SUPREME COURT OF QUEENSLAND

CITATION:	*R v CX* [2005] QCA 222
PARTIES:	**R** v **CX** (appellant/applicant)
FILE NO/S:	CA No 353 of 2004 DC No 394 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2005
JUDGES:	de Jersey CJ, Keane JA and Mullins J Judgment of the Court
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - FRESH EVIDENCE - AVAILABILITY AT TRIAL - MATERIALITY AND COGENCY - GENERALLY - where appellant had been convicted after trial of indecent dealing, maintaining a sexual relationship, sodomy and rape in relation to a child under the age of 16 years - where the appellant sought to adduce further evidence on appeal - where new evidence included statements suggesting that the appellant had been the victim of a criminal conspiracy - where evidence contained in affidavits replete with irrelevant assertion, speculation and hearsay - whether evidence had been permitted to be called at trial - whether new material meets the conditions of admissibility for fresh evidence on appeal CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - CONDUCT OF TRIAL JUDGE - where appellant had been convicted after trial of various offences - where appellant's twin brother

claimed to have had acrimonious dealings with the learned trial judge when she was still practising as a barrister - where these dealings had taken place over 11 years before the trial - where it was alleged this gave rise to a risk of bias on behalf of the learned trial judge - where record showed that the learned trial judge was never asked to recuse herself from the trial - where the learned trial judge gave a comprehensive warning to the jury about the risks of convicting on the complainant's uncorroborated testimony - whether a reasonable person would consider that the learned trial judge had been unable to bring an unbiased mind to the discharge of her duties in relation to the trial

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IRREGULARITIES IN RELATION TO JURY - MISCONDUCT - where appellant had been convicted after trial of various offences - where, on one occasion, appellant noticed jurors standing near non-jurors during course of an adjournment and observed a non-juror point to the appellant and say "that's him" - where, on another occasion, a juror was discharged after admitting to discussing the case with her hairdresser - whether the learned trial judge should have discharged entire jury

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant submitted verdict was unsafe because of inconsistencies in evidence of complainant, the delay in the bringing of the original complaint and the learned trial judge's decision to allow hearsay evidence of the complainant's complaint - where appellant also submitted that the learned trial judge was not able to perform her functions because she was deaf - whether appellant was denied a fair chance of acquittal by reason of any of the matters raised

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - where appellant had been convicted after trial of indecent dealing, maintaining a sexual relationship, sodomy and rape in relation to a child under the age of 16 years - where appellant was sentenced to seven and a half years imprisonment for each offence - where case involved grossly criminal conduct and serious breach of a

position of trust - whether sentence imposed was manifestly excessive

Criminal Code 1899 (Qld), s 572
Criminal Law (Sexual Offences) Act 1978 (Qld), s 4

M v The Queen (1994) 181 CLR 487, applied
R v J [1992] QCA 425; CA No 264 of 1992, 4 December 1992, cited
R v Robinson; ex parte Attorney-General [1991] 1 Qd R 262, cited
Ratten v The Queen (1974) 131 CLR 510, applied

COUNSEL: Appellant/applicant appeared on his own behalf
M J Copley for respondent

SOLICITORS: Appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

[1] **THE COURT:** The appellant was convicted on 21 September 2004 of six counts of indecent dealing with a child under the age of 16 years as a guardian, one count of maintaining a sexual relationship with a child under the age of 16 years as a guardian, one count of sodomy of a person under 18 years of age and one count of rape.

[2] The female complainant was born in 1976. The offences were charged to have been committed between 29 January 1991 and 11 April 1991. At the time of the trial the complainant was 28 years of age.

[3] The appellant was sentenced to seven and a half years imprisonment for each offence with each sentence to be served concurrently.

[4] The ground of appeal against the appellant's conviction for these offences is that it is "unsafe and unsatisfactory and contrary to law".

[5] The appellant also applies for leave to appeal against sentence on the ground that the sentence imposed is "manifestly excessive in all the circumstances".

The trial

[6] The Crown case was that at the end of January 1991, the complainant, who had just turned 15 years of age, was sent from Sydney where she had been living with her mother to live with the appellant and his family. The appellant was the brother of the complainant's father. He lived with his then wife and children on a sugar cane farm near Bundaberg.

[7] According to the complainant's evidence, after the complainant had been living with the appellant and his family for between a week and a half and two weeks, the appellant came into the complainant's room one night when she was alone and started touching her. She was asleep but awoke when the appellant started rubbing her back on top of her nightshirt. He then put his hands underneath her nightshirt and pulled it up. He then put his hands down across her backside and legs and pulled her underwear down a bit to rub her backside. She moved a bit "hoping he

would think [she] was waking up and go away". She said that he just kept rubbing. After about 10 or 15 minutes he left.

