SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 443
PARTIES:	**R** **v** **M** (appellant)
FILE NO/S:	CA No 114 of 2003 CA No 276 of 2003 DC No 3292 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2003
JUDGES:	McMurdo P, Dutney and Philippides 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 extension of time within which to appeal against sentence allowed** **3. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – UNRESONABLE OR INSUPPORTABLE VERDICT – where appellant convicted of two counts of indecent treatment of child under 12 who is a lineal descendant - whether verdict unsafe and unsatisfactory and unreasonable on the evidence CRIMINAL LAW – SENTENCE - JUDGMENT AND PUNISHMENT – FACTORS TO BE TAKEN INTO ACCOUNT - where appellant sentenced to three years imprisonment for rape and two years imprisonment on two counts of indecent treatment, to be served concurrently – where appellant had no prior convictions – where appellant father of victim – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 349
Evidence Act 1977 (Qld), s 93A

Black v The Queen (1993) 179 CLR 440, referred to
Mackenzie v R (1996) 190 CLR 348, considered

COUNSEL: S J Hamlyn-Harris for the appellant
C Heaton for the respondent

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

[1] **McMURDO P:** The appellant was charged with four sexual offences alleged to have been committed on his son on about 25 November 2001. On 8 April 2003, in the District Court at Brisbane, the jury found him guilty of count 1, rape; not guilty of count 2, rape, and not guilty of the alternative verdict on count 2, indecent dealing with a child under 16; and guilty of two counts of indecent treatment of a child under 12 who is a lineal descendant. He appeals against those convictions on the ground that the verdict was unsafe and unsatisfactory and unreasonable on the evidence. He was sentenced to three years imprisonment for rape and two years imprisonment on each count of indecent of treatment, all sentences to be served concurrently. He also applies for an extension of time within which to apply for leave to appeal against sentence contending that the sentence was manifestly excessive.

The appeal against conviction

[2] The appellant and his wife, the mother of the victim, were married on 25 August 1990. Their son was born in mid-1995. The couple separated in early 2000 and the appellant's wife had the day to day custody of their son, with the appellant exercising regular access. He visited fortnightly and on occasions stayed overnight. The boy and his mother lived in a unit in suburb 1 after leaving the matrimonial home in 2000. When the appellant visited, the boy's mother would go elsewhere, jogging and walking. In about August 2001, the boy and his mother moved to a unit in suburb 2 where the offences occurred.

[3] On Saturday, 24 November 2001, the appellant's wife attended a wedding, leaving her son in the care of the appellant at her home. She left at 1.30 pm returning the following morning at 8.00 am.

[4] The prosecution case turned on the evidence of the son who was seven at trial and six when the offences occurred. His evidence included a video recorded interview with police on 3 December 2001 contained in three tapes recorded between 12.55 pm and 2.25 pm; a tape recorded interview at the boy's home later that same afternoon in which he pointed out where the incidents occurred, and a further video recorded interview with police on 18 December 2001. These tapes were admitted as evidence in the trial under s 93A *Evidence Act* 1977 (Qld). The boy also gave brief oral evidence at the trial.

[5] The prosecution case was that count 1 was a rape by the appellant putting his penis in the complainant's mouth; count 2 was a rape by the appellant inserting his finger into the complainant's anus or, alternatively, if not satisfied of actual penetration,

indecent dealing; count 3 was indecent treatment by the appellant sucking the child's penis; and count 4 was indecent treatment by the appellant rubbing his penis on the child's back with water and rubbing ejaculate on the complainant's back.

[6] Because of the importance of the child's evidence in this case, I have watched all the video-taped interviews with the child. Early in the interview of 3 December 2001, when asked by the police officer "And what about your Dad?", the boy replied:

> "Ah. My Dad's not real nice. But I'll tell you what happened. He put his willy in my mouth and well, he put cream on me and rubbed it and sticked his finger in me and he whacked my head and bent my arm and smacked my foot. And I runned into my bedroom and he, when he put his willy in my mouth, stuff came out. He sucked my willy and I sucked his willy, stuff came out and I spit it out on a white towel and try and hide into my bedroom and I put my, and I can't lock it, so I put my chair and my Bob the Builder's bag. He couldn't open it. But when, when it was night-time and when I was asleep, he get me awake and he put water on me, rubbed it on me. … And he put his willy on my back and rubbed it and stuff came out."

