SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gallimore* [2019] QCA 170
PARTIES:	**R** **v** **GALLIMORE, Julian Charles** (appellant)
FILE NO/S:	CA No 310 of 2017 DC No 8 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bowen – Date of Conviction: 23 November 2017 (Lynham DCJ)
DELIVERED ON:	3 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2019
JUDGES:	Gotterson and Philippides and McMurdo JJA
ORDERS:	**1. The applications for leave to adduce evidence are refused.** **2. The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – SEXUAL OFFENCES – where the appellant was convicted of one count of sexual assault – where the appellant had touched the complainant's penis without his consent – where the appellant contended that the verdict was unreasonable or insupportable having regard to the evidence on the basis that, *inter alia*, his legal representation was incompetent and ignored his instructions, the jury was "rigged", that certain witnesses should have been called but were not, and that he found it difficult to put his case forward when giving evidence because of his neurological and cognitive issues – whether the verdict of guilty was unreasonable or insupportable having regard to the evidence so as to constitute a miscarriage of justice *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, applied
COUNSEL:	The appellant appeared on his own behalf D Balic for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the

respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

[2] **PHILIPPIDES JA:** The appellant was convicted on 23 November 2017 after a trial by jury of one count of sexual assault on 15 April 2015 against the complainant who was then 16 years old.

[3] The appellant appeals against his conviction on the ground that the verdict is unreasonable and cannot be supported by the evidence.

[4] The relevant principles governing such an appeal are well settled. In deciding whether a jury verdict is unreasonable, or cannot be supported by the evidence, such that the verdict is unsafe or unsatisfactory, the question for the appellate court is whether the Court considers that, upon the whole of the evidence, it was open to the jury to be satisfied that the appellant was guilty beyond reasonable doubt.[1] This necessarily requires the Court to perform its own independent assessment of the evidence, including as to its sufficiency and quality.[2] While doing so, the Court ascribes special respect and legitimacy to the jury's verdict,[3] as setting aside a jury's verdict on grounds of unreasonableness or inability to be supported on the evidence is "a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial".[4] The boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way.[5]

Evidence given at trial

[5] In this case, the jury had the benefit of seeing the witnesses and assessing their credibility. Evidence was given by the complainant, his father, his mother, his brother, ND, and his father's cousin, FG. In addition, two police officers were called. The appellant also gave evidence.

The complainant

[6] On 13 April 2015, the complainant, his family and a group of others, which included the appellant, travelled to a camping location near a homestead at Finch Hatton. The complainant had not previously met the appellant, but knew him to be a friend of his father. Two campsites were set up. The complainant's tent was under a shed at one campsite where drinking was allowed. The appellant set up his own tent about 10 metres away from his.[6] They all ate dinner at the homestead. The complainant returned to the campsite with his father and also his brother ND and cousin LQ who were sharing the tent.[7]

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1 *R v Baden-Clay* (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

2 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at [14].

3 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at [48] and [59].

4 *R v Baden-Clay* (2016) 258 CLR 308 at [65].

5 *R v Baden-Clay* (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

6 AB at 20-23.

7 AB at 23-24.

[7] The following morning, the complainant went fishing with ND, LQ and the appellant. The complainant said the appellant "acted weird" and "started saying stuff like 'oh, you guys, you know – you guys are really good-looking. Oh, too bad my – my age limit's 21'". The appellant started talking "about him and his boyfriend" and the complainant and the others went off fishing and later went pigging.[8]

[8] The complainant said that later when his father was having a drink and they were having a smoke "it started getting, like, pretty weird" because the appellant went over to his mother and said, "Oh, you know you've got … really good-looking children" and "you should start buying them bigger condoms". His mother told him to shut up. The complainant got up to use the toilet and he heard the appellant say, "Oh, you know, watch out. He's going to whip it out. Like he's going to pull it out". His mother got angry and told the appellant to leave.[9]

