SUPREME COURT OF QUEENSLAND

CITATION:	*R v B* [2003] QCA 465
PARTIES:	**R** **v** **B** (appellant)
FILE NO/S:	CA No 207 of 2003 DC No 71 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2003
JUDGES:	Jerrard JA and Jones and Holmes JJ Separate reasons for judgment of each member of the Court, Jerrard JA and Holmes J concurring as to orders made, Jones J dissenting
ORDERS:	**1. Set aside the convictions for unlawful carnal knowledge against the order of nature, unlawfully and indecently dealing with a girl under 16 years of age, and rape** **2. Order a new trial on those counts** **3. Remand the appellant in custody until further or other order of a court with jurisdiction to grant him bail**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where prosecution permitted to lead evidence that the appellant had previously been in prison – whether the Crown was entitled to lead such evidence in chief in an anticipatory rebuttal of an attack on credit – whether such evidence was admissible as part of the *res gestae* – whether such evidence was so prejudicial that its admissibility had caused justice to miscarry CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the trial judge had described certain conduct leading to the

applicant's prior convictions in terms of the latter having "taken advantage of" his then victim – whether a description of the applicant's prior convictions in these terms was appropriate

Harriman v The Queen (1989) 167 CLR 590, referred to
R v Johnson v Edwards [1981] Qd R 440, discussed
R v B [1993] QCA 321; CA No 346 of 1992, 2 September 1993, referred to
R v F (1995) 83 A Crim R 502, considered

COUNSEL: M J Griffin SC for the appellant
R G Martin for the respondent

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

[1] **JERRARD JA:** In this matter I have had the considerable advantage of reading the reasons for judgment of Jones J and Holmes J, and like Holmes J I gratefully adopt the background facts carefully set out in the judgment of Jones J. I respectfully agree with Jones J that the sentence imposed upon B was well within the appropriate sentencing range, but agree with Holmes J that B's conviction should be set aside and a new trial ordered.

[2] The appellant's remark "Don't tell anyone 'cause I'll go away again" was not made admissible simply because it was said immediately after the first time the appellant sexually exploited the complainant. Rather, if those words are admissible, that is because the appellant's utterance of them at that particular time is relevant to proof of the offence charged. When defence counsel announced a preparedness to admit the date at which the appellant came to live in the complainant's household the words were no longer relevant to the proof of that date, it no longer being in issue; and thereafter, the fact the statement was made was relevant only to the complainant's credit.

[3] It was relevant to that credit only on the assumption that the complainant understood the statement as a threat that the appellant would either voluntarily or involuntarily depart to live elsewhere should she report his abuse of her, and only on the further assumption that she was moved by that statement, as he intended, not to complain. She was not asked at any stage in the trial what she understood by the words, and so neither assumption was actually established by the evidence. However, the submissions made to the learned trial judge by counsel for the Crown, in support of the admission of the statement, made it clear that the Crown expected to establish that she understood the statement meant the appellant would be returned to prison. If so, that understanding must have been expected by the appellant, which suggests that there had been discussion about the fact of the appellant having recently been released from prison, and occurring in the presence of the appellant and the then complainant child.

[4] Counsel for the Crown intimated in argument an intent to lead from the complainant only in evidence in rebuttal that she had not wanted her uncle to be sent back to prison, and thus had not made any complaint; and with respect that appears the appropriate way in which that evidence might have been used. That is, it was

evidence relevant to her credit, but would be relevant to that credit only if and when it was attacked by cross-examination which inquired about or made the point that she had made no complaint until 20 years later about the persistent sexual abuse by the appellant which she was now describing. Until any such challenge was made, her understanding of those words said by the appellant and her own unstated and private response to them was not relevant to any matter in issue (there was no suggestion in evidence from the complainant or in argument from the Crown that the appellant saying those words on that first occasion had any later effect on any consent or non consent by the complainant to any of the appellant's conduct with her).

[5] It follows that the fact that those words were spoken was not admissible in the complainant's evidence in chief. Had it not been admitted in chief, the appellant's counsel would have had a choice about challenging the complainant about non-complaint. Had that challenge been made and had the complainant in re-examination come up to the expected proof, and explained non-complaint (in part at least) by reason of that statement having then been made, and her understanding of it, then at the end of the day much the same evidence may have been before the jury. However, it may not have been; the defence may have preferred not to cross-examine the complainant about non-complaint.