[7] He told police this occurred when his mother was at the wedding. Some details provided by the child seemed extremely convincing, for example in relation to count 1 he said:

> "Police officer: OK. And what happened to that stuff that came out of his willy?
> Child: It was very normal. And I thought it was water but it was wee.
> Police officer: It was wee?
> Child: Yeah. It came into my mouth and I spit it out on the white towel and it was so small I spit it.
> Police officer: And what did that taste like?
> Child: It taste like sour, what's, what's sour makes me, urgh, makes me a little bit vomit. So I spit it out, except for vomit."

The boy told the police he spat the ejaculate onto a small white towel in the bathroom.

[8] When asked by the police how the appellant sucked his willy (count 2), he said:

> "Child: Well he didn't use his teeth to crunch it.
> Police officer: Yeah.
> Child: He just suck it with his jaws went up and just went suck, suck like a baby.
> …
> Police officer: So how did he suck your willy?
> Child: By using his jaws going up and sucked it.
> …
> Child: No stuff comed out of my willy. It was not. I feel like I had to go the toilet I remember."

[9] He gave the following details concerning count 4:

> "Child: And when he got me out and when he put me in bed, we woked me up and he put water on my back and he rubbed, he taked

> his willy out of his pants and rubbed it on my back and stuff came out and rubbed it. And he nearly tried to put his willy in my bum and he tried so I try and move so moved it.
> …
> Child: He put water on my back and he put his willy and rubbed it and stuff come down and rubbed it.
> Police officer: OK. So he got water. Where did he get the water from?
> Child: From the taps.
> Police officer: The taps?
> Child: Yeah. Because, so he used the bathroom tap and bathroom tap where? … there was cold water. He made me freezing. And he rubbed it on me. And when he put his body on my …
> Police officer: So you were in bed?
> Child: Yeah.
> Police officer: And how were you in bed. How were you lying or sitting?
> [The child at this point demonstrated that he was lying on his stomach.]
> …
> Police officer: And how do you know he rubbed his willy on your back?
> Child: Because I saw him done that.
> Police officer: OK. And you said that stuff came out?
> Child: Yep.
> Police officer: And how do you know that?
> Child: Well I saw it.
> …
> Child: And in the lounge room he put cream on me too. … Yeah but in the bedroom he put water and put his willy on my back and he, stuff came out and he rubbed it. And I will tell you about the stuff what looks like. It looks it was yellow this time and it was so yellow I thought it was vomit and I nearly vomit and he rubbed it on me really hard and it really hurt."

[10] He said that in the bedroom his father took the cream and put it on him and tried to stick his willy in his bum. He said: "He nearly tried to kill me. He tried to kill me." He said he pulled his pants up and pulled his mother's flower blanket over his head. The police officer asked:

> "Was that on the outside of your bum or the inside of your bum?
> Child: On the outside. He tried to put it inside my bum. He just put it on the outside."

[11] Later in the interview, he said that his Dad put yellow cream from a white bottle on his bum. His Dad told him he was stupid and to shut up and said: "This is life."

[12] The child gave no further details of count 2 beyond the very brief account set out in para [6] of these reasons.

[13] During the third tape, which commenced at 2.05 pm, he said that the appellant had done the same thing at the unit at suburb 1 and gave the following description:

> "He laid me on the couch. He, he, he, - he laid me on the couch and pulled the curtains. He whacked me on the head, he bent my arm. Whacked me on the foot and put his willy and done stuff and I spit it out. Then he sucked my willy and stuff came out and he put it in and out, in and out. And, and I spit it out on the towel and I went into the bedroom hiding and he opened the door and he put me in bed. And he, and he woked me up and he put water on my tummy and … no on my back and he, he put his willy on me. Oh yeah. In the lounge room he put me, he put cream on me and he, and he put, he put his willy, when I was in the bedroom he put, put water on me and he went and put his willy on my back. And he, he rubbed it and stuff came out and he rubbed it. And I pulled my pants up and took the sheet, the sheet over me."

The boy confirmed that he was talking about events in suburb 1. Later in the interview he said "exactly the same" thing had happened at suburb 1 as at suburb 2 and that there was no difference. When asked for details about the earlier incident at suburb 1 he seemed to be recounting the events of 24 or 25 November 2001 rather than a different incident. When told by the interviewing police officer that it was OK if he did not remember about what happened at suburb 1 he said, "Well, I don't remember it." The boy also said his father had sexually abused him in the matrimonial home but the few details given suggested he was again recounting count 1.

[14] Later, in the afternoon of 3 December 2001, the interviewing police officers took the boy to his home. He showed police where the offending behaviour occurred in the lounge room; how he ran into his bedroom and shut the door and how the appellant opened the door and took him into his mother's bedroom where count 4 occurred. The boy also showed the police officers the towel (by then washed) into which he spat the ejaculate and which he ordinarily used to dry his bath toys.

