SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 150
PARTIES:	**R** **v** **D** (appellant)
FILE NO/S:	CA No 338 of 2002 DC No 70 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2003
JUDGES:	McMurdo P, Davies JA and Philippides J 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 refused**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE - where appellant sentenced to seven years imprisonment for four counts of rape and two years concurrent imprisonment for one count of indecent dealing - whether sentence manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – UNREASONABLE OR INSUPPORTABLE VERDICT - where appellant convicted of rape and indecent dealing - where counts spanned a period of six years and were nearly 20 years old - where complainant's evidence was uncorroborated on all counts - whether evidence was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty - whether convictions were unsafe and unsatisfactory and against the weight of the evidence *R v B* [2003] QCA 105; CA No 336 of 2002, 14 March 2003, applied *R v M* [2001] QCA 458; CA No 126 of 2001, 26 October

2001, distinguished
R v Sakail [1993] 1 QdR 312, applied
R v W; ex parte Attorney-General (Qld) [2002] QCA 329; CA No 84 of 2002, 30 August 2002, distinguished

COUNSEL: M J Byrne QC for the appellant
R G Martin for the respondent

SOLICITORS: Arnell & Cooper for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The appellant pleaded not guilty to two counts of indecent treatment of a girl under 16 years with a circumstance of aggravation and five counts of rape contained in a single indictment. The offences were alleged to have occurred over a period of about six and a half years from July 1982 to December 1988. The indictment originally charged nine counts, but the original counts 1 and 8 were removed and the various counts renumbered accordingly. During the course of the trial, the Crown entered a *nolle prosequi* in respect of count 5, a count of rape, and a directed verdict of not guilty was entered in respect of count 4, a count of indecent dealing with a girl under 16 years with a circumstance of aggravation, because the complainant's evidence did not establish that those offences occurred during the period alleged in the indictment. The jury convicted the appellant of the remaining count of indecent treatment of a girl under 16 years with a circumstance of aggravation and four counts of rape. The appellant contends the convictions are unsafe and unsatisfactory and against the weight of the evidence.

[2] The appellant was sentenced to seven years imprisonment on each count of rape and to two years concurrent imprisonment on the count of indecent dealing. He contends that the sentences are manifestly excessive.

The evidence

[3] A consideration of these grounds of appeal requires a review of the evidence. The complainant first gave a statement to police officer Prendergast on 23 March 2000. On 18 May 2001, in company with the complainant and another police officer, he drove around a number of towns in south-east Queensland where the complainant had lived during the time of the commission of these offences. On 17 July 2001, he charged the appellant with these offences.

[4] The prosecution case turned on the evidence of the complainant, K. She was born on 30 September 1974 and the appellant is her step father. Her natural parents separated in the late 1970s when she was four or five and they were living in town 1 in New South Wales. After a period, her mother moved to Queensland but she stayed in town 1 with her father and her eldest brother, Sh. Part way through Grade 2, she moved to town 2 in south-east Queensland where she met the appellant who was living with her mother, her brother Sc, a younger brother Lu and, intermittently, Sh. She was in Grade 2 at the local state school in 1982. They lived in a house near a squash court and she slept in the same room as her brothers whilst her mother and the appellant had the other bedroom.

[5] When she was eight years old and in Grade 2, she was asleep in her bedroom. The appellant:

> "…would come and wake me up and tell me to go into his bedroom. … And he would tell me to lay down on the bed where he would then remove my pants and perform oral sex on me. … He would like (sic) my genitals for, I think, between five to ten minutes. And then he would pull his pants down and pull out his penis and rub it on my vagina and masturbate himself until he orgasmed, where he orgasmed over my stomach and removed it with a tissue. And then told me to get dressed and go back to my bedroom."

These incidents would happen day or night, anytime her mother was not home, mostly when she was at bingo.

[6] The complainant attended Tae Kwan Do lessons three or four times but stopped because she hated being alone with the appellant who would take her after lessons into nearby bushland.

> "He would pull his pants down and grab my hand and place it on his penis. …
> And tell me to pull him until he ejaculated and then pull his pants up and go home."

This occurred on only one occasion. She did not recall anything else to do with Tae Kwan Do. These facts constituted count 1.

[7] Her evidence at trial differed from her detailed statement to police, in which she said that these incidents occurred after every lesson and was why she stopped going to Tae Kwan Do. She said her memory has become clearer in the last two and a half years because she has thought about it every day.

