SUPREME COURT OF QUEENSLAND

CITATION:	*R v YD* [2002] QCA 489
PARTIES:	**R** **v** **YD** (appellant)
FILE NO/S:	CA No 186 of 2002 DC No 95 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2002
JUDGES:	Davies JA, Cullinane and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted; term of imprisonment of 18 months set aside; substituted sentence of 12 months to be suspended after six months with an operational period of two years.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – SEXUAL OFFENCES – BUGGERY AND INDECENT ASSAULT OR DEALING – PRACTICE AND PROCEDURE – where appellant convicted of one count of indecent dealing with child under age of 12 with a circumstance of aggravation – where appellant sentenced to 18 months imprisonment – whether sentence was excessive CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – COMPETENCE AND COMPELLABILITY – CHILDREN – GENERALLY – where evidence given by six year old complainant – whether evidence led to an unsafe and unsatisfactory verdict – whether the learned trial judge should have issued a warning to the jury about the evidence of the complainant *Evidence Act* 1977 (Qld), s 93A *Criminal Code Act* 1899 (Qld), s 632

R v GA [1999] QCA 9; CA No 417 of 1998, 4 February 1999, considered
R v Hill [1995] QCA 450; CA No 303 of 1995, 5 September 1995, considered
R v N [2001] QCA 70; CA No 215 of 2000, 6 March 2001, considered
R v Pham [1996] QCA 3; CA No 435 of 1995, 6 February 1996, considered
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, referred to

COUNSEL: K M McGinness for the appellant
B G Campbell for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **CULLINANE J:** The appellant appeals against his conviction in the District Court at Brisbane on 21 May 2002 on one count of indecent dealing with a child under the age of 12 years. He also seeks leave to appeal against the sentence imposed of eighteen months imprisonment.

[3] The appellant is the grandfather of the complainant who was born in October 1995. She was thus a little over five years at the time of the offence which was alleged to have been committed on 17 February 2001.

[4] The complainant's mother is the daughter of the appellant.

[5] The appellant advances two grounds of appeal against his conviction. The first is that the conviction is unsafe and unsatisfactory and the second is that the learned trial judge erred in failing to give the jury a warning about the evidence of the complainant. It was said that a Robinson type warning was called for in this case (a reference to *Robinson v The Queen* (1999) 197 CLR 162).

[6] The complainant's mother had taken her to the appellant's apartment where she was to stay the night. This was something that had occurred before. On the following day when the complainant's mother collected her, the complainant told her whilst they were driving home that "Poppy" had put his tongue in her "fanny" and that she also said, "Can you tell him not to do that again" and "I didn't like it".

[7] The complainant gave evidence and a video of her interview with the police was tendered under s 93A of the *Evidence Act* 1977.

[8] The evidence of the complainant before the jury which was given by video link was quite brief. The complainant gave evidence that the appellant "licked my privacy". She was asked what she was referring to and it seems she pointed downwards. She was asked what she used her privacy for and she said, "changing" and when asked whether for anything else she said, "I can't remember". She was also asked a little

later if she used any other word for privacy she said, "floss" and a little later when asked what part of her body she was referring to said, "down on my body" and also pointed downward. She did not (when asked to refer to the part of her body that she said the appellant had licked) use the word "fanny".

[9] The primary ground advanced in support of the first ground of appeal was that the complainant's evidence was so vague in important aspects of her evidence that it was difficult to test her evidence. This primarily related to the part of her body she said the appellant licked but also included other matters.

[10] It can be accepted that the evidence was somewhat vague in these respects. However it is necessary to bear in mind that the complainant was six at the time. In her evidence in chief after being asked what she used her privacy for and giving the answer "changing" she was asked:

> "*What else? – I can't remember.*
>
> *Do you call it any other name A? – I'm too shy to tell you.*
>
> *You're too shy to tell me? – Mm."*

[11] The jury saw the complainant and was in the best position to evaluate her evidence. The reluctance of the complainant to discuss these matters would have been obvious to the jury. It was open to the jury to ascribe the complainant's vagueness or unpreparedness to elaborate upon the evidence she gave of what had occurred to her aversion to discussing these matters with those asking questions of her at the trial. This is it seems to me a natural explanation for the vagueness and lack of detail complained of rather than any desire to not tell the truth. It was plainly a conclusion which the jury was entitled to reach in determining whether to accept her evidence something the jury must ultimately have done.

[12] There are some complaints in the written outline of other answers said to be in the nature of inconsistencies but an analysis of them leads me to conclude that they cannot be regarded as inconsistencies or as uncertainties in her evidence of such a nature as to make the verdict unsafe and unsatisfactory.

[13] In some respects they are no more than a failure to agree with parts of the account given by the appellant. The first ground is in my view without substance.

[14] So far as the second ground is concerned the appellant relied upon a number of matters but ultimately pressed the considerations of the complainant's age, the absence of corroboration, the absence of medical evidence and the absence of any earlier or subsequent misconduct.

[15] Section 632 of the *Criminal Code* prohibits the giving of a warning that it is dangerous to accept the evidence of a witness because the witness belongs to a particular class of witness and it was accepted this would stand in the way of a warning being given upon that ground alone. The learned trial Judge did in fact make some reference to the age of the complainant suggesting that in stating that the jury should take this into account all that was being stated was the "very obvious". This reference cannot be regarded as unfavourable to the appellant.

[16] The learned trial Judge squarely focussed the issue which the jury had to consider when giving a direction that the only evidence against the appellant came from the complainant and that the jury could not convict the appellant unless the jury was satisfied beyond a reasonable doubt that her account was both truthful and reliable. He told the jury that that was the essential issue.

[17] The evidence was in fairly narrow compass and the learned trial Judge outlined the arguments advanced by counsel for the appellant at the trial.

[18] The matters relied upon in support of the claim that a warning should have been given must be taken to be within the capacity of a jury to appreciate and evaluate properly without the need for any specific warning.

[19] No redirection along the lines now contended for was sought.

[20] In my view the circumstances did not call for a direction that it would be dangerous to accept the evidence of the complainant and this ground also fails.

[21] The appeal against conviction should be dismissed.

[22] The appellant also seeks leave to appeal against sentence.

[23] He was born on 26 August 1955 and has no criminal history.

[24] Only a single incident was alleged against him. The conduct of the applicant towards the complainant undoubtedly involved a serious breach of trust, the complainant having been entrusted to him with the care of the complainant overnight. The breach of trust involved is made more serious by the tender age of the complainant.

[25] There is some evidence of behavioural change on the part of the complainant and the complainant's mother appears to be concerned about her and is extremely protective of her.

[26] A consideration of the cases to which we were referred satisfies me that the sentence imposed was manifestly excessive being outside of the range of sentences imposed in cases of this kind.

[27] The conduct involved places this at the lower end of the scale of seriousness of offences of indecent dealing. Some of the cases to which we were referred involved appeals by the Attorney-General and are perhaps of somewhat limited assistance. However cases such as *re GA* (CA 417 of 1998); *re Hill* (CA 303 of 1995), *re N* (CA 215 of 2000) and *re Pham* (CA 435 of 1995) all of which involve broadly comparable conduct lead me to the conclusion that a sentence of eighteen months imprisonment was excessive.

[28] I am satisfied that a term of imprisonment was called for. I would substitute for the sentence imposed below of eighteen months imprisonment, a sentence of twelve months imprisonment to be suspended after six months with an operational period of two years.

[29] **HOLMES J:** I agree with the reasons of Cullinane J and with the orders he proposes.