SUPREME COURT OF QUEENSLAND

CITATION:	*R v Black* [2019] QCA 114
PARTIES:	**R** **v** **BLACK, Sean David** (appellant)
FILE NO/S:	CA No 202 of 2018 DC No 1567 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 13 July 2018 (Cash QC DCJ)
DELIVERED ON:	11 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2019
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDER:	**Appeals against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of assault occasioning bodily harm and one count of rape – where the complainant and the appellant were married when the counts allegedly occurred – where the counts allegedly occurred in the marital home – where the complainant and the appellant later separated – where there was inconsistency in the complainant's evidence as to the sequence and timing of the events the subject of the counts – where the appellant submits that the complainant's attitude towards the appellant after separation is not that which would be expected of someone who had suffered the conduct alleged – where the complainant complained to police over eight years after the alleged events occurred and at a time when the complainant and the appellant were in litigation about their children – whether the verdicts were unreasonable having regard to the evidence *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, cited
COUNSEL:	M J Copley QC for the appellant

C N Marco for the respondent

SOLICITORS: Gary Rolfe Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[3] **McMURDO JA:** The appellant was tried in the District Court on three counts of assault occasioning bodily harm and one count of rape. In each case the complainant was his then wife. They had married in 2004 and separated in August 2008. The offences allegedly occurred in 2007. The jury found the appellant guilty of two counts of assault occasioning bodily harm and guilty of rape. He was acquitted on count four on the indictment, the other charge of assault.

[4] He appeals against those convictions upon the sole ground that, in each case, the jury's verdict was unreasonable having regard to the evidence. Another ground of appeal, which was that the verdicts were unreasonable because they were inconsistent with the acquittal on count four, was abandoned.

[5] For the offence of rape, the appellant was sentenced to a term of five years' imprisonment, suspended after 27 months with an operational period of five years. He was sentenced to concurrent terms of 12 months' imprisonment on the other counts. He has abandoned his application for leave to appeal against sentence.

The evidence

[6] The appellant and the complainant met in January 2004. They married in September of that year, and their first child was born that December. A second child was born in February 2006. After separating in August 2008, they were divorced in September 2009.

[7] The first count on the indictment, the charge of assault occasioning bodily harm, was alleged to have occurred in a period between 31 March 2007 and 19 April 2007 at the house where the couple then lived at Beenleigh. The complainant described the incident, the subject of this count, as follows. The couple was arguing when he pushed her against a staircase in the house, forcing her down the stairs. He was then verbally abusing her, telling her that she did not deserve to live there and that he had control of the house and of their money. He ripped off the nightie she was then wearing and grabbed at her breasts. He kicked her in the shins, and tried to push her out the front door. After telling her to stay downstairs, he went upstairs for a while, before later calling out to her to attend to one of the children, who was crying. She said that she suffered bruising as a result of this event, and sought treatment from a general practitioner who testified that he saw her on 18 April 2007 and that his notes recorded bruising to her right leg. He made no record of any assault. The complainant's evidence was challenged by cross-examination to the effect that the incident never occurred.

[8] Count two on the indictment alleged that on a date between 30 September and 28 October 2007, at the house where the couple then lived at Mt Warren Park, the appellant unlawfully assaulted and did bodily harm to the complainant. The complainant's evidence was that, during an argument, as the complainant was trying to leave the room carrying one of the children in her arm, the appellant slammed a door closed, hitting fingers on her other hand. She said that her fingers became swollen and very sore. She went to a general practitioner for treatment and told him that she had injured her hand on a "trailer". She was sent for an x-ray, which did not show any fracture. The doctor who saw her for this injury gave evidence that she had a soft tissue injury. In cross-examination, it was suggested that there was no incident in which the appellant had slammed a door on her hand.

[9] The offence of rape (count three) was allegedly committed between 27 October and 31 October 2007, again at the Mt Warren Park house. The complainant said that this occurred between her visits to doctors who treated her for the injury to her hand, which resulted from the incident the subject of count two. The complainant said that the couple were arguing when she was in the shower and he was standing at the door to the bathroom. She said that he reached in and grabbed her by her hair, pushed her against the vanity basin, and raped her. She said that she recalled the sharp edge on the vanity basin causing her pain in her hip. She said that the appellant "penetrated me from behind", and that "[i]t was not anal sex. It was vaginal sex". She said that, when he stopped, the appellant got in the shower and then got ready for work. She said that she had a large bruise on her hip as a result of this event, as well as a bruise on her right thigh. She said that, when she returned to see a doctor, to receive the result of her x-rays (from the incident the subject of count two) she showed the doctor the bruise on her thigh but did not say that it came from an assault. The doctor confirmed that, on that occasion, he was asked to examine her thigh and made a provisional diagnosis of superficial thrombophlebitis.

[10] The complainant's evidence was that, on that evening, he asked her "[w]hat are you sulking about?", and she replied "you raped me", to which he responded "[d]on't be stupid, you're my wife, you stupid fucking woman. No one's going to believe that".

