SUPREME COURT OF QUEENSLAND

CITATION:	*R v C* [2002] QCA 82
PARTIES:	**R** **v** **C** (appellant/applicant)
FILE NO/S:	CA No 291 of 2001 DC No 131 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	19 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2002
JUDGES:	Davies and Thomas JJA, Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – appellant convicted of rape – where offences occurred on appellant's property – where complainant placed on appellant's property as part of a care program CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where evidence against appellant included his admissions of other sexual misconduct in relation to another person – whether trial judge erred in failing to exclude such evidence – where appellant's statement part of the *res gestae* – where statement clearly admissible CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – GENERALLY – whether appellant prejudiced by newspaper report published during the trial - where clear

directions given to jury – where appellant had a fair trial

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – whether trial judge took sufficient account of appellant's medical condition

Corrective Services Act 2000 (Qld), ss 133-135

Black v The Queen (1993) 179 CLR 44, referred to
KRM v The Queen (2001) 75 ALJR 550, referred to
R v Hasler ex parte Attorney General [1987] 1 Qd R 239, referred to
R v Morrison [2001] QCA 184; CA No 150 of 2000, 17 May 2001, considered
R v Pettigrew [2001] QCA 468; CA No 145 of 2001, 30 October 2001, considered
R v Self [2001] QCA 338; CA No 77 of 2001, 24 August 2001, referred to
R v Stirling CA No 205 of 1996, 17 September 1996, applied
R v York [2001] QCA 408; CA No 124 of 2001, 28 September 2001, considered

COUNSEL: M J Byrne QC for the appellant/applicant
SG Bain for the respondent

SOLICITORS: Ryan & Bosscher for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Thomas JA and with the orders he proposes.

[2] **THOMAS JA:** This is an appeal against a conviction of rape.

[3] The grounds relied on are that evidence was wrongly received; that unfair prejudicial remarks were made by the learned Crown Prosecutor in his closing address; and that a report in the local newspaper on the second day of the trial prejudiced the fairness of the trial. As I understand the argument of Mr Byrne QC for the appellant, it is the accumulation of such matters that is relied on for his final submission that the appellant did not receive a fair trial.

Summary of evidence

[4] At material times the appellant and his wife lived on a property at Rosevale where wayward or displaced children were cared for. The complainant was a 15 year old girl who left her mother's home in Gladstone on 1 January 1999 and began living with a friend. Her mother contacted an organisation which made contact with the appellant and his wife and arranged for her to stay on their property. The complainant arrived there on 13 January.

[5] On 21 January, on the complainant's evidence, there was a conversation between them in the kitchen. It is expressed somewhat ambiguously in indirect speech, but is capable of being interpreted as a statement by the appellant that he thought that the complainant was able to give him what he wanted, but that she would not; that he would still go over and buy her boots "and everything"; that "we'll find out tonight"; and that "he could take me home on Monday".

[6] That night, after the complainant had gone to bed, the appellant came in and shone a torch in her face. He asked did she remember the deal. She said "What deal?" He asked her whether she remembered she had to go home to Gladstone. She said that she did not want to go home. She said "So if I don't give you what you want, I have to go back to Gladstone?" to which the appellant replied, "Yes". Her evidence continues, "So I laid there and I just let him take off my top and my bra and boxer shorts". She went on to describe the ensuing sexual activity, including the appellant putting his tongue into her vagina, his inserting his penis, her screaming and stating that she did not want to get pregnant, his statement that he knew the ropes, just to relax and that it always hurt the first time.

[7] After his penis was withdrawn the complainant lay naked and crying, and complained "I didn't want that". Her evidence of his response was:

> "He said he just wanted another Clair, and that he could see by my teddy-bear that I was a – a young 15, not a mature 15. And he just said that most 15 year old …"

At that point she was cut short by counsel. Earlier the learned trial judge had ruled that part of the complainant's proof of evidence concerning this conversation should not be led, namely "most 15 year old girls have done it before and don't carry on". Obviously the introductory words of that sentence were mentioned before the learned Crown prosecutor could prevent them.

[8] The following day the complainant received a birthday present from her mother. She telephoned her mother and said that she wanted to come home. The complainant's evidence is that she suggested in a round-about way that the appellant had done something to her but when her mother asked did he do something she said "No, he's threatening to". Later that day she went to Bundaberg with the appellant to attend the greyhound races.

[9] The following morning Ms M, (the person who had arranged for the complainant to stay with the appellant), telephoned her. On the complainant's account the appellant was only a few metres away during the conversation. Ms M said "just say, yes or not, did he rape you?" And she replied "Yes". Ms M's evidence was that she asked the complainant, "What's the problem?" and was told that the appellant had made her have sex with him two nights before. She was told that the appellant would be back from the horses at about 6.30. Later that day Ms M picked up the complainant and took her to the Gladstone police station.