[8] The appellant used to wake her up at 5 or 6 am to go running along the beach. After they got home he would make her have a cold shower and he would sit there and watch her showering naked with the screen pulled back. On a couple of occasions, he would play with himself whilst she showered; this allegation was made for the first time when she gave her evidence in chief.

[9] In 1983, the family moved to town 3 and she attended another local state school during 1983 and part of 1984 for Grades 3 and 4. She shared a bedroom with her brother Sh; her brothers Lu and Sc shared another bedroom and her mother and the appellant a third. The family then moved to town 4 and she attended the local school. On one occasion the appellant and her mother had a bar-b-que for friends. Everyone was drinking and the children were playing. She was in the kitchen when the appellant said to her, "Tonight is the night, you're going to give me a head job." This comment stuck in her memory. In her police statement she said this conversation occurred when she was outside playing but she now knew this was wrong: "the nightmares had clarified [her] memories". She was then nine or ten years old in Grade 3 or 4. The other children were in bed. She fell asleep in a bedroom. The appellant came in, woke her up and told her to go to his bedroom. Her mother was not present. He pulled down his pants, put his penis to her face, grabbed the back of her hair and tried to force her mouth onto his penis. She would not open her mouth and he became angry and forced her back on the bed. He took her pants off and put his penis inside her for the first time. She was crying and shaking. She was scared. He had sex with her, withdrew and ejaculated over her

stomach. He cleaned up with a tissue and told her to return to her bedroom as if nothing had happened. These facts constituted count 2.

[10] In 1984, the family moved to another rented home in town 5. They lived there until 1985 and her brother Le was born there. The appellant and her mother worked in Nambour. From time to time in the mornings she would go into her mother's bedroom and talk to her mother and the appellant. She would get under the blankets beside the appellant and he would make her rub paw-paw cream on his anus; sometimes he would grab her hand and make her rub his scrotum and his penis whilst her mother was in bed beside him.

[11] At least once a week, when she was asleep and her mother was out, he came into her bedroom, had oral sex and penetrated her.

[12] They had four or five horses. The appellant, her brother Sh and she went riding towards the State park and the appellant sent Sh ahead. The appellant took the horse by the reins and led them off into long grass. He took her off the horse, removed her clothes and placed her on the grass. He had sex with her and penetrated her again with his penis until orgasm. The ejaculate was all over her and she wiped it off on her clothes, got dressed, mounted the horse and kept riding. She was about ten or eleven and Sh would have been eight or nine years old. He was not present during the incident. These facts constituted count 3.

[13] The family unit then moved to town 6 at the end of 1985 where she attended another local school for Grade 6. The appellant "preyed" on her every time her mother went out when, she said, "he would get me". Her mother separated from the appellant in 1988 and she lived with her mother in town 7 with the appellant's parents whilst the appellant remained at the former family home in town 6. She attended high school in town 7 in 1988. For the first time during cross-examination she said that when she lived in town 7 the appellant's father was touching her improperly; he put his hands down her pants and tried to kiss her.

[14] In the September holidays that year she returned by bus to the appellant's home in town 6 to see her old friends because she had no friends in town 7. The appellant collected her from the bus. She visited her girlfriend AP but the appellant insisted that she return to his home. She did not want to go but he became angry and threatened her that if she did not return he would come and get her; she reluctantly returned to his home. That night, after she had fallen asleep in her old bedroom, he woke her up and told her to go to his bedroom. He took all her clothes off and removed his clothes. He performed oral sex on her. She had by then reached puberty; he took a condom from his side cupboard, put it on and had sex with her. He told her to return to her bedroom and she did.

[15] When they lived in town 3, the house backed onto sugar cane fields and she and the appellant went for a walk amongst the sugar cane. He took her off the track and into the sugar cane where they were alone, told her to lie down, removed her pants, performed oral sex on her and pulled his penis out of his pants. He did not penetrate her but rubbed his penis over her vagina and pulled himself until he ejaculated all over the ground. These facts constituted count 4 on which a directed verdict of not guilty was entered.

[16] One night, while living in town 5, he woke her up there for the first time and told her to go into his bedroom. She hid in a washing basket full of clothes. He returned

and looked everywhere for her. He kept telling her that if she came out he would not be angry but he was becoming increasingly angry; she gave herself up because she was scared. He told her to get on the bed. She did not want to but obeyed him. He undressed her and took off his pants. He had oral sex and then penetrated her until he withdrew and ejaculated over her stomach. He wiped this off with a tissue or a warm face cloth. These facts constituted count 5 on which the prosecution entered a *nolle prosequi*.

