SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAN* [2004] QCA 416
PARTIES:	**R** **v** **BAN** (applicant)
FILE NO/S:	CA No 273 of 2004 DC No 475 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	3 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2004
JUDGES:	Davies and McPherson JJA, Fryberg J
ORDER:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted. Appeal allowed. Set aside sentences imposed on counts 4, 6 and 7 and in lieu thereof a sentence of 18 months is imposed on each count.**
CATCHWORDS:	CRIMINAL LAW – Appeal and new trial – Appeal against sentence – Appeal by convicted persons – Applications to reduce sentence – When granted – Particular offences – Offences against the person – Sexual offences *R v Harkin* (1989) 38 A Crim R 296, cited *R v W* [2000] QCA 321; CA No 141 of 2000, 8 August 2000, referred to
COUNSEL:	K M McGinness for the applicant T A Fuller for the respondent
SOLICITORS:	Legal Aid (Queensland) for the applicant Director of Public Prosecutions (Queensland) for the respondent

FRYBERG J: On 29 July this year, the appellant was acquitted in the District Court on one count of maintaining a sexual relationship with his elder daughter, another of indecent dealing with the same daughter and a third of raping that daughter.

At the same time he was convicted on one count of indecent dealing with that daughter and another of common assault upon her and of two counts of indecent dealing with his younger daughter.

He now appeals against his conviction on the last two counts and seeks leave to appeal against the sentences of imprisonment for two years to be served concurrently for each of the three counts of indecent dealing. The sole ground of the appeal against the convictions is that they are unreasonable and cannot be supported by the evidence.

It is unnecessary to go into the circumstances of the three acquittals. They were probably due to doubts held by the jury regarding identification. The appellant did not himself give evidence. It is however necessary to consider some of the evidence relating to the appellants older daughter as well as that specifically relating to the younger one.

The younger daughter was born in February 1985. She was nearly five years younger than her sister. The offences were alleged to have occurred when she was aged about nine, which

puts them after the offence of indecent dealing with the sister.

In contrast to the position with her sister, it is not alleged that there had been any molestation of her except on the two occasions charged. Each offence was alleged to have occurred on a Thursday night when the complainant's mother was regularly out. The offences were alleged to have occurred one to two weeks apart.

The complainant had been suffering pain in her tailbone for some time prior to the first offence. She had complained about it to her mother who had examined her while she was fully clothed. The complainant alleged that on the first occasion, the appellant called her into the bathroom whilst he was showering. He told her to get into the shower. She could not recall ever having showered with her father previously, although it was put to her that this had occurred when she was small.

She removed her clothes and got into the shower. The appellant told her to bend over so he could check her tailbone. He used his hands to feel her spine, moving them down to her tailbone. He continued down to her vaginal area and she felt one of his fingers go in. This "only lasted for a split second". He told her that it did not look like there was any bruising. She washed herself, then went and put on a nightie.

In cross-examination it was suggested that the appellant did not touch her on the vagina but only around the lower back and buttock areas. Those suggestions were denied. In addition, it was twice suggested to her that the entry of the finger into her vagina might have been an accident. On the first occasion she responded:

> "I don't know. Why would he be checking the vagina area if my tailbone is sore? I don't understand."

On the second, she responded:

> "Could have been."

A week or two later, the appellant again called her into the shower. She started crying to her sister and said that she did not want to go in there. She had told her sister what happened on the first occasion. Her sister said that she could not do anything and she would have to go. So she went to the bathroom. She removed her clothes and got into the shower with the appellant who was already naked. She kept her side to him until he asked her to bend over. He checked her tailbone and said that there was no bruising and it looked fine. He did not touch her anywhere else. She was a late developer and was sexually undeveloped.

In relation to the first occasion, the appellant submits that without other evidence to establish a sexual relationship, the jury could not be satisfied beyond a reasonable doubt that the touching of the vagina was not an accident. No complaint is

made about the direction which the trial Judge gave on that subject.

The respondent submits that evidence to establish a sexual relationship is not required to exclude the defence of accident. All of the circumstances could be taken into account, including evidence concerning any offence of a similar nature involving the older sister. Relevant circumstances on the respondent's submission included:

(a) The complainant speaking to her mother about having a sore tailbone;
(b) The complainant's mother having examined her, but her father not having done so;
(c) The appellant choosing to examine her whilst her mother was absent from the house;
(d) The appellant choosing to examine her whilst he was naked in the shower;
(e) The appellant requiring her to join him in the shower;
(f) Her inability to recall having showered with her father previously;
(g) The nature of his purported examination of her including touching her vaginal area unnecessarily if it was simply an examination of her tailbone; and
(h) The appellant's requiring her to join him in the shower on a second occasion where he touched her tailbone without touching her vaginal area.

The circumstances of the offence involving the older sister were these. When she was about 12 or 13 years old, that is, one or two years before the charges the subject of the appeal, the appellant would regularly make her have showers with him. On the occasion in question, the appellant, as his counsel's submission on appeal put it, "showed the complainant his genitalia whilst explaining to her the condition of prostate cancer".

He also purported to show her how to check herself for cancer. As she put it, "He showed me how to look for cancer in my boobs by looking for lumps as well. He showed me just on my boobs how to lift your boobs up and feel them every time you get in the shower which is for lumps." The Judge directed the jury on the use they could make of similar fact evidence and warned against using the sister's evidence to conclude that the appellant was a person who commits this type of offence. There is no complaint about any of these directions.

In relation to the second charge under appeal, the appellant submits that on the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the touching was indecent. It is not suggested that the jury could not have concluded that the touching occurred. Counsel for the respondent relies on the matters to which I have already referred as sufficient to demonstrate indecency.