[9] The complainant returned to the campsite and to his tent.[10] He recalled the appellant and his father, brother and cousin being around the camp fire, about three to four meters from his tent, "chilling out". The appellant was "really drunk" at that time and "getting a bit rowdy". The complainant then fell asleep.[11]

[10] The complainant said that he was woken up by feeling someone being behind him; he rolled over, had a look but could not see whom it was. The person had short, spiky hair, similar to his father's, so he thought it was him. He rolled back over and tried to get back to sleep. He then felt an arm come over him and he "flipped it off", thinking it was his father. He decided to go back to sleep again and then felt a hand down his pants, touching his penis. The complainant woke up and "freaked out" and "whacked" the person with his elbow in the person's face. He got up, and the person tried to grab him. The complainant grabbed his head torch, recognised the appellant and started to run.[12]

[11] The complainant said he ran towards the creek and sat on the bank and watched the appellant, who had jumped in his car and drove around looking for him. After about five minutes, the appellant turned around and went back to the camp; the complainant then continued running.[13] He went through the creek, across to where the road was. It took him about another five minutes to get to the other side; he then met his brother, ND, and cousin in their car on their way back from the homestead.[14] The complainant recalled that his brother got out of the car and the complainant told him what had happened "straight away". The complainant was scared because the appellant was after him and he was crying. He told his brother that "he tried to touch me, you know". His brother became really angry and went to find the appellant.[15]

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8 AB at 25.
9 AB at 25.
10 AB at 25.
11 AB at 26.
12 AB at 27.
13 He said that the reason he did not run to the road was because that was the most obvious route and he did not want to be caught, AB at 38.
14 AB at 28.
15 AB at 29.

[12] The complainant said that they went to the campsite; the appellant was packing up his camp. His brother jumped out of the car and confronted the appellant. He asked the appellant "did you do it?" The appellant replied, "Oh – oh, but I'm one of youse". His brother then took his shirt and shorts off and challenged the appellant to admit what he had done.[16] The complainant's brother hit the appellant when he admitted it. The appellant got up and his brother "washed him off". The appellant then jumped in his car and started "doing donuts and stuff like that" really close to the complainant and his brother. The complainant then picked up a rock and threw it at the appellant's car. The appellant took off in the car. The complainant, his brother and cousin then went back to the homestead to get their father. The complainant told everyone what had happened.[17]

[13] The complainant, his brother and father later confronted the appellant back at the campsite where the appellant was again packing up.[18] The appellant was tackled to the ground.[19] The complainant punched the appellant to the face, held him down and restrained him and they eventually took him to the Collinsville Police station.

[14] The complainant also gave evidence that at some stage earlier in the night the appellant had thrown condoms and pornographic magazines at the complainant and others.[20]

[15] The complainant said he did not consent to being touched by the appellant.[21] In cross examination, the complainant maintained that, in addition to telling his brother "he tried to touched me", he had told his brother that the appellant "touched his penis". The complainant denied that he and his brothers were smoking drugs and denied sprinkling "some substance" on the appellant's food.[22] The complainant disagreed with the proposition that the appellant "fell into" the tent, which woke him up.[23] The complainant did not accept that the appellant was joking when he called them "very good-looking children" and "babe magnets" or that he should get them bigger condoms and, in fact, felt "a bit disgusted".[24] The complainant accepted that his brother had also joined in giving the appellant "a hit or two" and that his father had been involved in tying up the appellant with a strap so that he could be taken to the police.[25]

The complainant's father

[16] The complainant's father gave evidence similar to the complainant of leaving for a camping trip with his family and others. Some of the group of family members stayed at the homestead and others stayed at a campsite that was set up across the creek, which was where the appellant set up his tent. The first night he shared a tent with the appellant. On the second night, he camped near the homestead beside his son's grave.[26] On the evening of 15 April 2015, he had been at the campsite with his sons, nephew and the appellant. He had drunk some beers that afternoon and