[17] She lived at town 3 in 1983 and part of 1984 and then moved to town 4 where she lived in 1984 before moving to town 5 in 1985 and town 6 at the end of 1985. The family stayed at town 6 until 1992 although she lived in town 7 in 1988 for a few months.

[18] She first met her current partner, T, who is the father of her son, in 1992. The appellant showed T a sexually suggestive fax and T told the appellant that he knew the appellant had "touched up" the complainant. The appellant admitted that he had and that he was sorry; he said he only did it because he was on speed. The appellant and T then went outside and had a big verbal argument at which she was not present.

[19] Count 6 is alleged to have occurred over a two year period. The complainant gave no evidence about this incident during her evidence-in-chief. Only in cross-examination did she agree that she and the appellant were riding their horses from town 5 to town 7 because they had moved to town 6. The appellant took her off the track into a bit of bush where he told her to get off the horse. He took her pants down and had sex with her on the side of the road until ejaculation. He did not have a condom and did not ejaculate inside her. He got up, they dressed and kept riding. She was 13 or 14 and in Grade 7 or 8 when this offence occurred.

[20] She initially spoke to police on 23 March 2000. She did not mention the facts constituting counts 3 or 4. She spoke to police again on 24 November 2000 and told them about the facts constituting count 4. She did not tell them about the facts constituting count 3 until May 2001 when she visited with police the houses in which she had lived with the appellant; when they stopped in town 7 she remembered that incident for the first time. She accepted the proposition put to her in cross-examination that this was a flashback.

[21] The complainant's brother, Sh, had no memory of ever going horse riding with both the complainant and the appellant. At the committal proceedings, he agreed that the appellant never took him horse riding with the complainant.

[22] The complainant's mother gave evidence of the complainant's age. She had the complainant and Sh to the complainant's father; the appellant is the father of her two sons, Lu and Le. She left the complainant's father in about 1980 and formed a relationship with another man for about 12 months. She then formed a relationship with the appellant for about nine years; they married in 1982 when they were living in town 2 and subsequently they lived in towns 4, 5, 6 and 7. They separated in about 1990.

[23] The children, including the complainant, were involved in Tae Kwan Do at one time or another. The family used paw-paw cream for treatment of sores, burns and so forth. She did not give evidence of the incident involving the complainant, the

appellant and the paw-paw cream, which was said to have occurred in her presence in the matrimonial bed.

[24] The complainant's partner, T, gave evidence that in March 1992 at town 6 he visited her and was having a drink with the appellant, her mother and her. The appellant showed him a sexually explicit magazine and he became angry. He said he wanted to talk about what the appellant had done to the complainant. They went outside and T accused the appellant of being "a rock spider" and asked him why he would do such a thing. T said, "Why didn't you tell [the complainant's] mother what you did to her when she was a kid?" The appellant said that the mother already knew about one incident. T said, "It was more than that. It started when she was six years old and [the complainant's mother] said she had no idea at all." T called the appellant a rock spider and said, "I should like, you know, give you a hiding for it and kill you for it." and "What have you got to say for yourself." The appellant said that he was ashamed of himself and that he blamed it on an amphetamine habit. T said, "That's no excuse at all", that the complainant had been trying to kill herself, and "Someone's got to – the damage to her head just can't be let go, because it's too serious, because I found her like trying to kill herself."

[25] The prosecution did not call AP, the complainant's friend in town 6.

[26] The appellant did not give or call evidence.

[27] The appellant had the benefit of a ruling from the learned primary judge excluding from admission into evidence a tape-recorded phone call made by the complainant to the appellant from the Murgon Police Station between 3.20 and 3.50 pm on 16 May 2001 because the admissions were non-specific to any particular charged offences and were therefore more prejudicial than probative. This Court has not been asked to reconsider that ruling but it seems such evidence would ordinarily be admissible and although non-specific was capable, if accepted by the jury as such, of being important evidence supporting the complainant's evidence.[1] It was, however, excluded and it must be ignored for present purposes.

Were the verdicts unsafe and unsatisfactory?