In my judgment it was open to the jury to convict the appellant on each count. The circumstances referred to by

counsel for the respondent are more than enough both to negate accident and to permit a finding of indecency. An indecent assault on a female must have a sexual connotation, but it is not essential that there be a touching of her breasts or her genitalia, nor that the offenders genitalia do the touching.

Any touching accompanied by an intention on the part of the assailant to obtain sexual gratification may amount to an indecent assault, R v Harkin (1989) 38 Aust Crim R 296 at p 301. In the present case, the circumstances strongly suggest the existence of such an intention. Taken in conjunction with the similarities between the offence committed on the older sister and that alleged against the younger, they satisfy me beyond reasonable doubt that the appellant's finger did not enter the complainant's vagina by accident.

In any event, the offence of indecent dealing was not constituted solely by touching the vagina with the finger. It comprehended the whole of the appellant's dealing with the complainant on the occasion in question. Even if the jury had felt a doubt about whether the vaginal touching was accidental, it remained open to them to convict.

However, in response to a question asked by the jury, the judge directed, "The Crown has to prove beyond reasonable doubt that the action, that is vaginal touching, was not accidental. So, if you have a reasonable doubt about whether it was accidental or not, the accused is not guilty." That

direction favoured the accused, although no doubt, it simplified matters.

It meant that in considering the second charge, the jury would have been entitled to take into account the undoubted indecency involved in their finding in relation to the first charge. I have no doubt that the appellant's conduct toward the complainant amounted to indecency.

The appellant also submitted that there was a danger that the jury may have used evidence only admissible against [sic] the older sister in deciding guilt on the present charges. He submitted that the judge did not clearly direct them as to what evidence was not admissible when considering those charges. There was no indication of what further directions ought to have been given, save that in oral submissions a general direction of the type ordinarily given and adequately given in this case, was suggested.

Counsel for the respondent submitted that the judge correctly identified the evidence applicable to the subject counts and in that context, referred only to the similar fact evidence described above. She gave proper directions concerning the use of that evidence. She directed the jury on the use of uncharged acts with regard to the charges involving the sister and warned against their use to conclude that the accused was a person who commits this type of offence.

I am unable to perceive any other direction which ought to have been given. In any event, there was no request for a redirection of this type and no miscarriage of justice is demonstrated. See R v Glattback [2004] QCA 356.

As to sentence, the applicant submitted that two years imprisonment for counts 4, 6 and 7 was manifestly excessive when regard was had to R v M [2003] QCA 556; R v W [2000] QCA 321; R v Warburton [2002] QCA 304 and R v K [2003] QCA 521.

The applicant was aged about 35 to 37 when the offences were committed. He had no relevant criminal history. The trial occupied four days, but this must be seen in the light of the serious offences of which he was acquitted. The offences were committed against his daughters aged 12 to 13 and 9 at the relevant times. They involved breaches of trust, particularly serious in relation to the elder girl who was having difficulty in relating to her mother and had come to place particular reliance on him. No evidence of remorse was placed before the Court. No force or threats were involved in the offences.

It is not easy to discern the impact of the offending conduct on his victims, particularly the older one. Her victim impact statement occupies six pages of typescript and relates not only to the consequences of the charges of which the applicant was convicted, but also, and perhaps predominantly, to those of which he was acquitted, as well as to a wide range of

peripheral events and allegations. These included assertions of stress imposed by members of her father's family; stress when she realised that none of her family, including her younger sister, and particularly her mother, was giving her support; and anger that her sister should be living with their mother and associating with the applicant. Understandably, she saw most of the consequences as flowing from the alleged rape.

The sentencing judge did not refer to the victim impact statements in her sentencing remarks, although she did refer, in a general way to "far reaching consequences for the children". In the course of submissions and very shortly before making her sentencing remarks, her Honour said, in relation to what was in the statements, "It is of very limited relevance, but it is a factor to take into account. As often is the case that if it is a father touching up children, then quite often the family does get destroyed by their actions." It appears likely that her Honour took the statements into account on that limited basis.

In my judgment, the statement of the older sister should not have been considered, even in this limited way. It should have been ignored. See R v W at para [14]. Before her Honour, counsel for the Crown submitted that a sentence in the range of two to four years would not be inappropriate. Before this Court, the respondent submitted that the range included a sentence of up to two years imprisonment. Counsel for the

respondent also conceded that the sexual acts in this case fell to the lower end of the scale.

Of the cases referred to, particular reference was made to M and W. M involved a plea of guilty, but the circumstances were more serious than this case. A head sentence of 18 months was imposed, the plea apparently being recognised by early suspension of the sentence. W was found guilty after a trial and was closest of those cited to the present case. His appeal on sentence was allowed and he was sentenced to imprisonment for six months, suspended after two months.

These cases satisfy me that something has miscarried in the sentencing process. This is not as serious a case as most which come before this Court although doubtless many similar cases are determined in the District Court and not appealed. The sentences on counts 4, 6 and 7 are, in my view, too high. They should be set aside. Having regard to the circumstances, the applicant should be sentences to imprisonment for 18 months on each of those counts.

DAVIES JA: I agree.

McPHERSON: I agree. The jury were, in my opinion entitled, on the evidence, to reach the verdict they did. Few things are more sickening than men who use pseudo-scientific explanations as a cover for their illicit sexual self-gratification with respect to young girls. Nevertheless, having regard to the character and extent of the offending

here, which is somewhat less serious than what we are unhappily accustomed to seeing and hearing in this Court, the sentence was, I consider, somewhat too high and should be varied to reduce it as Justice Fryberg says effectively from two years to 18 months.

DAVIES JA: The appeal against the conviction is dismissed. The application for leave to appeal against sentence is granted. The appeal against sentence is allowed and the sentences on counts 4, 6 and 7 are set aside and in lieu a sentence of 18 months imprisonment is imposed.