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16 AB at 29.
17 AB at 30.
18 AB at 31, 73.
19 AB at 31, 94.
20 AB at 35.
21 AB at 39.
22 AB at 40.
23 AB at 51.
24 AB at 54.
25 AB at 52-53.
26 AB at 68.

thought that the appellant had been drinking red wine and was intoxicated.[27] He said that the complainant had gone to sleep early and was left at the campsite with the appellant while the others drove him back to the homestead, where he was dropped off.[28]

[17] The father gave evidence that he heard the boys "singing out".[29] He went to the back of the house and the complainant told him that the appellant had come into his tent and tried to touch him and put his hands down his pants. He, his two sons and his nephew jumped into the car and went straight across to the appellant's tent.[30] He confronted the appellant and asked what had happened. The appellant was tackled to the ground and held down while a rope was obtained to tie him up so he could not run away. He gave evidence that, at that stage, his cousin, FG, and his uncle came over. They put the appellant into the back of a truck and drove to the homestead and then to the police station. He followed in another vehicle and could see the appellant was sitting up.[31]

[18] In cross examination, he gave evidence that earlier in the evening his wife had visited the campsite for a couple of hours. At one stage, he saw his wife having an argument with the appellant and heard her telling the appellant not to be talking "about our sons like that, with filth".[32] He accepted that his son restrained the appellant when they returned to confront him and that they "hogtied" him. They released the appellant's ties so that the appellant could sit up in the back of the truck. He recalled that the appellant had defecated whilst tied.[33] In cross examination, he was questioned about his criminal history.

The complainant's brother

[19] The complainant's brother gave an account that was similar to the complainant's. He gave evidence of sharing a tent with the complainant and his cousin. The complainant's brother gave evidence of hearing the appellant ask his mother how big his penis was and also recalled that when they went fishing and were in the creek that the appellant said that they were "real hot" and that they had "good bodies" and that they should be "underwear models".[34] He also recalled the appellant walking in with "one of his magazines" and that he threw it on the complainant's face and that he also came into their tent and threw a box of condoms to each of them and said, "Oh, these won't fit you boys. Don't – youse all got big ones, don't you".[35]

[20] He gave evidence that on the night in question, they had eaten dinner at the campsite and that the appellant had been drinking. He and his cousin drove his father back to the homestead as he wanted to sleep near his other son's grave. They left the complainant at the campsite, as he was asleep. On driving back to the campsite, he saw the complainant walking by the side of the river. The complainant had tears all over his face and looked very stressed. He had a big stick in his hand. He was so "shaky he couldn't talk and …wasn't making sense". The complainant

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27 AB at 71, 77.
28 AB at 70.
29 AB at 71.
30 AB at 72.
31 AB at 75-76.
32 AB at 79.
33 AB at 83.
34 AB at 89.
35 AB at 101.

told him that the appellant had put "his fucking hands down my pants". He jumped into the car and went to confront the appellant. He asked the appellant to tell him what he had done, but the appellant denied doing anything. He hit the appellant who fell to the ground and said, "Yes, I did it" and then he hit the appellant a second time.[36]

[21] He said that after that the appellant jumped into his car and was doing circles trying to run them over. He and the others got into their car and drove to the homestead.[37] On being told what had happened, the complainant's father and a few other men returned with the boys to confront the appellant. The appellant was packing up and he tackled him to the ground. They all ended up holding the appellant down and tying him up. They sat the appellant up in the truck and took him to the police station, stopping on the way to check he was all right.[38]

[22] In cross examination, he accepted that he told police that when he confronted the appellant, he asked about him "touching" the complainant, that the appellant was making a cup of tea and that he punched him when the appellant denied he had done anything. He maintained, however, that the appellant admitted it when he fell to the ground.[39] He accepted that the appellant "got thrown around a bit" when he returned with his father and they were holding the appellant down.[40]