[28] The appellant emphasises the following matters to support his contention that the verdict was unsafe. The counts on the indictment spanned a period of six years in the 1980s and some were nearly 20 years old. Individual counts covered time spans of two and three years. The complainant did not give evidence to support the particularised dates in counts 4 and 5 and as a result a directed verdict and a *nolle prosequi* was entered. Her evidence was uncorroborated on all counts.

[29] As to count 1, the appellant points out that the complainant originally said that such incidents occurred after every Tae Kwan Do lesson but in her evidence she said the incident occurred only once after a Tae Kwon Do lesson; this constituted a fundamental difference.

[30] As to count 2, the appellant contends the particulars were insufficient to have allowed the count to proceed, comparing the case to *R v M*.[2] The appellant also relies on the discrepancies in the complainant's versions as to whether the appellant

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1 See *R v Sakail* [1993] 1 QdR 312; *R v B* [2003] QCA 105, CA No 336 of 2002, 14 March 2003, [19]-[22].

2 [2001] QCA 458; CA No 126 of 2001, 26 October 2001.

spoke to her in the kitchen or outside and the complainant's explanation for the discrepancy, namely that "the nightmares had clarified [her] memories".

[31] As to count 3, the appellant emphasises that it covered a time frame of three years; the particularity and the evidence were not such as to support a reasonable verdict of guilty; and her brother Sh either had no recollection of, or never went riding with, the appellant and the complainant

[32] As to count 6, the appellant emphasises that this was alleged to have occurred over a two year period and the complainant omitted to give evidence of it in chief, remembering it only in cross-examination.

[33] As to count 7, the appellant emphasises that the complainant voluntarily returned to spend time in the appellant's house during the school holidays. She claims to have been called home by the appellant from AP's house but AP was not called by the prosecution. The complainant alleged for the first time in her evidence at trial that she had been molested by her grandfather in town 7 and that such a striking addition to her account must seriously compromise her evidence.[3]

[34] The appellant also emphasises that the complainant added new matters to her evidence and some of her evidence resulted from flashbacks. The mother did not give evidence of any admission by the appellant nor of seeing any untoward conduct between the appellant and the complainant. Finally, the appellant emphasises the differences between the evidence of the complainant and her partner, T, as to their history of drug taking and the degree of physical aggression in their relationship.

[35] All the factual matters raised by the appellant here were before the jury and most, if not all, were canvassed by counsel in addresses and referred to by the learned primary judge in his summing-up. The weight and effect of these matters were for the jury to determine.

[36] I am not persuaded the charges were insufficiently particularised so as to justify a stay of the indictment: cf *R v W; ex parte Attorney-General*.[4] There were significant differences between this case and *R v M*.[5] In that case, the lack of particularity was but one factor when combined with other aspects of the case (which do not apply here) throwing doubt on the complainant's reliability and her evidence was further challenged by the appellant's competing evidence. The complainant here was cross-examined at length by an experienced defence counsel but she did not resile from the evidence supporting these charges. That she was confused after so long about the time two offences occurred did not compel the jury to reject the remainder of her evidence as dishonest or unreliable.

[37] Although Sh could not remember going riding with the appellant and the complainant, such an incident occurring 15 years ago would not have been memorable for him because there was no suggestion he was present when the offence occurred.

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3 Compare *R v M*, ibid, at para [12].

4 [2002] QCA 329; CA No 84 of 2002, 30 August 2002.

5 Ibid.

[38] The complainant did not give evidence in chief about count 6, but she did give evidence about it in cross-examination; she did not resile from that evidence and it was not refuted by any other competing evidence. The learned primary judge referred to this peculiar feature of the case in his summing-up. It was for the jury to decide whether it warranted the rejection of her evidence on count 6 and weakened her evidence on other counts.

[39] The complainant was cross-examined as to why she would return to holiday with the appellant if he had treated her so badly and why she hated living in town 7. She was reluctant to answer the latter question. Only when pushed, did she say that it was because the appellant's father put his hand down her pants and tried to kiss her. She did not mention it to police because she "did not think it would make a difference". The conduct of the grandfather was much less serious than the appellant's. It was not relevant to the charges against the appellant and would not have been admissible in evidence in chief. It is not surprising she made no earlier mention of it.

[40] The flash-backs referred to by the complainant occurred during a drive-around with police to the many homes in which she had lived with the appellant. It is not the least remarkable that her memory was jogged in that context and she was able to remember further details.

