SUPREME COURT OF QUEENSLAND

CITATION:	*R v D'Arcy* [2003] QCA 124
PARTIES:	**R** v **D'ARCY, William Theodore** (appellant)
FILE NO/S:	CA No 388 of 2002 DC No 3096 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2003
JUDGES:	Davies and Williams JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring with the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS - STAY OF PROCEEDINGS - PRE-TRIAL PUBLICITY - where appellant former member of Parliament - where at time of trial, appellant in gaol having been convicted of indecent dealing - where previous trial received great deal of adverse publicity - where trial judge gave direction to the jury that they should ignore media publicity - where alleged offences occurred more than 30 years before trial - whether appellant was capable of receiving a fair trial because of these matters - whether permanent stay of proceedings should have been ordered CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JURIES - OTHER MATTERS - where appellant submitted that because of pre-trial publicity and the prejudice this may have caused in minds of jurors, the jurors ought to have been questioned in accordance with s 47 *Jury Act* 1995 (Qld) - where substantial time lapsed between worst adverse publicity and commencement of trial - where trial judge told jurors that if they considered that they could not act impartially they should tell him - whether special reasons

existed requiring inquiry of jurors pursuant to s 47 *Jury Act* 1995 (Qld)

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - OTHER CASES - where complainant's cousin gave evidence of incident which did not constitute counts charged and where complainant could not recall it occurring - whether such evidence supported that of complainant and should have been admitted by trial judge

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE AND INSUPPORTABLE VERDICT - where jury returned verdict of guilty on one count and not guilty on another - whether such verdicts were inconsistent and insupportable

Jury Act 1995 (Qld), s 47

R v Lewis [1994] 1 QdR 613, cited
R v Long [2003] QCA 77; CA No 104 of 2002 and CA No 81 of 2002, 28 February 2003, cited
Murphy v R (1989) 167 CLR 94, considered
R v M [1997] 1 QdR 404, cited

COUNSEL: A F Maher for appellant
B G Campbell for respondent

SOLICITORS: Lake Lawyers (Forest Lake) for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **DAVIES JA:** The appellant was convicted in the District Court on 14 November 2002 on one count of indecent dealing with a girl under the age of 17 years. The offence was alleged in the indictment to have taken place between 6 July 1969 and 28 May 1972. At that time the appellant was the headmaster and teacher at a small State school at Logan Village. The complainant was a pupil at that school aged between 10 and 13 at that time. The complainant thought that this offence occurred when she was in Grade 5.

[2] In fact the appellant had been charged on three counts, all of indecent dealing with the complainant. The facts alleged in each count were similar.

[3] The counts were particularized as follows. In the first count the complainant was called into the appellant's office and sat on his lap. He put his hand up under her skirt, undid her bra and squeezed and rubbed her breasts. In the second count, he called her into the office, sat her on his lap, placed his fingers inside her panties and rubbed around her pubic hairline. In the third count, he called her into his office, sat her on his lap and placed his fingers inside her vagina. The trial judge directed an acquittal on count 2 and the jury returned verdicts of guilty on count 1 and not guilty on count 3. That last verdict forms the basis for one of the grounds of appeal; that the conviction on count 1 is inconsistent with the acquittal on count 3.

[4] The appellant appeals against his conviction on a number of grounds. It is convenient to consider them in the following order:

1. that the learned trial judge erred in refusing an application for a permanent stay of the indictment such that the appellant was deprived of a fair trial;
2. the learned trial judge erred in refusing an application pursuant to s 47 of the *Jury Act* 1995 to question the jury as to their impartiality such that the applicant was deprived of a fair trial;
3. that the learned trial judge erred in admitting the evidence of Grace Elizabeth Drahm;
4. that the learned trial judge erred in directing the jury that the evidence of Grace Elizabeth Drahm was capable of constituting corroboration of the complainant's evidence;
5. that the verdict of the jury was unsafe and unreasonable in all the circumstances.