[6] Even on the assumption that the attack upon the complainant's credit would have been made, and thus much the same evidence led, it was still an error of law and of principle to allow evidence in support of the complainant's credit to be led from her in chief and in response to an as yet only anticipated attack on credit. In *R v Johnson and Edwards* [1981] Qd R 440, the Court of Criminal Appeal dealt with a charge of blackmail under s 415(2) of the *Criminal Code*, in which two accused persons were alleged to have demanded $2,000.00 without reasonable or probable cause and with threats that the person from whom the money was demanded (a Mr Cater) would be charged with an offence if the demand was not complied with, and where it was alleged that the two accused intended to extort money thereby from Mr Cater. The Court held that the gist of the offence in 415(2) is the threat with intent to extort, and that whether Mr Cater had or had not committed the offence with which the blackmailers (who were then serving police officers) intended to charge him, was irrelevant to their own alleged guilt of extortion.[1]

[7] The Court of Criminal Appeal accordingly held the trial judge erred in letting the Crown lead detailed evidence in chief from the complainant, Mr Cater, denying the commission by him of the offence with which it was threatened he would be charged if the $2000.00 was not paid. As Demack J wrote:

> "Whether the accusation be true or false can have no bearing on guilt, but it may have a substantial bearing upon the credit of the complainant.
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> However the fact that the defence may wish to cross-examine upon the matter does not mean that the Crown is entitled to open up the issue in evidence in chief. If such a procedure were followed to its fullest, criminal trials would drag out to intolerable lengths..."[2]

[8] Dunn J wrote:

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1 Judgment of Demack J at 458

2 At 458

> "It was objected on behalf of the Crown that, as a practical matter, the admission of the evidence which, I have held, was wrongly admitted caused no miscarriage of justice, it being submitted that it was clear from what was said when the evidence was objected to, and from what in fact happened, that the evidence would have been placed before the jury during the cross-examination of Cater.
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> That objection is, in my opinion, immediately answered by what Fullagar J. said in *Mraz v The Queen* (1955) 93 C.L.R. 493, at p. 514. The answer has practical application. His Honour said this:
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> > 'It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may hereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.'
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> In this case, an important rule of evidence, namely the rule that the Crown case should consist of evidence tending to prove the guilt of the accused, was not followed. Moreover, accepting that the evidence which I have discussed would probably have been tendered in the course of cross-examination, counsel for the accused would have had opportunities to be selective as to time and the context of its tender, and the nature of the emphasis placed upon it when tendered; and their being deprived of these opportunities involves, I think, that the appellants may have lost chances fairly open to them of being acquitted…"[3]

[9] Those observations are relevant to this case. Had the trial followed a different course, defence counsel would still have had the forensic advantages described by Dunn J. Those observations in *Johnson and Edwards* as to the error of leading in chief evidence in anticipatory rebuttal of an attack on credit also gain support from the point made in *R v F* (1995) 83 A Crim R 502 at 507-8, by the Court of Criminal Appeal in New South Wales. This was that it would undermine the basis on which the Crown, as an exception to the rule against leading evidence in chief on matters going only to credit, is permitted to lead evidence of a fresh complaint in evidence in chief, (for the limited purpose of bolstering a complainant's evidence by establishing consistency between what was said in the witness box and what was said on the occasion of the complaint) if the Crown were *also* permitted to lead in evidence in chief (and not simply in rebuttal on re-examination to restore credibility) evidence explaining the fact of non-complaint or late complaint, and led to bolster the complainant's credit.

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3 At 446-447

[10] In the circumstances I would order that the appellant's convictions for unlawful carnal knowledge against the order of nature, unlawfully and indecently dealing with a girl under 16 years of age, and rape be set aside; that a retrial on those counts be held; and that the appellant be remanded in custody until further or other order of a court with jurisdiction to grant him bail.

[11] **JONES J:** The appellant was convicted after trial of two counts of carnal knowledge against the order of nature, one count of unlawful and indecent dealing with a girl under 16 years of age and two counts of rape. The complainant in each instance was the appellant's niece. She was born on 27 May 1974 and therefore was between 10 and 11 years old when the alleged offences (save for one count of rape) were committed. The four offences were alleged to have occurred between May 1984 and May 1985. The remaining count of rape is alleged to have occurred some five years later when the complainant was 16 years old. The appellant at these times was respectively 25 years old and 30 years old.

[12] The appellant was sentenced to terms of imprisonment of 10 years for each count of rape, five years for each count of carnal knowledge and four years for indecent dealing. All sentences were to be served concurrently.

[13] The appellant appeals against his conviction on the grounds that the learned trial judge erred in allowing the prosecution to lead evidence that the appellant had previously been in prison. He seeks leave also to appeal against the sentences on the ground that the learned trial judge's discretion miscarried because he gave undue weight to the appellant's prior criminal history.

