SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAU* [2019] QCA 126
PARTIES:	**R** **v** **FAU** (appellant)
FILE NO/S:	CA No 259 of 2017 DC No 290 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 4 October 2017 (Lynham DCJ)
DELIVERED ON:	25 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2019
JUDGES:	Gotterson and McMurdo JJA and Boddice J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where the appellant was convicted by a jury of twelve counts of various sexual offences against his step-daughter, the complainant – where the complainant in cross-examination agreed that she had accessed pornographic material on her phone when she was at the appellant's father's house – where the complainant's mother agreed with a question put in cross-examination that the complainant accessed pornography when she stayed at the appellant's father's house but also revealed that the complainant used to watch pornography with the appellant – where this information had neither been revealed before nor had been alleged by the complainant – where an application was made by defence counsel to discharge the jury because of the highly prejudicial nature of the response – where the learned trial judge refused to discharge the jury on the basis that any prejudice caused to the appellant by the complainant's mother's response could be cured by robust directions to the jury, which were then given – whether there has been a miscarriage of justice *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29, cited *R v Pearson* [2015] QCA 157, cited

COUNSEL: I A Munsie for the appellant
D C Boyle for the respondent

SOLICITORS: MacDonald Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** The appellant, FAU, was charged with having committed five offences of indecent treatment of a child under care (Counts 1, 4, 5, 9 and 12) and seven offences of rape (Counts 2, 3, 6, 7, 8, 10 and 11). He was convicted on all counts at a trial in the District Court at Townsville which concluded on 4 October 2017.

[2] For each offence, the complainant was the appellant's step-daughter. She was nearly eight years of age at the time when the first offence (Count 1) was committed in late April 2011 and nine or ten years old at the times of the commissions of the other offences.

[3] On 5 October 2017, the appellant was sentenced to six years imprisonment for each of the rape offences and to lesser periods of imprisonment for the indecent treatment offences. All terms of imprisonment are to be served concurrently. A period of 32 days of pre-sentence custody was declared to be time served under the sentence. A parole eligibility date at 3 September 2020 was fixed.

[4] On 1 November 2017, the appellant filed a notice of appeal to this court against the convictions.[1] There is one ground of appeal. It concerns the refusal by the learned trial judge to discharge the jury after a witness had given a non-responsive, but prejudicial, answer in cross-examination.

[5] Despite the relative narrowness of this ground of appeal, it is appropriate that I summarise the offences charged and identify the witnesses who gave evidence at trial.

The offences charged

[6] The offending was alleged to have occurred on six separate occasions.[2] They were as follows:

(i) After a fight at a hotel, the appellant, the complainant and her mother ("CM") returned home where the appellant touched the complainant's vagina (Count 1).

(ii) At a time when the appellant and the complainant were in his truck on a work trip to Mt Isa, the appellant inserted his finger or fingers into the complainant's vagina (Count 2), penetrated the complainant's mouth with his penis (Count 3), made oral contact with the complainant's breast (Count 4) and with the complainant's vagina (Count 5).

(iii) At a time when the appellant and the complainant were in his truck waiting for CM to collect some work equipment, the appellant inserted his finger or fingers into the complainant's vagina (Count 6), penetrated the complainant's vagina with his tongue (Count 7), penetrated the complainant's mouth with

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1 AB545 – AB548.
2 Particulars, Exhibit 1: AB432.

his penis (Count 8) and made oral contact with the complainant's breast (Count 9).

(iv) In CM's bedroom, the appellant penetrated the complainant's vagina with his finger or fingers (Count 10).

(v) In the lounge room, the appellant inserted his finger or fingers into the complainant's vagina (Count 11).

(vi) In the complainant's bedroom, the appellant touched her vagina (Count 12).

The witnesses at trial

[7] **The complainant:** The complainant first made disclosure of sexual abuse to the appellant's father ("AF"). Later, he suggested to CM that she should be "very watchful" when the appellant was around the complainant.[3] On 17 July 2013, CM questioned the complainant regarding sexual abuse. Initially the complainant denied that it had happened.[4] After further questioning, the complainant made disclosures of sexual abuse of her by the appellant.[5]

[8] CM had a friend, K. That evening, CM took the complainant to K's house. She and K asked the complainant questions regarding sexual abuse which they recorded on their phones together with the complainant's answers. Later, they provided the recordings to police.[6]

[9] Police interviewed the complainant on 19 July 2013 and again on 7 September 2013. The complainant's oral evidence was taken at a pre-trial hearing on 8 November 2016 and when she was recalled for further cross-examination on 8 August 2017.