[11] In cross-examination, it was suggested there had been no such incident.

[12] Evidence was given by a friend of the complainant, Ms Sunn, that about "four or five years ago", meaning in about 2013 or 2014, the complainant told her that she had been raped by the appellant, and related the incident in details which closely corresponded with the complainant's testimony. In cross-examination, the witness was taken to a statement she had given to police, in February 2017, when she had said that it was "a couple of years ago" that the complainant had told her of this event. The witness denied that she was now saying that it was "four or five years ago" to try to assist the complainant, but she could not "rule out the possibility" that she was told this by the complainant in 2015.

[13] Count four was another charge of assault occasioning bodily harm alleged to have been committed in the Mt Warren Park house. The event was said to have occurred on or about 26 November 2007. The complainant described an incident, during an argument, when he threatened to kill her. She then grabbed her phone and challenged him to repeat what he had said, and he responded by saying that he would do "anything to protect his family". He lurched across the kitchen bench at her and she pulled the phone into her stomach, to try to hold it and to continue the

recording. The couple continued to argue as he took the phone from her, and she was thrown onto a wall, when the phone fell and smashed on the floor. She then ran out of the house. She had been grabbed by the stomach during the struggle, she said, resulting in a large bruise. She also had bruises to the back of her legs from a fall. Photographs taken on 28 and 29 November 2007 showed some of the bruises of which she complained. She said that in 2017, she found the SD card which contained the recording of some of this argument, and the recording was played to the jury.

The appellant's arguments

[14] It is argued for the appellant that it was not open to the jury to be satisfied of his guilt beyond reasonable doubt on any of the counts, although it is also said that this Court might accept that submission about the count of rape but not the other offences.

[15] The appellant's argument focussed upon three considerations, namely:

(a) inconsistencies in the complainant's accounts as to the sequence and timing of the events;

(b) the complainant's friendly attitude towards the appellant for many years after the couple had separated and divorced; and

(c) the circumstances in which the complainant ultimately went to the police and complained of rape in February 2017.

[16] The suggested inconsistencies as to the sequence and timing of the events are as follows. The complainant's evidence was that the offence of rape occurred between the two visits to doctors for the injury suffered in the event the subject of count two. It is submitted that this is inconsistent with what the complainant told police, which was that the rape occurred between the first episode (count one) and the second episode (count two). It is further submitted that the complainant told police that only a couple of days had separated the first and second episodes. As to count four, it is said that the complainant's original version had been that the event occurred in October 2007, and that it was only the week prior to the trial that she changed her version to place the event in November 2007.

[17] For the respondent, it is not accepted that there were all of the inconsistencies that the appellant's argument suggests. The respondent conceded that there was some inconsistency, in that the effect of her account to police was that the event the subject of count four occurred "first" in time, and at the Beenleigh property, and that the incident the subject of count two occurred a couple of days after that.

[18] The statements to police were not in evidence. In this Court, counsel for the respondent sought to tender the complainant's written statement to police and a transcript of a record of interview with her. The Court refused to admit that further evidence, because it was irrelevant. The only ground of appeal is that the verdicts were unreasonable, in that it was not open to the jury to be satisfied of the appellant's guilt *on the evidence at the trial*. Therefore, it is the complainant's testimony in cross-examination, as to what she said to police, that must be considered.

[19] The cross-examiner suggested to the complainant that she had told police that the episode the subject of count four had happened at a "different time", to which the complainant agreed, saying that "I hadn't had any evidence to corroborate the time at that point. So it was off a lot of putting it together as I remember without knowing the sequence …" She added that "I am aware [that the incidents] are in the incorrect sequence."

[20] There was then this cross-examination:

> "Yes. What you originally said was the incident when you hit the record button occurred after the stair episode. So you've got the earlier one at - - -?---Yep.
>
> - - - Oddie Road?---Yeah.
>
> You - - -?---At first I thought that was the first one.
>
> So the first episode at Shields Street – you told the police that was the first at that address; correct?---That is what I believed at the time. Correct.
>
> You then went on to say that it was a couple of days later or after that that you had your hand slammed in the door?---That's right. That's what I believed at the time. I was putting it together.
>
> Yeah?---Yeah.
>
> And then you said, in the interim – so between those two events – you said that's when the rape occurred?---Yep. That's correct. They were – they were out of sequence. And at that point I was relaying the events that had happened, and I had not yet located evidence that went with them. So at that point, yeah, the sequence was out."

[21] In that passage of evidence, the "incident when you hit the record button" was that which was the subject of count four. The incident described as "the stair episode" was that which was the subject of count one. The place described as "Oddie Road" was the Beenleigh house, and that described as "Shield Street" was the Mt Warren Park house. It appears from that passage of evidence that the complainant was agreeing that she had told police that the episode the subject of count four had been the first of the three episodes which had occurred at Mt Warren Park, and that it had been between that event and the event the subject of count two that the rape had occurred. The complainant admitted that her version to police of the timing of what became count four was incorrect.