Background facts

[14] The appellant in December 1983 had been convicted of two counts of carnal knowledge of a girl then aged 14 years and with entering a dwelling house at night-time with intent. He was sentenced to nine months imprisonment. Upon his release from prison, the appellant lived for a time at the home of his sister who was the mother of the complainant. In addition to the complainant, her three brothers and two sisters were living in the house. The latter were younger than the complainant. The appellant lived in this house for approximately six months before moving to a house across the street where he lived in a relationship with a woman who later became his wife. The appellant and his partner subsequently again lived in the complainant's house before moving to his parents' farm property at a Queensland town. Other family members, including the complainant, her mother and her siblings, visited the farm property quite often.

[15] The appellant was released from prison on 28 May 1984. It was this fact which determined the dates between which the prosecution alleged the offences occurred. The prosecution sought to lead the evidence to establish the timing of the offences but more importantly to give context to remarks which the complainant alleged the appellant had used upon the completion of the actions of the first charge. She alleges the appellant said, "Don't tell anyone 'cause I'll go away again."

[16] Although the words conceivably had an innocent meaning, all counsel, both at trial and on appeal, proceeded on the basis that the words "go away again" would be understood by the jury to signify the accused's having previously been in jail.

[17] The timing of the offence could have been established by a simple admission which the defence was prepared to give, but the main reason why the prosecution wished

to lead the terms of the remark was to explain why the complainant had made no complaint until some 18 years later. Even if the prosecution chose not to lead the remark as evidence in chief any cross-examination of the complainant, adversely commenting upon her delay in making the complaint, would inevitably result in the remark being elicited in re-examination.

[18] In preliminary argument, before the case was open to the jury, the learned trial judge was called on to rule on the admissibility of the remark. The prosecution argued that it was relevant to the purpose identified above but moreover, and more fundamentally, it was admissible as part of the *res gestae*.

[19] The learned trial judge ruled that the evidence of the remark was admissible and he did not accede to a suggestion that it should be excluded because of its prejudicial effect.

[20] When the complainant gave her evidence in chief, she referred to the remark in the expected terms.[4] In cross-examination she was questioned about her failure to complain in a timely way. When in re-examination the reason for that delay was sought, the following exchange occurred:

> "… you were asked by my learned friend when he was particularly talking about the first episode … that you spoke about, he asked you whether you yelled out, resisted or tried to leave at all. Do you remember being asked that question? -- Yes.
> And you said you didn't. Why was that? -- I was scared.
> Right? -- I trust – he was my uncle.
> And you were also asked about whether you spoke to anyone after that first episode? -- Yes.
> Why is it that you didn't tell anyone what happened after the first time? -- I didn't think anyone would believe me.
> All right. And again, with the second time that you spoke about in the bathroom at [W] Street? -- Yep.
> You were again asked whether you yelled out or resisted in any way and you said you didn't, and why was that on that occasion? -- He was my uncle.
> All right? -- He – I didn't understand what was right and wrong at that time.
> All right. And the same with when you were down in [a Queensland town] – that time you spoke about when you were in [a Queensland town], you were asked why you didn't yell out to K, or you were asked about whether you could've yelled out to K, and you said you didn't. Why is it that you didn't yell out to K? -- I just blocked everything out. I – I learnt to block things out.
> All right. And you indicated that you never spoke about – you never told anyone what had happened until the year 2000? -- Yes.
> Why isn't it – why is it that you never told anyone? -- I didn't think people would believe me. I was scared. Just didn't have the courage to do it."[5]

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4 Record, 54/35.
5 Record, 74/30.

[21] The complainant's reason for her delay being that "she was scared" or that "she did not think anyone would believe her" meant that one of the bases for allowing the reference to the appellant's prior incarceration, namely that she was frightened her uncle would go back to jail, was misplaced. By this time, the complainant's mother had already given evidence and a reference to the appellant's incarceration was led from her. The appellant later gave evidence confirming the fact of his earlier imprisonment and it was the subject of an admission by the appellant's counsel before the closure of the prosecution case.[6]

[22] The appellant argues that the only basis upon which the evidence of his prior incarceration was admissible was for the second purpose advanced by the prosecution, that is, to explain why the complainant did not make the complaint. In circumstances where the complainant did not rely upon the threat, there was no need for reference to the appellant's prior incarceration to be made in evidence, either by the complainant's mother, the appellant's counsel or by the appellant himself. It was argued that this repeated reference to the appellant's prior incarceration in a finely balanced case, which depended on a finding of credibility between complainant and appellant, was highly prejudicial and ought to have been excluded.