[41] It is not unusual in cases such as this where the complainant has been sexually abused by a step-father over a long period, for the evidence of the complainant's mother to be unsupportive of the complainant's evidence; there may be many explanations apart from the complainant's dishonesty. In any case, the complainant did not say the mother saw the incident involving pawpaw ointment in the mother's bed; the mother may have been asleep. The learned primary judge brought these matters to the jury's attention in his summing-up; it was a matter for the jury. Nor is it surprising that the complainant and her partner T had different perceptions of their relationship and that T may have been reluctant to admit to taking illegal drugs.

[42] The learned primary judge pointed out the internal inconsistencies in the complainant's evidence and the inconsistencies between her evidence and other witnesses; the absence of recent complaint; that the complainant had said her memory had improved with nightmares and flashbacks; that allegations such as these can arise out of personal problems and the complainant had had a difficult and confused life and the difficulties in preparing a defence because of the delay in complaining. His Honour also directed that the jury could only return a guilty verdict if they scrutinised the complainant's evidence with great care; that there was no evidence supporting her evidence that the appellant was the offender but they could nevertheless return a verdict of guilty if after taking heed of those warnings they were satisfied her evidence was truthful and reliable. This last direction was unnecessarily generous to the appellant because T's evidence was capable of generally supporting the complainant's evidence on all counts: *R v Sakai*[6] and *R v B*.[7]

[43] His Honour gave a direction about T's evidence which was very favourable for the defence, namely, that T's evidence carried very little weight because he was

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6 [1993] 1 QdR 312.

7 [2003] QCA 105; CA No 336 of 2002, 14 March 2003, [19]-[22].

recalling a conversation that occurred long ago and one which was in dispute; it was a non-specific statement that did not refer to a count on the indictment.

[44] His Honour told the jury that if they were not satisfied of the complainant's evidence on one count, or in respect of uncharged acts of sexual abuse, then that would affect her credibility or reliability as a witness in relation to other matters.

[45] His Honour summarised the evidence in respect of each count and very fairly put both prosecution and defence cases. All relevant matters were placed before the jury in a manner favourable to the defence. The jury, however, accepted the complainant's evidence, which was uncontradicted on the essential issues, beyond reasonable doubt.

[46] After considering the many matters raised by the appellant both individually and collectively, on the whole of the evidence I am confident that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each of the five counts.[8] The appeal against conviction should be dismissed.

The application for leave to appeal against sentence

[47] Although the applicant has applied for leave to appeal against sentence, no submissions have been made in support of that application.

[48] The applicant did not have the benefit of cooperation with the administration of justice, an early guilty plea or remorse. He took advantage of his young step-daughter on many occasions over a prolonged period, shockingly breaching the trust she had in him as a father figure. His Honour moderated the sentence because the applicant had rehabilitated himself by not committing any further offences since 1988. The effective sentence of seven years imprisonment is by no means manifestly excessive. The application should be refused.

Orders:

Appeal against conviction dismissed.

Application for leave to appeal against sentence refused.

[49] **DAVIES JA:** I agree that this appeal and application should be dismissed substantially for the reasons given by McMurdo P. My only additional comment concerns her Honour's reference to *R v Sakail*[9] as authority for the proposition that evidence of an admission by an accused of indecent conduct against a child may support evidence of specific acts of indecent conduct against that child notwithstanding that the conduct the subject of the admission are not the same as the acts evidence of which is sought to be supported.

[50] *Sakail* is undoubtedly authority for that proposition. However since it was decided in 1991 dicta emanating from the High Court on this and related questions has not been entirely consistent. This was discussed recently by McHugh J in *KRM v The Queen*.[10] The decision of the High Court in that case has somewhat clarified the

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8 *MFA v The Queen* (2003) 77 ALJR 134.

9 [1993] 1 QdR 312; see her Honour's reasons at [27] and [42].

10 (2001) 206 CLR 221 at 228 - 233.

position and I think that the law relevant to the question considered in *Sakail* is now correctly stated by this Court in *R v B.*[11]

[51] **PHILIPPIDES J:** I agree with the reasons of McMurdo P and with the orders proposed.

[11] [2003] QCA 105; CA No 336 of 2002, 14 March 2003, at [19] - [22]; see also *R v Massey* [1997] 1 QdR 404 and *R v Knuth* [1998] QCA 161; CA No 64 of 1998, 23 June 1998.