[15] On 18 December 2001 the police further interviewed the child from 8.15 am to 8.30 am. The boy said that when they were living in the matrimonial home his father "put his willy in my mouth … He just did it, uh, hurt me, hurt me." He said:

> "That, do you know what I tell you last time?
> Police officer: Yep.
> Child: That, that was the thing what he, what he did.
> Police: OK, could you tell, could you tell me again?
> Child: Well, um, he shut the curtains. That makes me a bit sick but I'll try and tell it. Hmm, mmm, (UI).
> Police: And why would it make you a bit …
> Child: Well, when I'm telling my Mum I get, I get a bit sick and they, I try (UI) and sometimes I a bit vomit."

[16] When asked about the incident at suburb 1, he simply repeated that his father had "done the same thing" and when further questioned repeated sketchy details which, as far as they went, appeared to be the same as the account of the incident concerning these charges. He said his father "did it lots of times" at suburb 1 and suburb 2 and no-one other than his Dad had done these things to him.

[17] At the trial he reaffirmed the truthfulness of his account to police. In cross-examination, he said his mother told him what to say to the police; he did not

practice with her what he should say; he told her more than once what he was going to tell the police. When the appellant's case was put to him, he said his father touched him with his willy and did all the things he told the police; put cream on him in the lounge; touched his bottom with his finger; tried to put his willy in his bottom and slid his willy up and down his back. In re-examination, he said his mother told him to tell the truth to the police.

[18] The mother of the child gave evidence that when she returned at 8 am on the morning of 25 November 2001, the boy was asleep in bed in her bedroom dressed in Spiderman pyjamas. There was a glass tumbler in the bedroom which was not usually there. The boy's bed, desk and chair in his room had been moved to different positions as had his bag. The towels had been washed. The house did not appear to have been cleaned. She packed a bag for her son who went out for the day with a friend. After the boy left, she had sexual intercourse in her bedroom with the appellant because she was scared of him; this may well have left semen stains on her bedroom sheets.

[19] On Wednesday, 28 November 2001 after she picked up the boy from school, they were discussing his father and the mother's new male friend coming to a Christmas concert. The boy was concerned that his father may punch her new friend and said that bad Daddy was back. She asked him what the bad Daddy was and he said, "Daddy has been putting his willy in my mouth again." When they went home he elaborated, saying that his father closed the curtains, and went down to the bathroom and got the hand lotion. He poured the hand lotion on the boy's back and bottom and put his finger inside the boy's bottom. The boy said "no" but the appellant said, "That's life." He called the boy "stupid" and hit him across the top of the head. He bent the boy's right arm back and hit him on the bottom of his feet and then pushed him into the couch and rubbed his willy up and down the boy's bottom. He told the boy to get off the couch and sucked the boy's wee wee. He made the boy sit beside him on the couch and made the boy suck the appellant's wee wee until he came in his mouth. The boy walked into the bathroom and spat the ejaculate into a white towel. The appellant told the boy not to spit it out but to swallow it. The boy went to his bedroom and tried to lock himself in his bedroom.

[20] She subsequently made a complaint to police. On the afternoon of 3 December 2001 when the police were at the unit video-taping the child, police took possession of some items, including a towel and a bottle of body lotion pointed out by the boy, a floral flat sheet used in the lounge room and a double bed sheet from the mother's bed. No semen was located on the lounge room sheet, but semen was subsequently located on the double bed sheet from the mother's bed. The mother then told police that she had sexual intercourse with the child's father on her return from the wedding. In cross-examination she said that she took part in this sexual intercourse because she was scared of the appellant but she was too embarrassed to tell the police earlier.

[21] A paediatrician at the Royal Children's Hospital examined the boy on 30 November 2001 and noticed no abnormal scars, tears, lacerations or lesions. Penetration of the anus with a finger does not generally leave any abnormalities. She noticed no bruising, redness, swelling or anything of that nature around the head, face or bottom of the feet.

