SUPREME COURT OF QUEENSLAND

CITATION:	*R v P* [2003] QCA 103
PARTIES:	**R** **v** **P** (appellant)
FILE NO/S:	CA No 2 of 2003 DC No 2224 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	12 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2003
JUDGES:	de Jersey CJ, Davies and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where apparent concession by complainant – where inconsistencies in complainant's evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where evidence discrediting appellant's statements to police – whether evidence directed solely at credit *M v R* (1994) 181 CLR 487, followed *Jones v R* (1997) 191 CLR 439, followed
COUNSEL:	A J Glynn SC for the appellant B G Campbell for the respondent
SOLICITORS:	O'Mara's Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant appeals against his conviction in the District Court on one count of indecent dealing with a child under 16 years of age then in his care. He was sentenced to 12 months imprisonment to be suspended after six months for 18 months. The complainant was the appellant's niece as a result of his marriage. She was five years and eight months old, it seems likely at the time of the relevant incident, and she was six years and 10 months old by the time of the trial.

On the weekend of the 26th of October 2001 the complainant was staying with the appellant and his wife. During that weekend the complainant disclosed the commission of the subject offence to her aunt. The aunt subsequently told the police who spoke with the complainant on the 2nd of November 2001. The complainant then made no mention of the appellant.

The police again spoke with the complainant on the 6th of November 2001. The complainant was asked about her uncles and aunts. When asked about the appellant she said, "Well he made

me touch his doodle in the bath." She said there was nobody else at home at the time, that her aunt was at work, that they were both in the bath and that it was dark outside.

The appellant's wife gave evidence that the only occasion on which the complainant had stayed the night at their house while she, the aunt, was at work was the night prior to the Exhibition Day holiday which is in August. The trial appears

to have proceeded on the basis that that was the only occasion when the offence could have occurred.

The appellant was interviewed by the police on the 21st of November 2001 and he denied the alleged offence. The first ground of appeal is that the jury's verdict was unreasonable. One in particular is that the jury, "Failed to give proper weight to the complainant's concession in cross-examination when she agreed that it was not right that she had touched the appellant's penis."

Towards the end of her evidence, defence counsel asked her this question, "Sorry, I'll come to it in another way. It's not right, is it, that you touched Uncle Dave's doodle? It's not right, is it?" In his summing up to the jury, the learned Judge observed that the complainant, "was upset", there was a pause, and then she said, "No."

Commencing re-examination, the Crown Prosecutor sought confirmation from the complainant of the accuracy of what she had told the police. There was an objection, in response to which the prosecutor expressed his concern that the complainant may not have understood defence counsel's question to which I have just referred.

The learned Judge said that the question had seemed, "clear enough", and went on himself to ask the complainant whether she had understood defence counsel's question, to which the complainant answered, "No."

In his summing up, the learned Judge referred to the possibility of ambiguity attending the complainant's answer to the question put to her in cross-examination, but he reminded the jury that in the absence of ambiguity the answer would be clearly inconsistent with the section 93A statement given to the police.

That was one of a number of inconsistencies which the Judge reminded the jury they might care to assess and take into account in determining whether they accepted the complainant's account overall. It was submitted for the appellant that the complainant's answer in cross-examination, "should have given the jury a real doubt about the witness's reliability". It is pointed out that she had at least twice earlier during her evidence, sought clarification of questions asked of her.

During addresses, the aspect of the question's involving two negative expressions and whether in being asked about what was "right", the complainant's attention may not have been directed towards what was appropriate, were raised. Bearing in mind the age of the complainant at the time she was being questioned, it is to my mind strongly arguable that her answer, "no", to that less than simple question for a person of that age, should not have carried great weight. The jury were properly instructed about the matter by the learned Judge. It was not in my view an aspect which should in the end weigh substantially in determining whether the verdict should reasonably stand.

Counsel for the appellant raised the possibility the emotional disturbance suffered by the complainant while giving evidence, may have imposed such a burden on the jury that they may not rationally have analysed the evidence. The jury were told not to be swayed by emotion. I do not believe we should proceed on the basis they were.

The next particulars of the ground of appeal are that, "The jury failed to give sufficient weight to the inconsistent versions given by the complainant to her mother and her aunt and to her explanation of the differences between those versions." And likewise as to inconsistencies between the accounts given to her mother and the police.

The first person to whom the complainant made her allegation was the appellant's wife. That occurred on 26th October 2001.

She said that, "Uncle Dave let me play with his doodle in the bath." The appellant's wife asked, did the appellant, "Make you touch his doodle or did you ask to", drawing the complainant's response, "I asked." On the other hand when the complainant spoke to her mother, she said that the appellant's shower ran out of hot water and that he then hopped into the bath with her and made her touch his penis which accorded with her statement in the section 93A recording.

When confronted with this discrepancy, the complainant said under cross-examination, "I told Auntie Barb a different word

and I told Mummy a different word because I forgot what I told Aunty Barb so I made it different."
This aspect of inconsistency, whether the appellant made the complainant touch his penis or whether she asked to do so, may have been considered by the jury to lack overall significance, acknowledging the context, that of a very young child endeavouring to explain activities of which she likely had no great understanding. And of course whichever the true position, there would have been an offence.