[10] The trial began on 26 September 2017. In the course of opening the Crown case, the prosecutor tendered recordings of the two police interviews[7] with transcripts of them.[8] The recordings were played to the jury.

[11] On the following day, the complainant's pre-recorded evidence was played to the jury[9] and transcripts of it were tendered.[10] With the exception of about 15 minutes, the playing of the interviews and the complainant's oral testimony continued until the luncheon adjournment on the second day of the trial. After the adjournment, a medical practitioner gave evidence by telephone link. The remaining 15 minutes of the complainant's oral testimony was then played.

[12] **Other witnesses:** The medical practitioner gave evidence of a medical examination that she had conducted of the complainant. After the remainder of the complainant's oral testimony was played, the other witnesses to testify on the second day of the trial were K and CM. K's evidence was brief and was conducted by telephone link.

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3 AB227 Tr3-75 l42 – AB 228 Tr3-76 l2.
4 AB 144 Tr2-33 ll35-45.
5 AB 145 Tr2-34 l46 – AB 146 Tr2-34 l24.
6 AB 146 Tr2-35 l32 – AB 147 Tr2-36 l12.
7 Exhibits 4, 5.
8 MFI "C": AB451 – AB522; MFI "D": AB523 – AB539.
9 MFI "E"; MFI "G".
10 MFI "F"; MFI "H".

[13] CM's evidence began at about 4 pm that day. During her evidence in chief, the phone recording she had made together with a transcript of it were tendered.[11] The recording was played to the jury. The jury retired at about 4.35 pm that afternoon.

[14] CM's evidence in chief continued on the third day of the trial. Certain photographic exhibits of rooms in the house and furniture where she, the appellant and the complainant lived, were tendered. CM's cross-examination began at about 10.45 am. It was in answer to defence counsel's second question that the non-responsive answer was given. I shall return to it and its sequel later in these reasons. Ultimately, CM's oral testimony concluded at about 3.30 pm on the third day of the trial.

[15] The other witnesses who testified that day were AF and a person who had managed a company that had employed the appellant as a truck driver for about 15 years.

[16] The court sat for half a day on the fourth day of the trial during which the learned trial judge answered a question from the jury and an investigating police officer testified.

[17] The appellant did not give or call evidence.

[18] On the fifth day of the trial, the prosecutor and then defence counsel addressed the jury. The learned trial judge commenced his summing up. It concluded at about 10.20 am on the sixth day of the trial. The jury delivered the guilty verdicts after deliberating for a little over one and a half hours.

The non-responsive answer and its sequel

[19] **The non-responsive answer:** At the beginning of CM's cross-examination, the following questions and answers were asked and given:[12]

> "Witness, when in all this time did you become aware that your daughter had been accessing pornography on the internet whilst staying at (AF's) house? – Excuse me?
>
> You – your daughter was accessing pornography on the internet when she was staying at (AF's) house, isn't that correct? – Yes, but she also used to watch it with (the appellant)."

It was in cross-examination of the complainant that she indicated that when she was being cared for by AF she had had access to pornographic material on a phone.[13]

[20] **The application for discharge of the jury:** Defence counsel thereupon made an application in the absence of CM and the jury for discharge of the jury. It focused upon the words "she also used to watch it with (the appellant)". In support of the application, defence counsel observed that the complainant herself had not made any reference in her evidence to having watched pornography with the appellant. Nor was there evidence of a complaint to others by her to that effect. The words were highly prejudicial, it was submitted.[14] The prosecutor submitted that the evidence was not sufficiently prejudicial to warrant discharging the jury and that they could be directed to ignore that evidence.[15]

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11 Exhibit MFI "I"; MFI "J": AB540 – AB544.
12 AB173 Tr3-21 l45 – AB174 Tr3-20 l3.
13 AB40 Tr1-25 ll1-18.
14 AB174 Tr3-22 ll23-33.
15 AB175 Tr3-23 ll33-39.

