the occasions upon which Dylan was present or absent were matters which the jury was entitled to regard as matters of detail that did not affect the substance of her evidence and did not affect their view of the complainant's credit.

The jury had the advantage of seeing the three witnesses give evidence. It was for them to consider in a case like this whether the evidentiary conflicts that had been drawn to their attention were sufficient to destroy the complainant's credibility. Certainly the points now raised were, to my mind, incapable of being regarded as so destructive of her credibility as to

lead to the conclusion that her evidence was incapable of sustaining a verdict of guilty. For these reasons I would dismiss the appeal.

PHILIPPIDES JA: I agree.

DAUBNEY J: I also agree.

SOFRONOFF P: The order of the Court is that the appeal is dismissed. Call the next matter, please.