SUPREME COURT OF QUEENSLAND

CITATION:	*R v Webber* [2020] QCA 130
PARTIES:	**R** **v** **WEBBER, Nicholas Alexander John** (appellant)
FILE NO/S:	CA No 258 of 2019 DC No 364 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 29 August 2019 (Moynihan QC DCJ)
DELIVERED ON:	12 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2020
JUDGES:	Chief Justice, Mullins JA and Jackson J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – TEST TO BE APPLIED – where the appellant was convicted of two counts of carnal knowledge of a child under 16 and three counts of indecent treatment of a child under 16 – where the appellant's case at trial was that the events did not happen – where there were inconsistencies in aspects of the complainant's evidence – whether the verdicts were unreasonable *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12, followed
COUNSEL:	The appellant appeared on his own behalf C M Cook for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Mullins JA and with the order her Honour proposes.

[2] **MULLINS JA:** The appellant was convicted after trial before a jury in the District Court on three counts of indecent treatment of a child under 16 (counts 1, 3 and 9) and two counts of carnal knowledge of a child under 16 (counts 2 and 10). He is

self-represented on the appeal. His grounds of appeal refer to aspects of the evidence of which he is critical. The short description of the grounds are circumstantial evidence, the jury overlooked witness evidence and the forensic evidence was substandard. There are no complaints about the learned trial judge's summing up.

[3] The appellant's outline focuses on the credibility of the complainant. The appellant refers to some aspects of the evidence adduced during the trial and asserts that the prosecution did not produce evidence that could satisfy the jury beyond reasonable doubt that the appellant was guilty of the offences.

[4] The respondent therefore submits that the ground of appeal should be treated as the verdicts were unreasonable or cannot be supported having regard to the evidence. That is an appropriate course in the circumstances.

Particulars of the counts

[5] The prosecution's particulars of the counts were as follows:

Count 1 is that the appellant kissed the complainant on the mouth on a date unknown between 27/9/2016 and 31/10/2016.

Count 2 is that the appellant penetrated the complainant's vagina with his penis on a date unknown between 27/9/2016 and 31/10/2016.

Count 3 is that the appellant kissed the complainant on the mouth; and/or touched the complainant's breasts outside of her clothes; and/or touched the complainant on the genitals outside of her clothes; and/or moved the complainant's body against his penis between 1/11/2016 and 23/11/2016.

Count 9 is the appellant had the complainant put his penis in the complainant's mouth between 23/11/2016 and 2/12/2016.

Count 10 is the appellant penetrated the complainant's vagina with his penis between 31/12/2016 and 1/2/2017.

[6] Count 2 was charged as rape, but the appellant was found not guilty of rape, but guilty of the alternative of carnal knowledge of a child under 16.

Evidence at the trial

[7] The prosecution called the complainant, her parents, her school friend, the appellant's cousin and her husband, and the investigating police officer. The appellant did not give or call evidence.

[8] The complainant's evidence was as follows. In September 2016, she was 15 years old and living with her parents and four siblings. She is the eldest child. Her mother worked in aged care which involved nightshifts and her father was a truck driver and was often away working. The complainant's grandmother had been helping the family, but that stopped. The appellant was known to the complainant's mother. In late September 2016, he came around to the home, was helping out and stayed. In late September the complainant was dating her boyfriend and that was her first relationship. She talked to the appellant about the relationship, before she

ended it two or three weeks after the appellant commenced living in the family home.

[9] The first time something happened with the appellant was a kiss on the lips in the lounge room when her parents were at work. (That was the subject of count 1.) They were watching television together. Her physical reaction was to back off and she did not say much at all. The kiss occurred before her ex-boyfriend's birthday which she thought was 18 October.

[10] On the same day as the kiss, the complainant was in her bedroom when the appellant came in and sat at the end of her bed and one thing led to another and sexual intercourse (penile/vaginal) took place. (That was the subject of count 2.) The complainant said:

> "I can remember not wanting it … I can remember crying when it all finished. And I can remember him saying that he was sorry because it was wrong that I was 15 and I certainly do remember saying that I didn't want it and it hurt."

[11] The complainant explained further that when he started, she was saying "no" and was very "iffy", but "I guess I wasn't strong enough because it continued". When asked to explain further about what happened when she was crying afterwards, the complainant said:

> "He sat on the end of my bed with me and he told me it was all right and he told me that he was sorry and he didn't realise that I didn't want it."