The complainant's mother

[23] The complainant's mother gave evidence that, whilst at the campsite, the appellant asked her to describe what her son's penis looked like. She told him to shut up and the appellant "got really funny", started shaking and pointed at the complainant and said, "You've seen it. Tell me what it [indistinct] like [indistinct]". She told the appellant to shut up again and asked her sons to leave with her, however, they wanted to stay, as they wanted to look after their dad. She left and returned to the main house where her younger children were staying.[41]

[24] Later in the evening she was woken when her sons and her husband came to the house. They were all crying and "stressed out" and the complainant was screaming and said, "He touched me, mum. He's touching me". She "didn't know what to say".[42]

[25] She stayed at the house and the others left and then returned with the appellant. She saw the appellant in the back of the car, sitting and said he was laughing as she asked him why he did that.[43] She accepted that in her statement it was recorded that her son told her that the appellant had tried to rape him.[44] She maintained in cross examination that the appellant was sitting up in the car and denied that he was hogtied and unconscious in the back of the utility.[45]

The father's cousin

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36 AB at 92.
37 AB at 93.
38 AB at 94.
39 AB at 103.
40 AB at 96.
41 AB at 57-58.
42 AB at 59.
43 AB at 60.
44 AB at 61.
45 AB at 64.

[26] FG gave evidence of attending at the campsite and that the appellant was on the ground and was hogtied. He told those present to calm down and to release the ties, as he was concerned.[46] The appellant's legs were released. They talked about taking the appellant to the police station. He ensured that the appellant was able to sit up and released the pressure of the hand tie and stopped regularly to check on him.[47]

Police

[27] Sergeant Mills gave evidence that she arrived at the Collinsville Police station at 5.00 am on 15 April 2015 after receiving a phone call. She saw the appellant in the back of a utility and noticed that he had facial bruising and was bloodied and that he had either defecated or urinated on himself.[48] She assisted the appellant until the ambulance arrived and also took a photograph of him.[49]

[28] Sergeant Collie gave evidence that, after being briefed by Sergeant Mills, he attended the campsite and that no drugs or indicia of drug taking were found.[50]

The appellant's account

[29] The appellant gave evidence in his own defence. His examination in chief was very brief and concerned that he had no criminal history and his denial of putting his hand down the complainant's pants.[51]

[30] In cross examination, the appellant accepted that he had chucked some condoms and magazines at the complainant, but said he did that when the complainant was asleep as a joke. He maintained that the magazines were not pornographic but educational and that he carried condoms with him because he ran trips into areas with HIV/AIDS, handed them out, and gave advice to people.[52] He denied throwing condoms at the complainant while saying, "These won't fit you. You've got big ones", but admitted that he told the complainant's mother that her children were "babe magnets". He also implicitly accepted making some comment as the complainant urinated because he wanted him to walk away as he did not tolerate people urinating in front of him. The appellant denied asking the complainant's mum to describe her "son's cock" and that she should buy her sons "bigger condoms".[53]

[31] On the night in question, the appellant accepted that he knew that the complainant was asleep in his tent.[54] He stated that he "subconsciously" was hearing a pig in his sleep, which woke him up. He also did not feel well but was not drunk. He saw a black object in the distance. He walked around the camp, saw that it was empty and went over to the complainant's tent because he wanted to find someone to help him.[55] He said that he "knew that [he'd] been 'spiked'" and saw the complainant put something in the food when he was preparing it. The appellant thought it might have been bush pepper, but was not sure that the complainant was spiking his food.

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46 AB at 111, 114.
47 AB at 112.
48 AB at 121.
49 AB at 124.
50 AB at 127.
51 AB at 129.
52 AB at 132-133.
53 AB at 152-154.
54 AB at 136.
55 AB at 138-139.