[22] The complainant agreed that it had only been in the week prior to the trial that she had said that the incident the subject of count four must have happened in November 2007. The complainant made the same concession in answer to a question from the trial judge.

[23] The respondent's submission as to the effect of the complainant's evidence, about what she had told police, should be accepted. Nevertheless, there was the one inconsistency between what she had said to police and her ultimate testimony, as to the timing of the event the subject of count four. It may have been that inconsistency which explains, in part at least, the acquittal on count four. But that inconsistency did not significantly detract from her evidence about the other counts.

[24] The following matters are relied upon to show that the complainant's attitude towards the appellant, after their separation, was not that to be expected of someone who had suffered from this conduct, particularly an offence of rape.

[25] The complainant was an accomplished painter, who had submitted entries for major art prizes. In December 2008, the complainant told the appellant that she wished to paint his portrait to submit it for the Archibald Prize. After the appellant went to work in Dubai in 2012, the complainant acted as his attorney and, on occasions in 2013 and 2014, allowed the appellant to stay at her house for periods of weeks when he returned to Australia. In an email to him in 2009, she concluded with the words "[b]ig hug". In January 2010, she used the appellant as a personal referee. In April of that year, she posted a public comment on a newspaper website, congratulating the appellant on his engagement to remarry, saying this:

> "I'm very happy for Sean and Hajnal. They are wonderful people and both very dear to me. And I'm happy that they can finally share their joy with their friends and family openly."

The complainant attended their wedding and, on one Mother's Day, she gave chocolates to Hajnal and Hajnal's mother.

[26] When the complainant was challenged with these matters in cross-examination, she said that she had tried to have an amicable relationship with the appellant. She said that her apparent warmth towards the appellant and Hajnal came more from her high regard for Hajnal.

[27] The third consideration, which is advanced in the appellant's argument, involves the circumstances in which the complainant ultimately went to the police. At that time, the couple were in litigation in the Federal Circuit Court about their children.

[28] In 2009, they had agreed to have equal shared parental responsibility for the children, and apparently there was no significant disagreement between them in that respect until July or August 2016, when the appellant commenced a proceeding seeking orders that he have sole parental responsibility and that the boys live primarily with him.

[29] In May 2016, she applied to the Magistrates Court for a protection order, but then made no reference in her complaint to having been raped or sexually assaulted, but instead she referred only to the incidents which appeared to be those the subject of counts one and four.

[30] On 5 August 2016, the complainant went to a police station to make a complaint against the appellant. She rejected the suggestion that she did not then complain of being raped or assaulted by him. However the police records of that attendance referred only to information she had provided to police about the children.

[31] In an affidavit filed in the Federal Circuit Court in September 2016, the complainant said that the appellant had "sexually assaulted me in the bathroom", although she did not say that she had been raped.

[32] On 9 February 2017, the complainant told police that the appellant had raped her and provided a statement to that effect on the following day. On 21 February 2017, the appellant consented to an order that the complainant have sole parental responsibility for their children.

Consideration

[33] There was little support for the complainant's testimony from other evidence. There was the evidence of bruising, for which she sought medical attention. However that evidence did not indicate a particular likelihood that she suffered the bruising by being assaulted.

[34] As is submitted for the respondent, her evidence contained a detailed account of each incident. However the defence case was not that her testimony was unreliable because she had poor memory; it was that she had made all of this up, in order to prevail in the litigation about the children.

[35] The evidence of her cordial relationship with the appellant, over a period of about eight years following their separation, provided a substantial basis for challenging her testimony. In my view, taken together with the circumstances in which she ultimately made these complaints to police in February 2017, it might have justified a reasonable doubt in the minds of the jury, particularly about the offence of rape.

[36] However the question is not whether this Court has a doubt about the appellant's guilt beyond reasonable doubt; it is whether it was open, upon the whole of the evidence, for the jury to be satisfied of the appellant's guilt, having regard to the advantage enjoyed by the jury over this Court, which has not seen or heard the complainant's evidence being given.[1] A doubt experienced by this Court, in some cases, may be resolved by recognising that advantage.[2]

[37] The timing of her ultimate complaint to police was important. It strongly indicated that it was affected by the litigation between the couple about their children. But that did not require the jury to have a doubt about the credibility of her complaints. The jury may have considered that, over the years, she had been prepared to have a civil relationship with him, in the interests of her children for whom they had joint responsibilities, but that she was no longer prepared to do so and remain silent about what he had done when, as she might have seen it, he was trying to have the children taken from her. Further, the jury may have accepted the evidence of Ms Sunn and, if so, the complainant's credibility would have been enhanced by that evidence. In my conclusion, it was open to the jury to reason in that way, and to accept the complainant's evidence with the result that the guilty verdicts were open.

[38] I would order that the appeals against conviction be dismissed.

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1 *R v Baden-Clay* [2016] HCA 35 at [65]; (2016) 258 CLR 308 at 329 [65].

2 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 at 494.