[10] At the police station the complainant gave a statement. When the detective explained to her what would happen next she withdrew the complaint. After withdrawal of the complaint Ms M threw out the blood-stained underpants of the complainant which the complainant had given to her.

[11] A few weeks later she received some psychiatric advice and later underwent a medical examination which revealed a ruptured hymen. She conceded that during this period she received some advice about possible compensation. In the event the complaint was reactivated. Subsequently the appellant was diagnosed with leukaemia and "went bush". A considerable time elapsed before he was apprehended.

[12] The appellant gave evidence denying any sexual interference with the complainant. Both he and his wife gave evidence that the complainant was due to start school locally on the Tuesday following the complaint of rape, and that she did not want to go.

Admission of appellant's statements

[13] Before evidence was called objection was taken to the reception of some of the statements allegedly made by the appellant to the complainant immediately after the rape. Objection was taken to the reference to "Clair" as well as to the appellant's immediately following statement, "Most 15 year old girls have done it before and don't carry on". As earlier indicated, his Honour ruled that that last statement should not be led, but that the remainder of the statement could be led.

[14] The first question then is whether his Honour erred in failing to exclude the "Clair" statement. In my view the whole statement was clearly admissible as part of the res gestae. The complainant's evidence is that she had just been raped by the man who was supposed to be looking after her. She was naked and crying on the bed and she stated "I didn't want to do that". The evidence in question is the appellant's response to that statement. It is very much a part of the incident. He chose to express himself in those terms. His response may properly be seen as an attempt to dissuade her from making a complaint by assuring her of the normalcy of the conduct and as a means of settling her down. It is his explanation of his conduct and allows the incident to be understood in its proper context. It is true that the statement implies that he had had some sort of sexual dealing with someone else named "Clair" although the evidence is silent as to Clair's age or the nature of the dealing. But in my view even if he had said something far more prejudicial such as "I do this all the time and no-one complains" the evidence could properly have been received, and it would not necessarily be excluded as unfairly prejudicial and of insufficient probative weight. Sometimes an admission which contains gratuitous admissions of other criminal misconduct may properly be edited so as to exclude the gratuitous admissions on the ground of undue prejudice and insufficient probative value. But the fact that other misconduct is revealed by a statement is not of itself sufficient to justify such an exclusion. Questions of this kind have been considered in this court in a number of recent cases including *Pettigrew*[1], *York*[2] and *Morrison*[3]. Perhaps the most striking of these was *Pettigrew* where statements of intention to kill other persons were made in the course of admissions of the killing the subject of the charge. It was not considered that any error had occurred in the trial judge's declining to exclude such evidence. A similar result has followed

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1 [2001] QCA 468 paras 24 to 32.
2 [2001] QCA 408 paras 23 to 24.
3 [2001] QCA 184 at para 25.

admissions disclosing that the accused (charged with the rape of one girl) had raped three girls including the complainant.[4]

[15] In the present case the reference to Clair was an integral part of the appellant's response. It describes his reaction to her expression of resentment. Without it, the complainant's account would be unfairly truncated. I would go further. Whilst I do not suggest that his Honour erred in excluding the appellant's further statement about what most 15 year olds do without "carrying on", his Honour would not have been in error had he permitted it to be led. The statement as a whole was in my view part of the res gestae, descriptive of the appellant's manner of dealing with the complainant at the critical time.

[16] This last observation renders it unnecessary to say very much about the remaining objection to the few words "most 15 year old …" which she blurted out before being interrupted. The words identify a subject but nothing else. I do not think that the mentioning of those words, even though contrary to his Honour's original ruling, could possibly have prejudiced the appellant in this matter. But in any event in my view the appellant is fortunate that the learned trial judge did not rule that the whole statement might be given.

[17] Mr Byrne supplemented his primary submission concerning the reception of this evidence with a submission that it amounted to propensity evidence upon which his Honour was obliged to have given a direction to the jury, telling them how it might be used. No request was made at trial for such a direction, and it does not seem to me to be a case where it was necessary or even desirable for the learned trial judge to advert to the capacity for such evidence to reveal a propensity, followed by a direction against reasoning that the appellant was the kind of person likely to commit the offence charged. It is now recognised that such a warning is not universally necessary in relation to evidence that may be labelled "propensity evidence", and that the circumstances of the particular case need to be considered before determining whether error arises in the absence of such a direction. Such questions have been addressed by the High Court in *KRM v The Queen*[5] and by this court in *R v Self* [6]. It is enough to say that in the circumstances of this particular case I do not consider that the learned trial judge erred, particularly in the absence of any request to do so, in failing to give such a direction.

