SUPREME COURT OF QUEENSLAND

CITATION:	*R v B* [2003] QCA 459
PARTIES:	**R** v **B** (appellant/applicant)
FILE NO/S:	CA No 126 of 2003 CA No 320 of 2003 DC No 187 of 2003 DC No 170 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	24 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2003
JUDGES:	Davies JA and Jones and Holmes JJ Separate reasons for judgment of each member of the Court, Davies JA and Jones J concurring as to the orders made, Holmes J dissenting
ORDER:	**1. Appeal against convictions dismissed** **2. Application for extension of time within which to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where appellant convicted of sexual offences against a young girl - where main evidence against appellant was that of the complainant - where second child gave evidence that appellant offended sexually against both herself and complainant - where complainant gave no evidence of these occasions - where learned trial judge did not warn jury against impermissibly using this evidence as indicative of a disposition to sexual impropriety with young girls - whether non-direction deprived appellant of a fair trial *BRS v R* (1997) 191 CLR 275, distinguished

COUNSEL: G P Lynham for appellant
M J Copley for respondent

SOLICITORS: Spina Kyle Waldon Lawyers (Ingham) for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **DAVIES JA:** The appellant was convicted after a trial of 11 sexual offences against a young girl then aged between seven and 10. He appeals against that conviction, the sole ground of appeal on which he now proceeds being that the failure of the learned trial judge to adequately direct the jury as to the use they might properly make of the evidence of AW deprived the appellant of a fair trial.

[2] The offences occurred on five separate occasions. The first was the subject of counts 1 to 6 which involved digital penetration, oral sex of the complainant, masturbation of the appellant by the complainant and rape of the complainant. The second occasion which was the subject of count 7 involved masturbation of the appellant by the complainant. The third, the subject of count 8, also involved masturbation of the appellant. All of these occurred when the complainant, the appellant and other members of their family were residing at Purono Park.

[3] The fourth occasion which was the subject of counts 9 and 10 involved digital penetration and the appellant rubbing his penis against the complainant from behind. The fifth which was the subject of count 11 involved the appellant rubbing his penis between the complainant's legs. All of these offences occurred when they were residing at Mutarnee.

[4] The relationship between the appellant, who was aged between 22 and 25 at the time of the offences, and the complainant and other relevant members of their family was as follows. The complainant, whose mother had died young, was the niece of MW who had, in effect, adopted her as her own child. MW also had a daughter AW about two years older than the complainant. At all relevant times MW was living in a de facto relationship with JB. He was not AW's father. However he and MW had two further children together. Also living in the household at all relevant times was the appellant who was JB's brother. There were other members of the household but it is unnecessary to mention them.

[5] The main evidence against the appellant was that of the complainant. She did not say that AW was present on any of the occasions the subject of the counts on which the appellant was charged and convicted. However AW gave evidence that on four or five occasions during the period when they were residing at Purono Park, when she and the complainant were being babysat by the appellant, he offended sexually against the complainant in AW's presence and also against AW herself, in each case by requiring the girl to masturbate him. The complainant gave no evidence with respect to these occasions.

[6] The appellant does not contest the admissibility of AW's evidence in this respect. His complaint is about the directions which the learned trial judge gave with respect to that evidence. Moreover it is not what the learned trial judge said in this respect about which the appellant complained, for the trial judge explained to the jury correctly the use which could be made of this evidence. The appellant's complaint is about what the learned trial judge failed to do which, the appellant submits, deprived him of a fair trial. This was a failure to warn the jury against

impermissibly using this evidence as indicative of a disposition to sexual impropriety with young girls.