[21] The learned trial judge identified as the real issue for determination, whether the prejudice resulting from the answer could be cured by a direction.[16] He considered that the basis on which CM asserted that the complainant used to watch pornography with the appellant needed to be the subject of some voir dire evidence.[17]

[22] **The voir dire:** CM was recalled to give evidence on a voir dire in the absence of the jury. In examination in chief, she testified as follows:

(i) The appellant would watch pornography on a computer in the lounge/kitchen area of their residence. The complainant would "check over his shoulder". He would "also invite her to the computer". There were occasions when the complainant would see the appellant watching pornography on the computer.[18]

(ii) The appellant had told CM that when he and the complainant were "out on the trucks", he had invited her to open a message on his phone which contained pornographic material.[19]

[23] The voir dire concluded without any cross-examination of CM. In discussion with counsel in the absence of the jury, the learned trial judge expressed a view that the evidence that CM had given on the voir dire was prima facie admissible as evidence of discreditable conduct on the appellant's part.[20] Evidently, his Honour thought that, prima facie, that evidence would also render admissible the evidence that had been given by CM in the presence of the jury to which objection had been taken.

[24] His Honour canvassed how the prejudice that the answer that had been given in the presence of the jury, and the further evidence given on the voir dire, were it to be adduced in the jury's presence, could be addressed, given that the defence had not known of these allegations at the time when the complainant was cross-examined. His Honour ventured that one way would be to make the complainant available for further cross-examination.[21] Defence counsel discounted cross-examination of the complainant as "forensically not a wise thing to do".[22]

[25] The learned trial judge then proposed some directions that he might give to the jury. Defence counsel maintained that the jury should be discharged. However, he accepted that if the trial was to continue, the giving of directions was "probably the best way to deal with it".[23] For his part, the prosecutor indicated that he would neither rely on the answer the jury had heard nor seek to adduce as evidence in the trial the further evidence CM had given on the voir dire.[24]

[26] **The ruling:** The learned trial judge gave a ruling on the application to discharge the jury in which he recorded the submissions to which I have referred. His Honour acknowledged that there was "obvious prejudice" to the appellant in the answer that

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16 AB176 Tr3-24 ll13-16.
17 AB181 Tr3-29 ll12-14.
18 AB183 Tr3-31 l6 – AB184 Tr3-32 l10.
19 AB184 Tr3-32 l27 – AB185 Tr3-33 l7.
20 AB188 Tr3-36 ll28-42.
21 Ibid.
22 AB190 Tr3-38 ll20-22.
23 AB193 Tr3-41 ll18-22.
24 AB194 Tr3-42 ll6-12.

the jury had heard. However, his Honour considered that "it is not so prejudicial that it cannot be cured by a robust direction to the jury".[25]

[27] CM was recalled. In the absence of the jury, the learned trial judge explained to her that she was not to make any further reference to the complainant watching pornography with the appellant and that she was to keep her evidence to what she had told the police.[26] CM then left the courtroom.

[28] **The direction:** The jury then returned. The learned trial judge directed them as follows:[27]

> "Now, members of the jury, my apologies for the longer-than-expected delay. There were some matters of law that I needed to discuss with the lawyers in your absence, and you might recall when I was giving you some preliminary directions yesterday I mentioned that there might well have been occasions when I needed you to leave the courtroom while those sorts of matters were discussed with the lawyers, and it wasn't to exclude – it's not to exclude you from the trial process, but it's simply to ensure that your minds are not cluttered by irrelevancies.
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> Now, you will recall that during the evidence of the last witness whom you've been hearing from – that is (CM) – who of course is the mother of the complainant, …, she was asked a question specifically in relation to whether or not she was aware that her daughter had been watching pornography whilst she was visiting (AF's) house, and you might recall that (AF) is the grandfather of the complainant, and (CM) indicated that first of all, yes, she was aware of that, but she also added as part of her answer that the complainant – … – used to watch it with the defendant.
>
> Now, members of the jury, can I say this in very clear and unequivocal terms. You must disregard that last portion of her evidence. It is completely irrelevant to your considerations. Moreover, you will recall that the complainant, …, at no time in her evidence, either when she was spoken to by the police in the two interviews that the police conducted with her or in the course of her being cross-examined by (defence counsel) – at no stage in either of the police interviews or in cross-examination has (the complainant) made any allegation that she watched pornography with the defendant.
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> So, members of the jury, I direct you in very clear and unequivocal terms – that you must ignore that last part of the witness's evidence; that is (CM's) evidence. You are to disregard it. It is completely irrelevant to your considerations, and you must put that evidence out of your minds – in terms of your consideration of the facts and the issues in this matter.
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> Now, members of the jury, it's appropriate, given that we'd ordinarily have stopped for lunch in a little while, that we take lunch