The appellant later said that either his food *or* drink could have been spiked.[56] He was worried about having a heart attack because his chest was very tight. The appellant went and sat in the car and then tried to lie in his ute. His chest was tight and it was too hard. He did not blow the horn because he did not want to create a disturbance.[57]

[32] As he walked around the camp a few times, he looked into the complainant's tent and saw him but walked away. He "didn't want to wake him" but he was the "only person available". He went back, however, even though he said "the plan was not to go anywhere near him" and placed his foot on the bottom of the complainant's ankle and shook him, but the dome tent gave way and he ended up landing on top of the complainant.[58] The appellant said the reason he tried to shake the complainant's foot was because he needed help as he thought he was going to die.[59]

[33] The appellant said that the complainant did not wake up although he had fallen on him. The appellant lay next to the complainant and tried to wake him. He said the complainant was next to him "for a couple of minutes". The next thing he recalled was that the camp light was on, the complainant got up and looked at him and walked out of the tent. The appellant presumed that the complainant had gone to urinate and would come back. The complainant did not come back and, after five or 10 minutes, the appellant crawled out of the tent. He was making himself a drink when he saw some lights and saw ND driving. He made an allegation against the appellant who replied "don't talk such nonsense". He saw ND taking his clothes off and standing with an erection "bringing up, like, a power from the earth" and "getting, like, some aggression to him". He was hit on the back of the head; he was hit 34 times altogether.[60]

[34] The appellant maintained that it was "absolute nonsense" that he touched the complainant's penis but accepted that he made contact with the complainant's sternum but nowhere else below the belly button.[61] He said that, by the time the complainant's brother confronted him, the effect of whatever he had been "spiked" with was wearing off. He rejected the proposition that he was never drugged.

Consideration

[35] The appellant sought to adduce further evidence. The applications should be refused as the material in question is irrelevant, such as assertions of the connection of various people to drug rings, or could have been put before the Court at trial, such as medical records and photos of injuries he sustained.

[36] The appellant advanced a number of complaints relating to the preparation and conduct of his trial, including that his Legal Aid lawyers wanted him to lie and remember nothing, that his lawyers made many mistakes, lost his USB, which contained many photographs, that he was only given 15 minutes to read his brief on the day of his trial and that a law clerk was running his case. The appellant further complained that the trial judge ignored his objection to the empanelment of one of the jury members. The appellant explained that he suffered a brain injury in the course of

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56 AB at 140-141.
57 AB at 144-145.
58 AB at 143.
59 AB at 144, 145.
60 AB at 147.
61 AB at 155.

the events on 15 April 2015 and has ongoing neurological and cognitive issues which made it difficult for him to put his case forward. The appellant also contended that his "[third] Legal [A]id Lawyer was bias[ed]" because they did not like the assistance the appellant had given to authorities. The appellant also complains that *his* second barrister and the trial judge were from the same chambers. None of these contentions are of any relevance in this appeal as the sole ground of appeal was that the verdict of guilty was unreasonable and could not be supported by the evidence.

[37] The appellant referred to inconsistencies in the prosecution case, such as that the complainant and his brother gave a somewhat different account as to whether the appellant admitted what he had done before or after being hit. The complainant accepted that his police statement referred only to the appellant's denial, rather than an admission, of having done anything.[62] It was for the jury to consider the weight to be given to the inconsistencies. The complainant's evidence was plausible and generally supported by the evidence given by the other witnesses. The complainant's evidence was internally consistent, particularly the evidence of his fleeing the scene and hiding from the appellant. There was strong evidence of immediate complaint. The appellant's version, on the other hand, lacked coherence and, as the respondent submitted, was able to be discounted as fanciful and unconvincing.

[38] Having reviewed the evidence I conclude that it was well open to the jury to be satisfied that the incident had occurred in the way described by the complainant and to be satisfied beyond reasonable doubt of the guilt of the appellant.

Order

[39] The orders I would make are:

1. The applications for leave to adduce evidence are refused.

2. The appeal is dismissed.

[40] **McMURDO JA:** I agree with Philippides JA.

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62 AB at 48.