[22] A kindergarten assistant, a friend of the boy's mother, saw the boy on the afternoon of Wednesday, 28 November 2001 and noticed that he was not reacting normally to her. On Friday, 30 November 2001, she drove the boy and his mother to the hospital. On Monday, 3 December 2001, they came to her house. The boy had a swim and said that he was going to the police. She said to the boy, "… you must tell the police everything that happened to you and you and Mummy will be safe." The boy replied, "Yes, he just – we were in the pool and he just started telling me things." He said, "Daddy rubbed cream on my back. Daddy pulled my arm up behind me like this and it hurt. Daddy put his finger in my bottom. Daddy asked me if it felt good. When I said no, Daddy said, 'that's life'. Daddy put his wee wee (which was his words) in my mouth. Daddy ejaculated in my mouth." She said "ejaculation" was her word and she did not remember the expression he used. The boy said, "I ran and spat it into a white towel. Daddy said these things were OK because Josh's daddy and Lauchlan's daddy did them to them." He said, "I knew that – knew it was going to happen when Daddy pulled the curtains and it happened in the lounge and in the bedroom."

[23] The boy's mother phoned her new male friend on Thursday, 29 November 2001 and he went to her home. The boy said, "I want to tell you something my Daddy has done to me." I said, "What would that be?" He said:

> "… my Daddy did some things to me with his wee wee. After Mum went to the wedding he closed the curtains … Daddy asked me to lie down on the lounge … Daddy rubbed his wee wee … up and down my back … My Daddy smacked me on the head and the foot … My Daddy sat next to me on the lounge and put his wee wee in my mouth … My Daddy said, that's life … My Daddy said, 'don't lick it or chew it.' "

[24] The next day he went to the home and the boy said that he remembered some more things his father did: "My Daddy made me lie on the back and take off my pyjamas. My Daddy rubbed his wee wee up and down my back. I felt something on my back. I turned over." At one point, the boy also said:

> "… my Daddy put his wee wee in my mouth and some white stuff came out." … I went and spat it into a white towel in the bathroom … My Daddy hit me and called me stupid … "My Daddy said, 'That's life.' a few times."

At the end of the conversation the witness said to the boy, "You know, make sure you're telling the truth."

[25] In cross examination, he agreed that prior to the boy's disclosures, the mother told him that the boy wanted to speak to him and asked him to visit.

[26] The appellant gave evidence that when the boy's mother went to the wedding he and the boy spent a pleasant, uneventful evening playing games and watching television until the boy fell asleep on the lounge. There was a completed load of washing in the washing machine and as there was insufficient space to hang all of it he only hung out the towels. He cleaned the kitchen, mopped the floors, scrubbed the bathroom and cleaned the verandah which was particularly dirty. He did not finish cleaning until 2 am. At some stage, he carried the boy into his mother's bedroom.

He went to sleep next to him after 2 am when he expected the boy's mother to be home. He denied that he did anything improper to his son.

[27] He woke up to hear his wife return early in the morning and his son watching television. There was a panic because the boy was going out with a friend for the day and had to have a bag packed. He stayed and cooked the boy's mother breakfast and they had sexual intercourse on her bed.

[28] The defence case at trial was that the boy's mother had instigated the boy to make a false allegation and had required him to learn by heart the allegations against his father, which she then had him repeat to others before taking him to the police. The defence contended the exceptionally similar account given on each occasion suggested fabrication. The prosecution case was that the consistency of the account and the detail, supported by items found at the house, meant the jury could be satisfied of the appellant's guilt beyond reasonable doubt.

[29] The learned primary judge fairly and fully set out the defence case in his summing up. His Honour also reminded the jury of the possibility of fabricated complaints of a sexual nature and that false complaints had been made in the past. In this case, there was no supporting evidence of the child's complaints. His Honour invited the jury to consider whether the child was relating a true account or was simply repeating parrot fashion a false allegation told to him by his mother. His Honour emphasised to the jury the particular need for care in assessing the evidence of a child witness, not only as to honesty but also as to accuracy and reliability; children do not generally have the powers of recall or reasoning of adults and may not appreciate the serious nature of things they are saying; they may be suggestible. His Honour told the jury that to convict the accused they would have to reject the appellant's evidence and accept the complainant's evidence beyond a reasonable doubt.

[30] The jury retired at 12.35 pm on 7 April 2003. The next day the jury requested parts of the transcript of the taped interviews between the police and the boy to be read to them and retired again to consider their verdict at 10.40 am. At 12.40 pm the jury gave the following note to his Honour: "Two of our jury cannot find beyond a reasonable doubt that the charges are proven or not proven. There are reservations held by other members of the jury that a decision can be achieved based on evidence provided." His Honour then directed the jury in terms of the model direction in *Black v The Queen*.[1] The jury retired again to consider their verdict at 12.44 pm and returned with their verdicts at 4.20 pm.