1. The refusal of a permanent stay

[5] At the time of trial the appellant was in gaol having been convicted in the Supreme Court on 1 November 2000 of 11 counts of indecent dealing with a girl under 12, four counts of indecent dealing with a boy under 14 and three counts of rape. These offences were committed between June 1963 and July 1965. He appealed against that conviction to this Court and that appeal was dismissed by this Court on 22 August 2001. The present trial commenced on 11 November 2002.

[6] The adverse publicity arising from that earlier case was the first basis upon which the appellant sought a permanent stay of the indictment. The appellant's previous trial, conviction and appeal, which included an appeal against sentence, received a great deal of publicity. He had been referred to in the media after his convictions as a "convicted paedophile", and there was further adverse publicity which attended the reduction of his sentence on appeal, about his absence from his electorate whilst a member of Parliament and concerning a superannuation payout notwithstanding his convictions. It was submitted that it was unlikely that any potential juror had not heard about or formed an adverse view of the appellant. It is likely that at least some members of the jury in the present trial would have been aware of the fact that the appellant had been previously convicted of similar offences.

[7] The second basis was the lapse of time between the alleged offences and the trial and the consequences of that. The offences in this case, like the offences of which the appellant was convicted in November 2000, took place more than 30 years before his trial. No blame can be attributed to the appellant for the failure to bring these matters to trial before then.

[8] A delay of this magnitude between, on the one hand, the commission of offences and, on the other, indictment and trial can and often does pose difficulties for the accused. Memories fade and possible witnesses become unavailable. Moreover, as is almost inevitable in cases of this kind, it was impossible for the complainant to particularize with any precision when she said these offences occurred.

[9] On these bases the applicant's counsel sought a permanent stay of the indictment before the trial commenced. That application was refused. It is now submitted that the appellant did not receive, and was incapable of receiving a fair trial because of the combination of these matters.

[10] The principles relevant to consideration of a permanent stay have been recently discussed by this Court in *Long*[1] and it is, for that reason, unnecessary to repeat them or the relevant authorities here. The learned trial judge, after hearing argument on this question, delivered detailed reasons. He set out relevant authorities and then said with respect to the first basis relied on:

> "Ultimately the question here must be whether the potential for prejudice is so great that there exists a likelihood that the accused could not receive a fair trial."

[11] It was not suggested that that was misstating the principle. His Honour went on:

> "There has been a good deal of prejudicial material and, even allowing that it is unlikely that jurors would have a detailed recollection of this publicity, there can be no denying that it is capable of having an impact upon jurors. The published material, however, does not deal directly with the present charges. Nor does it purport to prejudge them in any way.
>
> In my view it should not lightly be assumed that a jury will not comply with their oaths to try the accused free from prejudice and according to the evidence only. In my assessment the potential for prejudice to the accused resulting from pre-trial publicity here can be effectively guarded against by appropriate directions from the trial judge. In the result I would refuse the application to stay the indictment on this ground."

[12] His Honour then went on to discuss the other bases upon which it was argued that the proceedings should be stayed, the principal one being the second basis to which I have referred. He referred to the loss of some school records and concluded, correctly it seems to me, that it was a matter of speculation as to whether the availability of these records might in some way assist the accused. In the end his Honour concluded that, whilst delay might inevitably be a cause of some difficulty in the conduct of a criminal trial, such difficulty would not necessarily lead to an order for the stay of proceedings and did not require such an order in that case. Accordingly he refused the application.

[13] In my opinion his Honour correctly applied the relevant principle to the facts of this case. Moreover his Honour gave careful directions to the jury, both at the commencement of the trial and during the course of his summing up, to the effect that they should ignore media publicity and all that they had heard or read about the accused or charges against him; and that they should decide the case solely on the evidence presented during the trial.

[14] At the end of his Honour's summing up the jury retired and considered their verdict for nearly six hours at the end of which time they found the appellant guilty on count 1 and not guilty on count 3. There is nothing from this, in the light of the evidence to which I refer later, which would indicate that they were "intractably set on convicting" the appellant.[2]

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1 [2003] QCA 77; CA No 104 of 2002 and CA No 81 of 2002, 28 February 2003.