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25 AB197 Tr3-45 ll27-30.
26 AB202 Tr3-50 ll1-3.
27 AB203 Tr3-51 l19 – AB204 Tr3-52 l9.

> now with a view to resuming at 2.30. So it's a little bit earlier than what we normally – at the time that we normally would have broken for lunch, but it's convenient, that we in fact stop for lunch now, and if I could ask you to go with the bailiff and be back in time to resume at 2.30. Thank you."

[29] The jury retired. No objection was taken to the direction. His Honour was not requested to direct the jury further on the topic.[28]

[30] The jury then returned. CM was recalled and her cross-examination continued. Not unsurprisingly, neither the prosecutor nor defence counsel referred to the non-responsive answer in addresses. His Honour did not, of course, refer to it in his summing up.

The ground of appeal

[31] The single ground of appeal is as follows:[29]

> "The learned trial judge erred in failing to discharge the jury when the Court received inadmissible, prejudicial and undisclosed evidence from the witness (CM), given in an non-responsive answer, which resulted in the appellant being denied a fair trial."

Appellant's submissions

[32] In written submissions, the appellant contended that the non-responsive answer by CM was inadmissible. The prejudice it caused the appellant was of such an order that no direction could have counteracted it adequately, the appellant submitted.

[33] In oral submissions,[30] counsel for the appellant referred to the decision of the majority in *Crofts v The Queen*[31] in which their Honours summarised factors that are relevant to the determination of an application to discharge a jury when an inadvertent and potentially prejudicial event occurs in a trial.[32] They affirmed that in an appeal against a refusal to discharge a jury, it is for the appellate court to decide for itself whether the refusal occasioned the risk of a substantial miscarriage of justice. In other words, their Honours said, "can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable?"[33]

[34] Counsel submitted that, here, the non-responsive answer was given relatively early in the trial. It had not been prompted by defence counsel. Those factors, together with the prejudice inherent in the answer, favoured a discharge of the jury. Further, the complainant was quite young and initially she had denied any sexual offending by the appellant. In those circumstances, this court could not be satisfied that had the answer not been given, the convictions were inevitable.

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28 AB204 Tr3-52 ll15-37.
29 AB546.
30 Appeal Transcript ("AT") 1-4 l32 – AT1-5 l25.
31 (1996) 186 CLR 427 per Toohey, Gaudron, Gummow and Kirby JJ.
32 At 440.
33 At 441, citing *Glennon v The Queen* (1994) 179 CLR 1 at 8-9 and *Maric v The Queen* (1978) 52 ALJR 631 at 635, cases involving the application of the proviso in s 668E(1A) of the Code which are to be considered now in light of *Weiss v The Queen* (2005) 224 CLR 300: see *Patel v The Queen* [2012] HCA 29; (2012) 247 CLR 531 at [67].

Respondent's submissions

[35] The respondent submitted that the decision to refuse to discharge the jury was correct. That there had been an inadvertent disclosure of prejudicial evidence did not necessitate a discharge of the jury.

[36] Counsel submitted that had the answer been led in the prosecution case it would have been admissible at the trial. Moreover, any prejudice in the answer would have been minimal because the conduct that the answer impliedly attributed to the appellant was far less serious than the acts of sexual offending alleged against him.

[37] Further, consistently with the decision of this Court in *R v Pearson*,[34] it is appropriate for this Court to have regard to the corrective effect of the direction that was given by the learned primary judge.[35] Here it was given shortly after the non-responsive answer. The direction was comprehensive and clearly conveyed that the answer was to be ignored. It may be assumed that the jury acted on it.[36]

[38] Allowing for that and the consistency in the complainant's evidence of the offending, this Court ought to be satisfied, it was submitted, that notwithstanding the non-responsive answer, conviction on all counts was inevitable.