The other inconsistency said to arise from this material concerned whether the complainant touched the appellant's penis more than once. In her section 93A statement the complainant said the incident in the bath was the only time that occurred. At the committal, having been asked about the events of that night and having said that when they got out of the bath they dried themselves and got dressed, she was asked,

"So you didn't touch his doodle again after that?", to which she said, "No."

To her mother, however, she asserted that the following morning the appellant made her play with his penis again. At the trial when asked how many times she claimed she touched the appellant's penis, she said she had forgotten and she refused to agree that she had told the investigating police officer that she only touched the appellant's penis once.

The point made in response on behalf of the Crown is that questions drawing the particular responses said to give rise to these inconsistencies may well have been interpreted as relating to the particular occasion. For example, when interviewed the complainant was asked, "Did anything else happen with Uncle Dave?" That could have been interpreted as being confined to the events of the particular night.

The questioning at the committal could have been interpreted similarly. It was not then put precisely to the complainant. For example, "Did anything happen the next morning?"

The jury was given an orthodox direction on the potential significance of inconsistencies and cautioned about the need in relation to the complainant's evidence to "scrutinize it with considerable care", bearing in mind her age and the prospect that a child of that age might be "easily swayed or subject to suggestions".

There was reference to her considerable emotional upset when giving evidence at the trial by video-link from a remote location. I am not satisfied that this particular inconsistency should necessarily have loomed large as a factor dissuading the jury from acceptance of the complainant's account of what happened.

Other suggested inconsistencies, for example as to the positioning of the parties in the bath and the positioning of the complainant's legs, as to the particular reason, in

relation to the operation of the shower, why the appellant may have joined her in the bath, and whether the complainant's evidence that she told her aunt of the incident the day after it occurred, which on the appellant's wife's evidence could not have been so, were not of such proportion as to warrant overall scepticism about the complainant's account.

As I have said, as at the likely date of the alleged offence the complainant was five years, eight months of age, and at the time of giving evidence, six years and ten months. In his sentencing remarks, the learned judge said of her, "I have no doubt that she is an intelligent child. I heard her give evidence."

The jury had the opportunity to see the section 93A interview and to observe the complainant being cross-examined. The jury was given an orthodox direction as to the inconsistencies now said to invalidate the verdict.

The jury was told in strong terms as to the need to scrutinise the evidence of the complainant and that the Crown case depended entirely on that evidence.

The jury was also told there was no supporting evidence, no recent complaint, and as to the significance of that. I should point out, however, that no complaint has been made of the summing-up and the proper disposition of a ground of appeal such as this does not depend on the summing-up.

It is necessary for this Court to embark upon its own survey of the evidence given and the way the case was conducted. M against R 1994, 181 Commonwealth Law Reports 487 at 493 to 4; and Jones against the Queen 1997, 191 Commonwealth Law Reports 439. Having carried out that survey, I am satisfied that it was open for a jury acting reasonably to be satisfied beyond reasonable doubt, that the incident upon which the conviction is based did occur.

Apart from the matters already covered I note that the complainant, described by the judge when sentencing as intelligent, in all situations held to her basic contention and further, that her account gained some indirect support from the evidence of the appellant's wife on finding the appellant and the complainant naked in the bathroom together, an aspect to which I will come in a moment.

Of course an appellate Court should be especially careful in reviewing a conviction based on evidence from one so young. But I am satisfied this one should be sustained. I would reject this first ground of appeal.

Upon the hearing this morning, the Court granted leave to amend the notice of appeal to add a second ground as follows, "The learned trial judge erred in admitting evidence from the appellant's wife solely for the purpose of discrediting the appellant's statements to police in a recorded interview."

In the course of that interview the appellant was asked, "Have you ever, whether anyone else has been at home or not, taken a bath or shower with the complainant?" He responded, "No, never. No. The complainant has walked into the bathroom whilst I have been taking a shower but she was told to leave because I obviously don't feel very comfortable having anybody in the bathroom with me, whether it be a child or another adult, other than say a parent like my mum or dad - possibly my dad, maybe. Maybe not my mum, or my wife if she decided to come in, but that would be about it."

I consider the jury may properly have interpreted that to signify the appellant's view that the child's presence with him in those circumstances would not have been proper.

Over objection the Crown was permitted to lead evidence from the appellant's wife to the effect that on one occasion when she returned home from work after dark, the appellant was having a shower and the complainant was having a bath in the same room; both of them naked.

On the evidence I should point out this could not have been the occasion of the alleged offence.

The point now taken for the appellant is that the sole purpose of the Crown's leading that evidence must have been, "discrediting the appellant's answers in the record of interview", which raised a merely collateral issue, which the

Crown should not have been permitted to explore through further evidence.

In my view, however, the relevance of the appellant's wife's evidence was not so confined. That evidence was admissible on a number of bases: first, it potentially evidenced the relationship between the appellant and the complainant, indicating a degree of familiarity which left the appellant prepared to be naked in front of the complainant girl. In that context, the appellant may have felt more secure to deal with the complainant as alleged.

Further, evidence that the appellant and the complainant were naked together in the bathroom on the occasion described by his wife, potentially rendered the complainant's evidence that they were naked in the bathroom during the alleged incident, more credible.

The evidence was, in those respects, relevant to and logically probative of the complainant's account and not directed solely to the issue of credit.

For those reasons the second ground of appeal was not in my view established either. I would dismiss the appeal.

DAVIES JA: I agree.

WILLIAMS JA: I agree.

THE CHIEF JUSTICE: The appeal is dismissed.