[31] The appellant contends that the evidence as a whole cannot exclude the possibility that the boy was coached to make these allegations by his mother; he had made the same allegations to his mother, his mother's kindergarten teacher-friend and his mother's male friend before repeating them again in identical terms to the police. This suggests coaching and fabrication and when combined with the inconsistent verdicts demonstrates there has been a compromise verdict rather than a unanimous verdict from 12 members of the jury satisfied of the appellant's guilt beyond reasonable doubt. The result is, he contends, that the verdicts are unsafe and unsatisfactory and must be set aside.

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1 (1993) 179 CLR 440.

[32] The child's account is so shocking that my initial reaction before viewing the tapes was to doubt its accuracy. After viewing in full the lengthy tape-recorded interviews, I am, however, confident the jury was entitled to accept the child's evidence beyond reasonable doubt and to convict the appellant of counts 1, 3 and 4. The boy's account of the offences was spontaneous, articulate and convincing in its detail. It is true that by the third tape, after he had been interviewed for several hours, he seemed tired, lost concentration and was unable to give any details of prior episodes of sexual impropriety; when pressed he simply repeated the details of the offending on this occasion. That is hardly surprising for a six year old pre-school boy in those circumstances. No doubt that is why no charges were brought in respect of any earlier incidents. The police video-tape of the boy at his home had some elements of a little boy playing to the camera but that is understandable, especially when he had been with the police for many hours, was obviously tired and had repeated more than once the details of his claims to the police. The boy was able to show police the bottle of hand lotion used by the appellant and the towel into which the boy spat his father's ejaculate. Many of the details the boy provided to police, (set out earlier in these reasons), seem unlikely to be fabricated and had the ring of truth. The child was not shaken in cross-examination at the trial. All things considered, difficult as it is to believe that a father would be capable of such conduct, the child's account was compelling.

[33] I was also initially puzzled as to the rational basis for acquitting the appellant on count 2 of both rape and the alternative charge of indecent treatment whilst convicting on the remaining charges. Again, the solution is in the tape-recorded interviews of the child. The child, in his first statement to the police about his father's sexual abuse, said that his father "sticked his finger" in him. This was the only evidence as to count 2.[2] In the lengthy interviews that followed, the child made no further mention of that incident although he expanded in detail about the other counts in a most convincing way. Additionally, had count 2 occurred, there may have been some physical injury to the body but there was none found by the time of the medical examination five days later.

[34] The model direction in *Black*, which was given to the jury in its last redirection, significantly lessens the chances of a jury giving unreasonable and inconsistent verdicts for it includes:

> "But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence."[3]

[35] There is a rational explanation for the verdicts here[4] and the appellant has not satisfied this Court that the verdicts cannot stand together, that the verdicts of guilty were open on the evidence, or that the jury did not conscientiously follow the *Black* direction.

[36] The appeal against conviction should be dismissed.

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2 The recent complaints were evidence only of consistency and not of the commission of the offence.

3 At 51.

4 *Mackenzie v R* (1996) 190 CLR 348, 365-370.

The application for an extension of time to apply for leave to appeal against sentence

[37] The material suggests that although the appeal against conviction was lodged in time, the appellant's legal representatives inadvertently omitted to apply for leave to appeal against sentence. The respondent sensibly does not oppose the application to extend time. In those circumstances, the extension of time should be granted.

The application for leave to appeal against sentence

[38] The conduct of which the applicant has been convicted on count 1 would, prior to 27 October 2000, have been charged as indecent treatment of a child under 12 years punishable by ten years imprisonment. That conduct now amounts to rape, punishable by life imprisonment: see s 349 *Criminal Code*.[5] The applicant has referred to comparable sentences prior to this legislative change but these are of very limited benefit. The clear intention of the legislature was to significantly increase the penalties imposed by the courts for such conduct.

[39] These offences were a serious breach of a father's trust with potentially devastating consequences for both his six year old son and the boy's mother. Some physical force was used beyond the emotional force of the father/child relationship. Fortunately, the boy was not physically injured and, for this reason, the offending is towards the lower end of seriousness for rapes. The applicant had no prior convictions but he was a mature man who has shown no remorse and nor does he have the mitigating benefit of an early plea of guilty. The sentence imposed of three years imprisonment was by no means manifestly excessive for the applicant's combined offences; it was lenient. I would refuse the application for leave to appeal against sentence.

Orders:

1. Appeal against conviction dismissed.

2. Application for extension of time within which to appeal against sentence allowed.

3. Application for leave to appeal against sentence refused.

[40] **DUTNEY J:** I agree with the orders proposed by the President for the reasons she has given.

[41] **PHILIPPIDES J:** I agree with the reasons of the President and with the orders proposed.

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[5] Section 24, Act No 43 of 2000, operational 27 October 2000.