Newspaper report of evidence not given

[18] Evidence was produced to this court of a newspaper report published on the second day of the trial which contained a paraphrased statement from the Crown Prosecutor's opening, attributing to the appellant the words "Most of the girls I get here are from the city – they are rough and tough and they know what I want". In the event the complainant, when she gave evidence, did not come up to proof and did not give that evidence. The publication was not read by anyone associated with the defence during the hearing, and no submissions were made in relation to it. However in the course of the trial the jury were given clear directions as to what evidence consists of, and to confine their considerations to the evidence. They were

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4 *R v Hasler ex parte Attorney-General* (1987) 1 Qd R 239, 243, 254-255.
5 (2001) 75 ALJR 550.
6 [2001] QCA 338 paras 24-42.

also directed to ignore any reports or versions of events that they may read or hear or otherwise encounter outside the court room.

[19] I am unable to see how the appellant could have been prejudiced by reason of this particular report of the Crown prosecutor's opening.

Cross-examination and address of Crown prosecutor

[20] In the end I do not understand this point in itself to be strongly pressed. It, like the previous point, was raised to enhance the submission that there was evidence of the appellant's propensity to take sexual advantage of young girls and that there should have been a direction on the subject. The objection is primarily directed to the prosecutor's portrayal of the appellant as a sexual predator on a vulnerable girl, a point which he submits exacerbated the unfairness of receiving the statements that have already been discussed. In my opinion the points made by the learned Crown prosecutor in cross-examination and address were within the limits of advocacy properly available having regard to the issues that arose in this trial.

Other points

[21] Mr Byrne submitted that the trial was finely balanced, pointing out that after a retirement of about two and a half hours the jury had indicated difficulty in reaching agreement, and that this was followed by the administration of a *Black*[7] direction. Mr Byrne also raised matters such as the absence of initial complaint and divergences (relatively minor in my opinion) in the accounts of the complaint that was made to Ms M on the telephone.

[22] It is true that some discrepancies can be found in the evidence of the complainant. One is in relation to the conversation in the kitchen on 21 January which implies that the appellant had not by that time purchased boots for the complainant. However the complainant agreed in cross-examination that on 19 January the appellant had driven her to Bundaberg and bought riding boots for her. Another point raised concerning possible unreliability of the complainant is that she gave evidence that her last period had ended on 9 January. If accepted this evidence forestalls a possible explanation that could have been offered by the appellant's counsel for the blood-stained underpants produced to Ms M on 23 January. The evidence also shows that the complainant purchased some sanitary pads on 17 January which, the appellant submits, goes against the complainant's evidence concerning the time of her last period. It may be thought quite reasonable for a girl living on an isolated property simply to buy such items when the opportunity presented itself. This was obviously a jury question on a fairly peripheral matter. It is enough to say that none of the additional points that have been raised are persuasive or capable of raising any concern as to the fairness of the trial or the safety of the verdict.

Conclusion

[23] In my view none of the points taken, either individually or collectively, suggest that the appellant had other than a fair trial. I would dismiss the appeal.

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7 *Black v The Queen* (1993) 179 CLR 44.

Sentence

[24] The appellant was sentenced to six years' imprisonment. He was 61 years old at trial. His condition of chronic lymphatic leukaemia was said to be in remission. Mr Byrne submitted that he should not be given a harsher sentence for exercising his right to give evidence. That is obviously so, but there is no reason to think that this happened. It was submitted that the sentence of six years was inappropriate in circumstances which did not involve violence, infliction of injury or use of a weapon. However such a sentence may well be appropriate in situations where there is such an age disparity and such an abuse of trust. Indeed, *Stirling*[8] suggests that a seven year sentence was an appropriate starting point having regard to conduct of the kind revealed by the appellant.

[25] The defence submissions below were that seven years was an appropriate starting point, and that the medical condition of the appellant would justify a reduction to six years. This appears to have been what his Honour did. The question now is whether his Honour erred by not making a greater reduction.

[26] The appellant was not at time of trial on any medication for his condition because he was in remission. His then state of health was described as "fair" though he tired easily. His prognosis was that he may die from the disease. If his remission ended, he would develop acute leukaemia which cannot be treated. It is reasonable to infer that his expectation of life has been reduced and that the prospect of his dying in prison is by no means out of the question. For this reason it was submitted that there should be a recommendation for parole at an earlier time than would otherwise have been the case.

However there was no reason to think that the learned sentencing judge did not take this into account when fixing the sentence. Moreover, it is impossible to tell whether or not the current remission of the disease will end. It is noted that the Corrective Services authorities have the power to grant early parole in "exceptional circumstances"[9], and that this might be activated if life-threatening illness supervened. Having regard to the vulnerable position of the complainant, the circumstances in which she came to the property, its geographical and social isolation, the applicant's breach of trust, the complainant's loss of virginity and the absence of remorse on the part of the appellant, I am unable to say that the sentence was manifestly excessive. I would accordingly refuse the application.

Orders

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.

[27] **MUIR J:** I agree with the reasons for judgment of Thomas JA and with the orders he proposes.

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8 CA No 205 of 1996, 17 September 1996.

9 *Corrective Services Act* 2000, ss 133-135.