[23] The respondent argues that the quoted words were admissible, certainly as part of the *res gestae* and, as a matter of probability, in re-examination, notwithstanding the potential for prejudice. The words did not, in fact, come out in re-examination and were not pursued because it was unnecessary to do so.

[24] Turning to the more basic question, it seems clear that the remark was admissible as part of the *res gestae* and consequently required no primary assessment of its probative value or prejudicial effect. In *Harriman v The Queen*[7] McHugh J referred to the fundamental admissibility of such evidence in the following passage:

> "If evidence which discloses other criminal conduct is characterized as part of the transaction which embraces the crime charged, it is not subject to any further condition of admissibility. Evidence which directly relates to the facts in issue is so fundamental to the proceedings that its admissibility as a matter of law cannot depend upon a condition that its probative force transcends its prejudicial effect. No doubt in a criminal trial a judge always has a general discretion to exclude prejudicial evidence. But it is difficult to see how evidence directly related to the very facts in issue can be excluded simply because it reveals other criminal conduct on the part of the accused. Consequently, it is a matter of great importance whether the evidence is classified as part of the res gestae or as circumstantial evidence tending to prove the facts in issue." [8]

[25] Brennan J (as he then was) commenting upon this passage, said:

> "I would therefore respectfully agree with McHugh J. that evidence of events which are part of the res gestae is admissible – and will usually be admitted – even if that evidence reveals the commission of an offence other than the offence charged." [9]

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6 Record, 90/50.
7 (1989) 167 CLR 590.
8 At 633.
9 At 594.

[26] Thus it seems to me that the complainant's evidence about the appellant's remarks was admissible in a primary sense. The fact, that it was admitted on the basis of its relevance to explain delay and that basis did not arise, does not result in error if it was admissible in any event. The fact that the die was cast by his Honour's ruling before the case was open to the jury did not, in my view, cause any unfairness in the conduct of the trial. I would therefore dismiss the appeal against conviction.

Sentence application

[27] The appellant also applies for leave to appeal against the sentence. The basis of the application is that the learned sentencing judge placed too great an emphasis on the applicant's previous conviction, on two charges of unlawful carnal knowledge of a girl under the age of 16 years, said to have been committed on 28 September 1983 and 2 October 1983. In the course of his sentencing remarks, his Honour said of these offences:

> "You have a relevant criminal history. It is in your favour that you have stayed out of trouble since that term of imprisonment. The offences for which you were convicted in 1983 involved a number of counts of carnal knowledge of a 14 year old girl. In what can only be described as a bizarre twist, the offences occurred in the same house in which the first four offences were committed on this occasion, that is the house at [W] Street. This child obviously became emotionally involved with you. You were then 23. You took advantage of that and you have suffered a term of imprisonment. It is a relevant criminal history, although of course it is some time ago and during that period you have remained out of trouble."[10]

[28] On behalf of the applicant, exception was taken to the words that the applicant had "taken advantage of" the girl who was aged 14 years. It had been explained to the learned sentencing judge that the appellant voluntarily desisted from his relationship with the girl when he became aware of her age. It was argued that his conduct leading to his earlier convictions was not such as to be described as "taking advantage" as his Honour had done.

[29] The circumstances of the offences, for which the applicant had to be sentenced, involved penetrative sex upon the complainant anally, vaginally and orally. The fact that the complainant was 10 years of age when this conduct began and that she was his niece adds to the seriousness of the conduct. It appeared that his conduct occurred at various times over an extended period when the complainant was aged between 10 and 16 years. The further fact, that the first offence occurred whilst the applicant was on parole and so soon after he was released from prison for earlier sexual offences, inevitably leads to the result that the penalties should be towards the upper end of the range. The applicant continues to deny his involvement in the charges and consequently is not in a position to have demonstrated remorse, but it means that there can be no allowance of the kind which would attend an early plea. The only telling point in mitigation was the fact that the applicant had not offended in the 19 years between the commission of the offences and the time of his sentencing.

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[10] Record, 163/40.

[30] The prosecution has referred to a number of cases – *R v Myers*,[11] *R v Adams*[12] and *R v Griffiths*.[13] These cases demonstrate a range of imprisonment of between 11 years and nine years. It is not necessary to set out the comparative facts of these cases, because it seems to me the range is clearly established. The learned sentencing judge was referred to a decision of *R v B*[14] in which a sentence of nine and a half years was imposed upon an offender who was convicted on trial of one count of attempted rape and one count of carnal knowledge of a female against the order of nature on the complaint of his stepdaughter who was 10 years of age. These offences were coupled with four other offences of a sexual nature. The applicant's conduct here was more significant and extended over a longer period. The sentence imposed is in line with that decision.