[7] In the circumstances his Honour's direction in this respect should be set out in full. He said:

> "Now, there is evidence here which is capable of corroborating the evidence of the complainant. Whether it does in fact corroborate her evidence is a matter for you because it is a question of fact. If you find that it does not in fact corroborate her evidence you may nevertheless convict on the uncorroborated evidence of the complainant provided you first approach it with caution and very carefully, and give consideration to the warnings I give you in relation to it. Now, the evidence which is capable of corroborating the evidence of the complainant is the evidence which her cousin, AW, gave as to the two of the girls being required by the accused to masturbate him one at a time, or together, on four or five occasions. Now, before that evidence could corroborate the evidence of the complainant, you would have to accept it. And if you do accept it then it is capable of corroborating the evidence of the complainant even though, notwithstanding that the complainant did not speak about it herself.
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> Now, it is, if you accept it, evidence of the relationship which existed between the accused and the complainant as described by AW, the course of that relationship, the setting in which the offence is charged and alleged to have occurred, the sexual attraction which may have existed on the part of the accused for the complainant. And there is no impediment to such evidence being given notwithstanding the fact that the complainant herself did not give evidence about it.
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> The evidence, if you accept it, is capable of showing, whether it does or not is a matter for you, it is capable of showing important aspects of the relationship between the accused and the complainant. And because it comes from a witness other than the complainant, it is capable of corroborating her evidence that the accused on other occasions engaged in other acts of sexual misconduct with the complainant. So, to that extent it is capable of supporting, strengthening or confirming the complainant's evidence of all charges.
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> If you accept AW's evidence that is capable of corroborating the complainant's evidence generally because it would tend to show sexual desire or passion for the complainant on the part of the accused, and some measure of gratification for that desire. It would support her evidence because it is consistent with the evidence that the complainant has given about other occasions, and it would make her evidence more credible if you accepted it, and it may go some way to allaying any concern about whether the evidence of the complainant is a fabrication or not. So, in that way it can, if you accept it, corroborate the complainant's evidence because it could be regarded as increasing the probability that the complainant's entire evidence is truthful. It is a matter for you, ladies and gentlemen, because it is a question of fact.

> If you accept it, it could be concluded to be indicative of strong sexual feelings by the accused towards the complainant, and therefore capable of corroborating her evidence, and it is relevant to showing the sexual nature of this relationship which existed between the accused and the complainant, and it puts the offences charged in some context.
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> So, the evidence of AW, if you accept it, about those matters is potentially corroborative of the evidence of the complainant in relation to all of the offences charged. It supports her evidence. It confirms it and strengthens it. It is a matter for you as to whether it does in fact have that effect. It certainly is capable of confirming, supporting, strengthening her evidence. It is a matter for you as to whether it does."

[8] The appellant does not complain about any part of this direction. The submission is, however, that, in the absence at least of a direction that this was the only way in which this evidence could be used, the danger to which I have referred, arose. He relied principally on statements of principle by members of the High Court in *BRS v The Queen*.[1]

[9] The facts in that case were materially different from those in this. The complainant gave evidence that the accused had on several occasions masturbated on the bed in the accused's room using a lubricant and a towel kept under the bed. He also deposed that he and the accused had engaged in mutual masturbation and, later, anal intercourse using a similar lubricant. The evidence in question in that case was the evidence of a school friend of the complainant's of about the same age who gave evidence that the accused had encouraged him to masturbate on the bed in the accused's room using a lubricant and a towel kept under his bed and that he had done so once whilst the accused masturbated out of his sight.

[10] Whilst it was held that the evidence of the school friend was admissible to corroborate the complainant's evidence about the presence of the lubricant and the towel for the purposes of masturbation, it was also held that there was a real risk that without a direction about the use that could properly be made of that evidence the jury would impermissibly rely on it as showing that the accused was the sort of person who would engage in the conduct the subject of the charges. No direction at all had been given by the learned trial judge as to the use which could be made of that evidence.

[11] A number of members of the court explained why, in those circumstances, there was a perceptible risk that, unless instructed otherwise, the jury would make improper use of the other boy's evidence as indicative of a disposition to sexual impropriety with young boys.[2] However there are two important factual distinctions between that case and this.

[12] First, in that case the corroborative evidence was solely of similar acts of impropriety with a different boy and the evidence was corroborative only as supporting the complainant's evidence about the use of lubricant and the towel. Here, by contrast, the evidence was of other improper acts involving the

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1 (1997) 191 CLR 275.

2 At 301, 302, 304, 305, 331 - 332.

complainant although also involving AW. Its corroborative use, therefore, was, as his Honour pointed out to the jury, in showing the relationship between the appellant and the complainant and the sexual desire or passion which the appellant had for the complainant together with some measure of gratification of that desire.