[12] The appellant introduced the complainant to smoking "ice". On one night after smoking ice with the appellant, they had "dry sex". The complainant described it in terms of the appellant fondling her genitals and her breasts, she did not take her clothes off, the appellant pulled her on top of his lap, she "was riding him on top" and she could feel his crotch. (That was the subject of count 3.) There were a number of times when dry sex with the appellant happened, but this occasion after the drugs was one that the complainant specifically recalled. When asked how she felt about the complainant at that point in time, the complainant responded:

> "Yeah, I thought it was okay. I thought that it was okay what we were doing because my mum didn't know and he made me feel good."

[13] After the evening of dry sex, the complainant did not go to school the next day. The complainant sat in the park for most of the day until her grandmother came and picked her up and she stayed there for two nights until her mother picked her up on 23 November 2017. After the complainant returned home, there was one night when the appellant wanted her to give him oral sex (where she put his penis in her mouth) which she did. (That was the subject of count 9.) That was the only occasion when that occurred. They continued to have penile/vaginal sexual intercourse.

[14] There was only one occasion after the appellant moved out on 2 December 2016, when the complainant had physical contact with the appellant. It was in the January school holidays of 2017. The complainant told her mother she was going to catch

a movie with two friends, but the complainant had planned with the appellant that he would pick her up from a train station. The complainant was certain it was either Helensvale or Coomera. The appellant picked her up from the train station in a red four wheel drive vehicle. On the way from the train station, the complainant said "some lady started screaming at him because he didn't have the car back in time" and they had to walk the rest of the way to his house. They had penile/vaginal sexual intercourse in his bedroom. (That was the subject of count 10.) It had a bunk bed and a low double wall unit where clothes could be put. There was a rug in the middle of the floor. The appellant organised for an Uber to take the complainant to the Coomera train station and she caught the train home. The complainant had been to that house on a previous occasion with the appellant, when he was still living in her parents' home.

[15] In April 2017 or 2018, the complainant told her mother about her having sexual intercourse with the appellant. The complainant did not make a complaint straight away. It was on the second occasion that she went to the police station that she wrote her statement. On that occasion she had a telephone conversation with the appellant that was recorded at the police station.

[16] The cross-examination drew out a number of inconsistencies between what the complainant said on one occasion and what she had said on another. One inconsistency was that the complainant had told police that she ended her relationship with her boyfriend in late September, but her evidence in the trial was that occurred two or three weeks later. In relation to the first occasion they had sexual intercourse, the complainant had told police that the appellant had pinned her arms down on either side, but she did not refer to that in her evidence-in-chief. In relation to her visit to the police in April 2017, the complainant was asked whether she remembered saying that she did not wish to proceed and that she signed a withdrawal of complaint. The complainant responded that she was "not 100 per cent sure", but said that she "must have" and that she could remember "not wanting to do it straightaway and then doing it later". It was put to the complainant that when she went to the police station in April 2017 she never mentioned an allegation of rape. The complainant explained that was because she thought what happened to her was not rape. She explained further that it was not until she wrote her statement that the investigating police officer said to her "you have been raped. Rape doesn't mean you were held down and you were raped. Rape comes under a big umbrella".

[17] The complainant was cross-examined on the first occasion that she had travelled to the Gold Coast. She and the appellant travelled in her parents' car, when he picked up his clothing from his house at the Gold Coast and they went to get ice from the appellant's friend. In respect of her second visit to the same house, the complainant confirmed it was a red vehicle that the appellant picked her up in, when it was suggested to her that it could have been a gold coloured car.

[18] The appellant's mother gave evidence of meeting the appellant through a friend and allowing him to stay at the family home on 27 September 2016. He was only meant to stay for the night, but he was a good help around the house and he stayed. After the appellant moved in, the complainant's mother noticed that her daughter had become very distant and would stay in her room, when she was at home. After the appellant had been there some time, the complainant's mother noticed that the complainant was moody and her routine had changed. One day when she and her husband were driving home, she saw the complainant drop to the ground and army

crawl behind their house which was into the bushes. The complainant did not come home that night and three or four days later, the complainant's mother collected her from the complainant's grandmother's house. The complainant's mother told the appellant to leave the family home on 2 December 2016 and he left on that day. The complainant did not speak to her about the appellant until April 2017 when the complainant told her that the appellant "did sleep with me and also he fed me a crack pipe".

[19] The complainant's father noticed that after the appellant commenced living in the family home that the complainant started becoming more withdrawn. He also recalled the incident when he and his wife were driving the other children home from school and he saw the complainant on the footpath and when she saw them, she went into the bushes to hide and did not stay at home that night. The appellant also went missing for a couple of days at that time. When the appellant came back, he was "stinking of sewage" and "claimed he was running from the police".