2 *R v Lewis* [1994] 1 QdR 613 at 639.

[15] I can find no error in the exercise of his Honour's discretion not to stay the indictment. And I do not think that his failure to do so resulted in any substantial risk of prejudice or otherwise in a miscarriage of justice.

[16] In my opinion this ground of appeal must fail.

2. The refusal to accede to an application to question the jury

[17] Section 47 of the *Jury Act* 1995 relevantly provides:

> "(1) If a judge who is to preside at a … criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process.
> … "

The special reasons why, in this case, it was submitted that the appellant's counsel should be permitted to question the jurors were the adverse pre-trial publicity and the prejudice against the appellant which that may have caused in the minds of jurors.

[18] As on the application for a stay the learned trial judge considered all of these matters and gave detailed reasons for refusing the application. He referred to the fact that the publicity, adverse though it was, did not relate to the charges the subject of this trial or refer to it at all. And he pointed out the substantial time which had elapsed between at least the worst of that adverse publicity and the commencement of this trial.

[19] There is no reason to think that what must be shown to justify an authorization under s 47(1) is any less than what must be shown under the legislation considered by the High Court in *Murphy v the Queen*.[3] Nor do I think that his Honour erred in applying to this question before him the principles in that case.

[20] During the course of empanelment of the jury two jurors asked to be excused, one of them on the basis only that he did not think that he could be fair at the trial. That juror was then challenged. The learned trial judge, as is usual in such cases told the jury, amongst other things, that if they considered that for any good reason they could not act as an impartial juror, they should tell him. He also added that this was a case which had received a good deal of media publicity and that it was extremely likely that some if not all of the jurors may have heard or read about the charges against the appellant. He went on to give the warnings to which I have already referred.

[21] I do not think that it was demonstrated that the learned trial judge erred in failing to be satisfied that there were special reasons requiring inquiry of jurors in this trial. In my opinion his Honour was entitled to accept the assurance of the jurors who remained that they would not have difficulty in acting in an impartial manner and there is no evidence that they did otherwise. There is no reason to think that his Honour's confidence in the jury's capacity to be impartial was misplaced. I am satisfied that there was no consequent miscarriage.

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[3] (1989) 167 CLR 94 at 103 - 104; see *R v D'Arcy* [2001] QCA 325; CA No 336 of 2000, 22 August 2001.

3. The evidence of Ms Drahm

[22] Ms Drahm was the complainant's cousin. She stayed with the complainant's family for some weeks during a year in which she thought she was in Grade 6. She thought this was in 1969. During that period she attended Logan Village State School in the same class as the complainant, taught by the appellant. The appellant taught a composite class which included Grades 5 and 6.

[23] On one occasion during this period, Ms Drahm said, the complainant told her that the appellant had asked the complainant to stay back in class during the lunch hour and the complainant asked her, Ms Drahm, to stay also. On this occasion she observed the appellant place his hand under the complainant's top and saw him rubbing her breasts. Only those three were in the class-room at the time.

[24] This was not one of the incidents alleged to constitute the counts charged and the complainant, at the trial, could not recall it occurring. On the contrary, to the best of the complainant's recollection, all incidents occurred in the office. In order to assess the relevance of this evidence it is necessary to say something about the complainant's evidence in respect of the offences charged.

[25] The events constituting the first charge occurred, the complainant thought, when she thought she was in Grade 5. She agreed in cross-examination that this was in 1970. The appellant called her into his office which was next to the class-room and asked her to sit on his lap. He then put his hand up her skirt, undid her bra and then squeezed her on both breasts.

[26] The complainant and Ms Drahm were born in the same year. However the complainant was held back a year in Grade 1. On that basis the complainant would have been in Grade 5 in the year in which Ms Drahm was in Grade 6. So while it is by no means certain, the likelihood is that the event described by Ms Drahm occurred in the same year as count 1. It is even more likely that it occurred some time before count 3 which, according to the complainant, occurred when she was in Grade 7.