[13] This difference between the two cases is, in my opinion, important. In *BRS* there was a danger that, unless warned of the limited use to which it could be put, the jury would be likely to use the evidence of the complainant's school friend, impermissibly and much more prejudicially than its admissible use permitted, as evidence of a propensity of the appellant to offend in this way against young boys. In this case, by contrast, the legitimate use to which AW's evidence could be put was more prejudicial to the appellant than as mere evidence of propensity to do things of this kind with young girls.

[14] The second difference between that case and this is that there the learned trial judge gave no direction as to the use which could be made of the evidence of the complainant's school friend in circumstances in which, if it were not given, there was a likelihood that it would be impermissibly used as indicative of a disposition towards sexual impropriety with young boys. Here, by contrast, the learned trial judge gave very specific directions as to the use which could be made of this evidence. This, it seems to me, focussed the jury's minds on the purpose for which the evidence could be used. It was not a case in which "one can only guess what use the jury thought they were supposed to make of that evidence".[3]

[15] The appellant concedes that a direction, of the kind which he submits should have been given, does not always need to be given.[4] As has been pointed out more than once,[5] the necessity for such a direction depends very much on the circumstances of the case,[6] especially on the risk that a jury might engage in unfair stereotyping.

[16] It would have been better, in my opinion, if the learned trial judge had told the jury specifically that the purpose which he stated was the only purpose for which they could use this evidence, or perhaps that it could not be used merely to show that the appellant had a propensity to commit sexual acts against young girls. However, for the reasons which I have given, I do not think that there was a real risk of the jury using it for that purpose here. For those reasons, in my opinion, his Honour's failure to tell the jury either of those things did not amount to a misdirection. The appeal against conviction must therefore be dismissed.

[17] The appellant has also applied for leave to appeal against a sentence of 12 months imprisonment imposed on him at the conclusion of this trial for an offence against AW of which he had earlier been convicted. However his counsel indicated in his written outline that his intention was to proceed with that application only if the appellant's appeal against conviction succeeded. Accordingly it should also be dismissed.

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3 *R v W* [1998] 2 QdR 531 at 534. This was also a case in which no direction at all was given.

4 *KRM v The Queen* (2001) 206 CLR 221 at [39], [69] and [114]; *R v Self* [2001] QCA 338 at [36] - [40]; and *R v Bowman* [2001] QCA 500 at [27] - [30].

5 Ibid.

6 *R v D* [2001] QCA 256 is an example of a case with unusual features in combination.

Orders

1. Appeal against convictions dismissed.
2. Application for extension of time within which to appeal against sentence dismissed.

[18] **JONES J:** I agree with the reasons for judgment of Davies JA and with the orders he proposes.

[19] **HOLMES J:** I have read the judgment of Davies JA. I agree, with respect, that the case of *BRS v The Queen*[7] is readily distinguished from the present case, in that the evidence in question there had a far more limited use and no direction at all was given as to that use. And it is clearly not the case that a warning against use for propensity purposes must be given in every case in which evidence of uncharged sexual acts is given. But the need for such a warning is likely to be more pressing where there is evidence of sexual offences against a victim other than the complainant in the indicted offences[8], than where the concern is simply as to uncharged acts in relation to the sole complainant.

[20] It is undoubtedly a matter of assessment in each case as to what the circumstances require. In this case the evidence of AW was admitted as relationship evidence, and a direction was given as to its function in that regard. But there was a real danger that the jury, having heard her account of being made to masturbate the appellant on a number of occasions, would, in consequence, regard as more likely the complainant's evidence of being made to do the same thing. The failure to give a direction which warned against that reasoning process constitutes a miscarriage of justice which requires the setting aside of the conviction. I would allow the appeal.

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7 (1997) 191 CLR 275.

8 *The Queen v D* [2001] QCA 256; *R v Bowman* [2001] QCA 500 at para 28; *KRM v The Queen* (2001) 206 CLR 221 per McHugh J at 235, per Kirby J at 261.