SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2002] QCA 486
PARTIES:	**R** **v** **M** (appellant)
FILE NO/S:	CA No 264 of 2002 DC No 269 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EXTEMPORE ON:	7 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2002
JUDGES:	de Jersey CJ, Davies JA and Mullins J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**The appeal is dismissed**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OBJECTIONS – where appellant convicted of 6 counts of indecent dealing with a child under 12 years of age and in his care – where part of the evidence led by the Prosecution was a recording of a phone call between the appellant and complainant where the appellant admitted the offences – where complainant rang the appellant from a police station – whether the learned trial Judge should have exercised his discretion by excluding the tape because of the circumstances in which the conversation occurred – consideration of *R v Swaffield; Pavic v R* (1997) 192 CLR 159 as to whether the tape was admissible *R v Broyles* [1991] 3 SCR 595, followed *R v B* [2000] 1 Qd R 28, considered *R v Swaffield; Pavic v R* (1997) 192 CLR 159, followed
COUNSEL:	J Farrell for the appellant B G Campbell for the respondent
SOLICITORS:	Mountfords for the appellant Director of Public Prosecution (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted in the District Court on six counts of indecently dealing with a child under 12 years of age in his care, and acquitted on one count of rape. The appellant was the complainant's step grandfather. At the time the complainant was six or seven years old. When she gave evidence at the trial she was 16 years old.

Part of the evidence at the trial was a tape-recording of a telephone call between the complainant, who was then 15 years old, and the appellant. The learned trial Judge admitted the tape into evidence over the objection of the offence. The objection arose from the circumstances in which the conversation occurred.

It was the complainant who telephoned the appellant and she did so from a police station. The learned Judge dealt with the issue on the basis that the complainant telephoned the appellant at the instance of the police for the purpose of possibly obtaining relevant admissions from the appellant. That is indeed what eventuated.

The admission on which the Crown concentrated was contained in this passage:

> "Complainant: I just want to know why you did it. Appellant: I did - I don't know why. Why, why, why, what - why. Complainant: You did all this stuff to me. I just want to know why you did it. Oh Pa, just tell me why please. You know you did it. Just why did you do it? Appellant: But what did I do to you, tell me, what? Complainant: Every night you used to take me into your bed and you used to finger me and lick me out and all that kind of stuff and you'd rub your dick all over me.

> Appellant: I thought you liked it. Complainant: No, I didn't."

The issue on this appeal is whether the learned Judge should have exercised his discretion by excluding the tape because of the circumstances in which the conversation occurred. The Judge had apparently been prepared to authorise some editing of the tape were that sought in the event of its being admitted. But defence counsel indicated that were the tape to be admitted, it should be admitted in its entirety.

In the written submissions the Crown has stressed a number of points. By the time of the conversation the appellant had not been charged. The police had not interviewed him. He had not declined to speak of the alleged events to any person in authority. The taping did not contravene any provision of the law.

In those circumstances, and noting that the other party to the conversation was not a police officer, there was, it was submitted in the written material, no reason why the learned judge should have excluded the evidence. His Honour took the view that he was not constrained by authority, including The Queen v. Swaffield, Pavic v. The Queen (1997) 192 CLR 159, to exclude the tape.

Defence counsel submitted before the Judge that the complainant was, in telephoning the appellant, effectively acting on behalf of the police and that because of the importunate character of her approach, which it was submitted

involved badgering and hectoring, application of the principles discussed by the High Court in those cases should have resulted in the exclusion of the evidence.

In Swaffield and Pavic the High Court followed, in relation to conversations secretly recorded, the approach of the Supreme Court of Canada in The Queen v. Broyles 1991 3 Supreme Court Reports 595. That approach requires the Court to consider first, whether the person in the position of this complainant was, in telephoning the appellant "an agent of the State", and second, whether the admission was "elicited", by contrast with its having been forthcoming in the course of a naturally flowing conversation.

Consistently with the view of the majority in Swaffield and Pavic, the complainant would here be regarded as an agent of the State, in that she spoke with the appellant at the instance of the police. See pages 203 to 4 per Toohey, Guadron and Gummow Justices and per Justice Kirby at page 220.

As to the second issue, one asks whether the statements made by the appellant were a response to what should be regarded as an "interrogation" by the complainant. According to Broyles at page 611 two matters should be taken into account:

> "The first set of factors concerns the nature of the exchange between the accused and the State agent. Did the State agent actively seek out information such that the exchange could be characterised as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done. The focus should not be on the form of the conversation but rather on whether the relevant parts of

> the conversation were the functional equivalent of an interrogation.
>
> The second set of factors concerns the nature of the relationship between the State agent and the accused. Did the State agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the State agent and the accused? Was the accused obligated or vulnerable to the Stage agent? Did the State agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?"

I have, of course, read the transcript of the conversation between the complainant and the appellant, a number of times. Certainly it is importunate, with the complainant asking the appellant over and over again why he did certain things to her. But it was especially important in this case, in order to address this issue, to hear the conversation as it occurred. Reading just the transcript would, in this case, give a quite distorted view of the nature of the exchange.

Listening to the tape, one reaches the view that the conversation was very much an exchange between a comparatively immature adolescent girl, tearful for much of it, and her mature and confident grandfather.

The pathetic tone of the child's questioning and comments is plaintive, not overbearing. There were many occasions on which the appellant could have withdrawn from the conversation had he wished. Indeed, he threatened to do so at one stage unless the complainant changed the subject but he remained on the line and the exchange continued.

It is the substantial age difference and contrasting levels of maturity, the apparent self-possession of the older man faced with the emotional and tearful questioning of the child which, notwithstanding the importunate character of that questioning, do in my view prevent a conclusion that the exchange should have been excluded because it amounted to an interrogation or elicitation.

Had the appellant felt under undue pressure he could, as I say, have withdrawn. That he did not do so itself suggests that the situation was not from his point of view unfair. In my view it was not, in terms of Broyles, "the functional equivalent of an interrogation".

The character of the conversation which occurred here is not unlike that of the conversation before the Court of Appeal in The Queen v. B [2000] 1 Queensland Reports 28 at 37. That Court did not consider that conversation exhibited undue pressure and took the view its tone suggested a degree of equality between the participants, page 43 and pages 33 to 34. The admission of that evidence was upheld.

I wish to add that listening to the tape led me to the firm conclusion that in so far as the appellant's responses were incriminating, they were of a high level of reliability. I would dismiss the appeal.

DAVIES JA: I agree.

MULLINS J: I agree.

THE CHIEF JUSTICE: The appeal is dismissed.
