[2018] QCA 205

COURT OF APPEAL

SOFRONOFF P
JACKSON J
BOWSKILL J

CA No 237 of 2017
DC No 21 of 2017

THE QUEEN

v

TAUTU, Mahuta **Appellant**

BRISBANE

FRIDAY, 31 AUGUST 2018

JUDGMENT

JACKSON J: A year ago less one day, the appellant was convicted of unlawfully and indecently dealing with a child, NM, who was under 12 years. He appeals against the conviction on the ground that, on the whole of the evidence, a reasonable jury could not have been satisfied beyond reasonable doubt of his guilt.

On Wednesday, 29 June 2016, NM, who was 11 years old at the time, was staying with the appellant's family at their home in Cairns. She was friends with two of the appellant's children, who were of similar age. They were friends from school and also at church. NM stayed at the appellant's home from the afternoon of Sunday, 26 June 2016 until Thursday, 30 June 2016. It was the first week of the school holidays. During the day on Wednesday, the

appellant was caring for the children, including his children and NM. The appellant's wife was at work. They were playing near the house in a park.

NM's account of what happened may be summarised. She said that the appellant called her into his bedroom and told her to lie down on the bed. She did so but got up again when there was a noise. He asked her to go see what the noise was. She returned to the bedroom shortly afterwards. He told her to lie down on the bed again. He pushed her down. He held her legs down with his own leg and started touching her breasts with his right hand on top of her clothes. He asked NM whether that felt good. She asked for a drink of water. He said yes, and she went out and went straight back to the park. The episode lasted for a period – she said:

> "Like one minute."

On 3 July 2016, during church, NM wrote and passed a note to her friend, Rachel, saying that the appellant had:

> "…put his legs on mine and then touched me everywhere."

The note was handed to an older girl, who asked NM about it on that day. According to the older girl's evidence, NM said the appellant leant over her while she was on the bed and then started to grope her. NM said that the appellant was groping her breasts and her private parts, and felt under her shirt and her bra and under her shorts. At some point in the ensuing days, a pastor at the church other than the appellant was informed of the existence of the note. She arranged to see NM and her mother. NM told the pastor that the appellant had put his knee between her legs and touched her in the chest and shoulder area. NM's mother asked why NM had not told her, and NM replied the appellant had told her not to.

On 18 July 2016, NM was interviewed by police. A video-recording of the interview was made, and the recording was tendered as evidence at the trial. On 3 April 2017, NM's evidence for the trial was pre-recorded. She was then aged 12. Her evidence-in-chief consisted of confirming that everything she told the police officer on 18 July 2016 was the truth. Her cross-examination consisted of only one question – that the appellant did not touch her by putting his hands on her clothes near her breast. She disagreed.

The appellant gave evidence. He denied that he took NM into his bedroom, pushed her onto the bed, groped her in any way or told her not to tell anyone what had happened. He was cross-examined as to events before and after the alleged offending, but none of his answers on those subjects appeared to undermine his evidence or contradicted NM's account with one exception. He accepted that on Monday, 27 June 2016, he held NM's hand on the way to the shop and kissed her hand, but he denied he left saliva on her hand; otherwise, his evidence was unremarkable.

If this Court is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or, on any ground whatsoever, that there was a miscarriage of justice, an appeal against conviction must be allowed. On an appeal such as this, the question is one which the Court must decide by making its own independent assessment of the evidence and determine whether, notwithstanding that there is evidence upon which a jury might convict, nonetheless, it could be dangerous in all the circumstances to allow the verdict of guilty to stand.

The question which the Court must ask itself is whether it thinks that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, but in answering that question, the Court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, this Court must pay full regard to those considerations, and those considerations have been reaffirmed by recent authority.

In the present case, the evidence to be considered by the jury was in short compass. There was nothing unacceptable or troubling about NM's evidence. There were some minor variations between the accounts she gave in the form of the note and in her conversations with the older girl compared with the account she gave to the church pastor and her mother and to the police that might have affected her credibility, but there was nothing significantly inconsistent in them. It might be observed that NM's account to the police, which formed the

subject of the section 93A statement, verified by her evidence-in-chief, was given within three weeks of the event in question.

On the other hand, the appellant's evidence as recorded in the transcript did not appear to be unreasonable or unacceptable either. This Court, however, does not have the advantage of seeing the appellant give evidence as did the jury. In those circumstances, I do not form the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that there was a miscarriage of justice. Accordingly, in my view, the appeal must be dismissed.

SOFRONOFF P: I agree.

BOWSKILL J: I agree.