[27] The complainant's evidence with respect to counts 2 and 3 was much less specific. This is not surprising after some 30 years particularly when, on the complainant's evidence, the appellant interfered with her, at least by touching her on the breasts, on many occasions, all in his office adjoining the class-room. For example, when first asked whether she could remember other occasions she described another incident, a day or so after the first, on which he did much the same things.

[28] She was then asked were there other occasions to which she replied that she could remember him calling her into the office and putting his hand down her pants to her pubic hairline. However when asked to describe this incident further she went on to describe the appellant also putting his finger into her vagina. It was unclear, by then, whether she was describing the events alleged in count 2 or those alleged in count 3 or, as appears more likely, an amalgam of the two. And she said that this was the only occasion on which the appellant had put his hand down her pants. She said that this occurred when she was in Grade 7.

[29] The evidence of Ms Drahm, in my opinion, plainly supported that of the complainant. It increased the probability that all of the acts charged occurred because it was evidence of an "unnatural and abnormal passion" by the appellant for

the complainant and a relationship between the appellant and the complainant of sexual gratification by the appellant.[4] This ground of appeal therefore must also fail.

4. An unreasonable verdict

[30] The main submission here is that the guilty verdict on count 1 is inconsistent with the not guilty verdict on count 3. It is submitted that the complainant's evidence, which was the only evidence directly relevant to either count, was no more specific or convincing in respect of the facts alleged in count 1 than it was in respect of the facts alleged in count 3.

[31] I have already summarized the complainant's evidence with respect to all counts. Her evidence on the first count was consistent as well as specific. Moreover the jury might well have thought that, as this was the first occasion on which the appellant interfered with the complainant, it would have been something which she would specifically remember. The guilty verdict shows that they were satisfied beyond reasonable doubt that the event occurred in the way in which the complainant said it occurred.

[32] By contrast, she then went on to describe the events said to constitute counts 2 and 3 as if they occurred at the same time. She went on to say that this was the last occasion on which the appellant interfered with her, the reason being, she thought, that she told her father about it at this time.

[33] It is not surprising in those circumstances that the learned trial judge directed the jury to acquit on count 2. However the jury may reasonably have thought that the problem went deeper than this. A reading of the complainant's evidence as a whole shows, as appears to be unfortunately common in such cases, a course of conduct by the appellant. The jury might reasonably have thought that, although conduct of the kind of which the complainant gave evidence in respect of counts 2 and 3 probably occurred during the period which she described, it was not completely clear which of it occurred on the occasion particularized in count 3.

[34] Having that doubt did not mean that they doubted the complainant's credibility; rather that they may have thought she was confused as to precisely which of the appellant's acts were committed on the occasion of count 3 and consequently whether that count, as particularized, had been established beyond reasonable doubt.

[35] There was therefore, in my opinion, a rational explanation for the jury's finding of not guilty on count 3 whilst still finding the appellant guilty on count 1.

[36] The appellant relied, on this ground, also on the evidence of Mr Musch, who had also been a pupil at the time. It was submitted that his evidence was unchallenged. He said, and this appears to be correct, that one could see into the office from the class-room. And he said that the teacher sometimes spoke to the class from there. He also said that he could not recall the complainant being called into the office or being in the office and absent from the class. But Mr Musch, unlike the complainant, would have had no reason, after 30 years, to recall whether or not she had been called into the office by the appellant.

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[4] *R v M* [1997] 1 QdR 403; *R v B* [2003] QCA 105; CA No 336 of 2002, 14 March 2003. See also *R v Knuth*, [1998] QCA 161; CA No 64 of 1998, 23 June 1998.

[37] Some inconsistencies in the complainant's evidence were also relied on but these, it seems to me, were matters about which an honest witness, in the situation of the complainant, might have been uncertain after 30 years. They did not, in my opinion, affect her credibility on the central issues in this case.

[38] This ground must also therefore fail. I would dismiss the appeal.

[39] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA. I agree with all that he has said therein, and with the order proposed.

[40] **ATKINSON J:** For the reasons given by Davies JA, I agree that the appeal should be dismissed.