[31] In my view, the learned sentencing judge had appropriate regard to the applicant's prior convictions and his Honour's penalty was well within the sentencing range. The application for leave to appeal against sentence should be refused.

[32] **HOLMES J:** I have read the judgment of Jones J, and gratefully adopt his setting out of the background facts. I agree that the threat (or plea) attributed by the complainant to the appellant, 'Don't tell anyone, 'cause I'll go away again' is properly to be regarded as part of the *res gestae* and was admissible; but I do not think that is the end of the matter. The Crown sought to lead evidence that the appellant had been in gaol and was on release on parole, on two bases. The first was that his release date assisted the prosecution case by giving a temporal starting point for the commission of the offences. That purpose was obviated when the defence indicated its preparedness to admit his arrival in the complainant's household at the relevant time. The second basis was put thus by the prosecutor:

> "I would want to lead evidence that he was released on parole after being in gaol on that particular date so that what she says, 'don't tell anyone or I'll go away again' makes sense to the fact that he's been in gaol."

She went on:

> "And she really can't provide an explanation if she can't say that … that I didn't want him to go back to gaol."

[33] The defence objected to the leading of the evidence because of the prejudice of the revelation that the appellant had been in gaol, and proposed alternative formulations in which the complainant might express the threat. The learned trial judge ruled that the evidence that the appellant had been released from gaol on a relevant date could be led. Consistent with that ruling, the complainant in her evidence said that the appellant had come to live with her family not long after he had left gaol.

[34] No doubt in an attempt to limit the damage, the defence made an admission in the course of the Crown case that the appellant had been released from prison and was on parole at the relevant time, and the appellant then gave evidence that he had been in prison for nine months, without disclosing the nature of the offence for which he served that period. Thus, he was the main source of the evidence as to his imprisonment; but only because he was placed in that unenviable position by the ruling that the Crown was entitled to lead it.

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11 [2002] QCA 143 – sentence of 11 years imprisonment not disturbed on appeal.

12 CA No 158 of 1997.

13 [2002] QCA 70 – 10 years imprisonment after reversal of serious violent offence declaration.

14 CA No 346 of 1992.

[35] In light of the defence admission as to the appellant's presence at the relevant dates, the only purpose for which the prosecution sought to lead evidence of the appellant's imprisonment and release on parole was to explain the complainant's failure to complain. There are, I think, two difficulties with that approach. The first is that the evidence was ruled admissible in advance of its having become relevant by way of an expected attack on the complainant's failure to complain in cross-examination, and an expected response by her that she did not wish her uncle to go back to gaol. The second of those expectations came to nothing when the appellant made no reference to the threat as having any bearing.

[36] In any event, it is very hard to see how the evidence could ever have become relevant, given the concession as to dates. The complainant was entitled, if challenged as to her failure to complain, to rely on the threat, and to explain its significance as causing her to believe that if she did complain her uncle would be returned to gaol, from where she understood him to have come. She did not in fact do either of those things; but even if she had, there was no prospect of the defence challenging her evidence that he had been in gaol. It is very difficult therefore to see why it should have been thought necessary or permissible to lead the evidence of imprisonment in the Crown case. And what was significant in explaining the appellant's failure to complain (had the evidence come up to proof) was her apprehension of the situation, rather than the objective fact that the appellant had been in prison. The threat had bearing only in respect of its effect on her and her understanding of what would happen if she did not comply. It did not matter whether her perception was soundly based; although if it had emerged from the complainant's cross-examination that the appellant had been imprisoned, it might have been fair to allow him to lead some evidence, in the manner he in fact did, as to the relatively brief period involved.

[37] It was argued by Mr Martin for the Crown that the statement "I'll go away again" was capable of conveying that the appellant had been imprisoned already (an interpretation supported by Mr Griffin SC, for the appellant); and that given that that was the case, there was no further prejudice flowing from proof that it was so. I am not at all convinced that a normal jury, given evidence that the complainant's uncle had moved in with the family after a period away, would take the statement "I'll go away again" as meaning any more than it said. Even if there were the possibility of such an inference, it hardly seems to me a satisfactory approach to proceed on the basis that because something is capable of being mildly prejudicial it may as well be converted into something unequivocally and seriously prejudicial.

[38] The evidence of the appellant's prior imprisonment should not, in the circumstances obtaining in this case, have been admitted. It was so prejudicial that it is impossible to say a miscarriage of justice has not occurred. I would set aside the convictions, order a new trial and remand the appellant in custody until further or other order of a court with jurisdiction to grant him bail.

[39] I respectfully agree with the conclusions of Jones J as to the appeal against sentence.