Discussion

[39] In oral submissions, counsel for the respondent accepted, as is the case, that insufficient evidence was adduced in the trial itself to determine whether the non-responsive answer would have been admissible had it been adduced in the Crown case.[37] That and the hypothetical circumstance which that issue addresses together suggest that it is neither necessary nor appropriate for this Court to reach any concluded view about the potential admissibility of the answer. I shall assume, for present purposes, that it was not admissible.

[40] The answer was prejudicial in several respects. In its subject matter, it was apt to imply that the appellant showed pornography to the complainant. Further, it concerned conduct of the appellant of which the complainant had not herself complained and, in any event, had not been available to the defence as potential evidence when she was cross-examined.

[41] A trial judge has power to discharge the jury which has not given a verdict where there are "proper reasons" for doing so.[38] It is common ground here that where there is an inadvertent admission of prejudicial evidence, it does not follow that the jury must be discharged. That is a matter for the discretion of the trial judge. In any event, the question is not whether the trial judge was wrong in refusing to discharge the jury; it is whether, in the terms of s 668E(1) of the *Criminal Code* (Qld), there has been a miscarriage of justice.[39]

[42] In *Pearson*, a witness in an answer suggested that the accused had possibly been in jail at some point in time. The accused was convicted. He appealed on the ground of a wrongful refusal to discharge the jury because the evidence was prejudicial to

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34 [2015] QCA 157.
35 Per Holmes JA (Morrison JA and Henry J agreeing) at [12].
36 Per Holmes JA at [17], citing *Gilbert v The Queen* (2000) 201 CLR 414 per McHugh J at 425.
37 AT1-10 ll41-47.
38 *Jury Act* 1995 (Qld) s 60(1).
39 *Patel* at [67].

him. His appeal was dismissed. Holmes JA, with whom the other members of the Court agreed, observed:[40]

> "The *Knape*[41] test does not require discharge simply because there is an identifiable risk of prejudice; what is to be assessed is the likely impact of the improperly adduced evidence on the jury's verdict. In that context, regard may properly be had to the corrective effect of a direction. His Honour's conclusion that the risk of prejudice could be sufficiently addressed by an appropriate direction indicated his satisfaction that the evidence would not lead the jury, properly directed, to draw any adverse inference and hence would not affect their decision. That was consistent with a proper approach to the question of whether the jury should be discharged."

[43] Here, a direction was given. It was comprehensive in that it clearly identified the content of the non-responsive answer and reminded the jury that the complainant had not given evidence that she watched pornography with the appellant either in her interviews with the police or in her pre-recorded testimony. The direction was also unambiguous. His Honour twice instructed the jury "in very clear and unequivocal terms" that they were to ignore the non-responsive answer. They were "to put it out of their minds".

[44] In addition to its comprehensiveness and unambiguity, the direction was given promptly and before the jury heard any more evidence. In following the direction, the jury would not have had any regard for the answer in assessing the evidence that was legitimately before them.

[45] Procedurally, the direction given all but eliminated any need on the part of the defence to cross-examine further the complainant as to what CM had said in the non-responsive answer. That state of affairs was maintained by the absence of any further reference to it in the trial.

[46] I would add that the non-responsive answer did not deter defence counsel from relying upon the evidence that the complainant had given in cross-examination that she had viewed pornography at AF's residence. That evidence opened the possibility that she had thereby attained some knowledge of sexual acts. Defence counsel referred to the evidence in his address[42] as did the learned trial judge in his summing up.[43]

[47] Having regard to all these factors, I am satisfied that the direction given adequately counteracted the prejudice that the non-responsive answer was apt to cause to the appellant.

[48] Consequently, the non-responsive answer could not have affected the appellant's prospects of an acquittal, and there was no miscarriage of justice in the terms of s 668E(1).

Disposition

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40 At [12].
41 [1965] VR 469.
42 AB340 ll34-43.
43 AB419 ll4-6.

[49] The single ground of appeal has failed. The appeal must therefore be dismissed.

Order

[50] I would propose the following order:

1. Appeal dismissed.

[51] **McMURDO JA:** I agree with Gotterson JA.

[52] **BODDICE J:** I agree with Gotterson JA.