[20] The complainant's school friend saw the complainant in early January 2017 in the school holidays when they and another friend caught the bus to the railway station and then caught the train to Brisbane. The complainant changed trains to travel to the Gold Coast, while her school friend and their other friend stayed in Brisbane. They met up again with the complainant at the Brisbane train station and caught the 3 pm train back home.

[21] The appellant's cousin lived with her husband and children in the Gold Coast region. The appellant was staying with them periodically at the end of 2016 or the beginning of 2017. The appellant brought a young lady to their house one evening. They were in the garage and the appellant was bringing some things into the garage from her car or the car they had. She had brown hair, was quite slim and was a bit taller than the appellant's cousin who did not remember her name, but nominated two letters of the alphabet which she said the name may have started with (and the letters do sound like the complainant's first name). The appellant's cousin saw the girl again a few weeks later, when the appellant had borrowed her car and she saw he had the girl in the car with him. This happened when the appellant's cousin was being driven by her sister-in-law, because the appellant had not returned her car, and the appellant stopped driving and gave his cousin back her car. When she returned to her house about 40 minutes later, the appellant and the girl were back at the house. The appellant's cousin said that at one point the appellant told her in respect of the girl, "That he had had a relationship with her or that they had seen each other or were seeing each other", but the appellant's cousin was not sure which. The appellant's cousin's car was a gold or silver Ford Explorer. It was suggested to the cousin in cross-examination that she never had any conversation with the appellant about his having relationships with any girls, but the appellant's cousin did not agree with that proposition.

[22] The appellant's cousin's husband recalled that the appellant brought a young girl to their home. The cousin's husband said to the appellant "She looks a bit young. Who's this" and the appellant replied "It's a friend of mine. She's 18." The cousin's husband identified three photographs showing a bedroom at his family home that he referred to as "my girls' bedroom". He said the appellant used that bedroom. He was asked how the room was furnished when the appellant was using it and said:

> "When he first came, we had a set of wooden bunks in there, and that was where the wardrobe is. …
>
> As you walk in, the bunks were to the left, and then we pulled them out sometime after and put a double bed in."

[23] The investigating officer was called to produce the recording of the pretext telephone call between the complainant and the appellant on 8 August 2017. There were many indistinct parts of the recording and the conversation that was recorded showed that the complainant and the appellant were having difficulty in hearing each other. Early in the telephone call, the following exchange took place:

> "APPELLANT: I was tryna, I was tryna support ya and tryna be there for ya as a mate anyway. Um Like.
>
> COMPLAINANT: By sleeping with me?
>
> APPELLANT: You know how I felt about it. You know how I felt about it and it just, yeah.
>
> COMPLAINANT: How you felt about it? So what are you gonna tell me, you didn't like it now or what?
>
> APPELLANT: [complainant's name], [complainant's name].
>
> COMPLAINANT: I don't know what you mean by how you felt about it.
>
> APPELLANT: [INDISTINCT].
>
> COMPLAINANT: I want you. I don't. What do you mean, you know how I felt about it? I don't know how you felt about it.
>
> APPELLANT: It's. It's well it's definitely not appropriate, [complainant's name]. It's definitely not appropriate. And I was tryna be your friend and, and just fuckin' coach you through things and, but you know, I don't fuckin' want any o' this crap for ya."

Later in the call the following exchange took place:

> "APPELLANT: I didn't come close to s-, sleeping with you---
>
> COMPLAINANT: Pardon?
>
> APPELLANT: Like before, when that happened. Like I never even came close to sleeping with you, [complainant's name].
>
> COMPLAINANT: Yeah, but you did after that. That's what I mean. It all led up to it and then ---
>
> APPELLANT: [INDISTINCT]."

[24] The prosecutor at trial submitted to the jury that what was important about the recording was the lack of response by the appellant to the assertion made by the complainant that he had slept with her. The prosecutor pointed out that instead of saying "I didn't sleep with you", he was saying "You know how I felt about it". In relation to the second exchange extracted above, the prosecutor suggested the jury would interpret that as the appellant saying that he did not sleep with her before she

broke up with her boyfriend. In contrast, the appellant's counsel at trial suggested in his address that it amounted to a denial, as it was to the effect that the appellant never came close to having sexual intercourse with the complainant.

[25] The investigating officer spoke to the complainant in April 2017 when she came to the police station and confirmed that the complainant signed a withdrawal of complaint on that day. The complainant disclosed sexual offences, but not rape and did not mention going to the Gold Coast. The investigating officer was cross-examined on whether she had said to the complainant the words that the complainant had attributed to the investigating officer about telling her she had been raped and rape did not mean that you were held down but comes under a big umbrella. The investigating officer did not recall that conversation. No forensic testing was undertaken during the investigation because of the time delay between the conduct the subject of the offences and the reporting of them.

Were the verdicts unreasonable?

[26] The appellant's case at trial was that the acts did not happen. The credibility and reliability of the complainant's evidence was put in issue in her cross-examination. Even though the defence case was the act relied on to constitute count 2 did not happen, as the complainant's evidence in respect of count 2 was capable of raising the defence of mistake of fact, the trial judge appropriately directed the jury on the burden on the prosecution to negative this defence.

[27] The court's role on the appeal is to determine whether upon an independent assessment of the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offences in respect of which the jury returned guilty verdicts. The High Court in *Pell v The Queen* (2020) 94 ALJR 394 re-stated the function of the court on this type of appeal at [39]:

> "The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt." (*footnote omitted*)

[28] The appellant referred to some factual matters that were not adduced in evidence at the trial and therefore cannot be relied on in this appeal. The factual matters that were adduced in evidence and were the subject of the appellant's submissions on the appeal were the timing and the poor quality of the pretext call, the prejudice arising from the evidence about the use of the drug ice by the appellant and the supply of ice by the appellant to the complainant and evidence from the complainant's father that suggested criminal activity on the part of the appellant.

[29] The appellant highlighted the poor connection of the pretext telephone call which came through as broken and half sentences. The quality of the call was no doubt apparent to the jury. (The appellant wished to explain how that poor connection

affected his responses to the complainant in that recorded conversation, but that is evidence that was not before the jury and cannot be considered on this appeal.)

[30] Some of the particular aspects of the evidence which are highlighted in the appellant's written outline for the appeal were raised by his trial counsel in his address to the jury for their consideration.

[31] The evidence in relation to the appellant supplying the complainant drugs was admitted to provide context to the relevant events between the appellant and the complainant. The trial judge gave the jury a strong warning against the misuse of the evidence. The appellant's trial counsel addressed the jury in respect of the complainant's drug use as relevant to her credibility and reliability. After the complainant's father's evidence that suggested criminal activity on the part of the appellant, the appellant's trial counsel obtained specific instructions from the appellant not to seek a mistrial, but to request a direction from the trial judge in relation to that evidence. An appropriate direction was given by the trial judge that the evidence was irrelevant and should be put completely out of the jurors' minds.

[32] In order to convict the appellant of each of the offences for which he was found guilty, the jury had to be satisfied of the truth and reliability of the complainant's evidence in respect of each of the subject acts. The prosecution relied on the appellant's statements in the pretext telephone call as capable of being an admission to the act relied on to constitute count 10 or as to other uncharged sexual acts of the appellant having sexual intercourse with the complainant when she was 15 years old. An appropriate direction was given to the jury, as to what they had to be satisfied about for the statement to amount to an admission of the offence in count 10 or another uncharged act of a sexual nature and, if the latter, how it could be used to show the appellant had a sexual interest in the complainant. The jury was also given an appropriate direction on how they should approach and use the other evidence of uncharged sexual acts given by the complainant.

[33] In relation to count 10, there was some support from the evidence of the appellant's cousin and her husband that the complainant had been to their house on the day the complainant said she was collected by the appellant from the train station in his cousin's vehicle. Although the complainant may not have remembered the colour of that vehicle, there was consistency with the appellant's cousin's evidence about the same encounter in respect of her recollection of the appellant's cousin taking the vehicle from them and being annoyed with the appellant for not having returned the vehicle to her earlier. There was also consistency with the appellant's cousin's recalling the girl visited her home on two occasions and with the complainant's evidence that she visited the house on the Gold Coast where the appellant stayed twice. In respect of the conversation the appellant's cousin recalled having with the appellant that suggested he admitted to some sort of relationship with the girl, the jury were given appropriate directions as to how to use that conversation. On the appeal, the appellant argued that his cousin and her husband had not positively identified the complainant in their evidence at the trial. In light of the consistency between the appellant's cousin's recollection of the girl's visits and the complainant's evidence, it was not in issue at the trial that there was no more formal identification of the complainant by those witnesses. The complainant's school friend's evidence supported the complainant's evidence as to her travel to and from the Gold Coast by train.

[34] The inconsistencies in the complainant's evidence that were relied on at the trial concerned peripheral matters, rather than the evidence of the circumstances of the conduct which was the subject of the charges, and did not detract from the consistency of the complainant's evidence in relation to that conduct.

[35] My assessment of the whole of the evidence is that the verdicts of the jury were not unreasonable or unsupported by the evidence. The appellant cannot succeed in his appeal.

Order

[36] It follows that the order which should be made is: Appeal dismissed.

[37] **JACKSON J:** I agree with Mullins JA.