[8] In both evidence-in-chief and cross-examination, the complainant maintained that she saw who was touching her. She said that she saw the appellant's face although her eyes were half-closed. It was suggested to her in cross-examination that she may have dreamt that the incident occurred, but she maintained that it happened.

[9] The second count of indecent dealing was alleged to have occurred in the horse stables on the farm. The complainant said that the appellant took her there saying that he had to talk to her and that she was in trouble. She said that the appellant backed her into a corner of the stable and started putting his hands all over the outside of her clothes and hugging her. He then started putting his hands underneath her clothes. She said that he put his hands all over her back, stomach, chest and breasts. She said that he put his hands into her pants and pulled them down a bit and rubbed her bottom and vagina. She said that on this occasion he put a finger between her buttocks and then inserted that finger in her vagina. She said that she thought that it was his middle finger, part of which had been cut off. She asked him to stop and said: "It hurts". He ignored her and kept going. After a time he stopped and told her:

"Fix your clothes up, put your pants back on."

She rearranged her clothing and walked back to the house with the appellant. She said on the way to the house that she was crying. The appellant asked why she was crying and she said:

"Because I don't like that and it hurts. I don't want you to do it".

The appellant said that he was just preparing her for later on in life.

[10] In cross-examination, it was suggested to her that in a video tape of the appellant's farm, which depicted the stables, there was no part that matched her description of the area in the stables in which she had been cornered by the appellant. She said that the stables looked completely different in the video. It was suggested to her that the incident in the stables never took place. She rejected that suggestion.

[11] Three counts of indecent dealing, the count of sodomy and the count of rape arose from what was called the "Thursday incident" or the "Shopping day incident". The complainant said that the appellant told her to take a Thursday off school on a particular week. She did not. He chastized her for that and told her that she was to do it the next week. As a result she "faked being sick and got the Thursday off school". When everyone in the house had gone, she got up to have a shower. While she was in the shower the appellant came in and started rubbing her back and bottom. The appellant told the complainant that she was "clever for getting the day off school" and "to be quick in the shower". He then left the bathroom.

[12] The complainant finished her shower, dried herself and put her nightdress back on. She came out of the bathroom and stood by the sinks and laundry tub. The appellant came to her and gave her a hug. He told her to go upstairs to his room. She did so and he came in, told her to get undressed and said that he would be back in a second. She got undressed. He came back into the room with a towel. He told her to get on the bed and he got undressed and lay on the bed next to her. He started putting his hands on her and rubbing her all over.

[13] He then took her hand and put it on his penis and made her masturbate him. He rubbed her on her arms, back, chest, stomach, bottom, legs and vagina. He took her left hand and put it on his penis and moved it up and down with his hand. When he let her hand go, she let go and he would take her hand and make her do it again. He told her that she had to get him going. She was crying by this time and told him that she did not like what he was doing. He said that he knew it was wrong. He then stopped and told her to roll over.

[14] She rolled over across the bed and he came at her from behind and tried to put his penis into her vagina. She said she was bent over on the bed on her knees and he was standing behind her. He grabbed her on either side and pulled her back to him trying to push his penis into her vagina. She said that he penetrated "… a little way. He couldn't get it all the way in, so then he tried my bottom, tried to push it in there".

[15] She said that she could feel his penis slightly in her anus. Her face was buried in the bed and she was crying.

[16] He stopped and made her lie on her back and got on top of her and tried again to put his penis into her vagina. He was moving up and down and sweating and dripping sweat on her. He grabbed the towel and wiped himself down and said: "See how hard I'm trying, I'm starting to sweat. I'm trying so hard, because it is not working, because I know it is wrong". She said that eventually he stopped.

[17] The remaining count of indecent dealing was said to have occurred one evening when everyone was watching television in the lounge room. The appellant called the complainant into his bedroom. He said that he had to talk to her to make sure that everyone else heard that she was going into his room for a "talking to". He shut the door to his room, put the television set in the room on and told her to get onto the bed. She did so. He then got onto the bed. Once again he started putting his hands on top of her clothes, all over her and under her clothes and into her pants. He touched her vagina and bottom on a number of occasions, and when he did so he dragged his finger up the middle so that it would partially go in. After a time he stopped. He then asked her to "kiss him like I would kiss a boyfriend". She said: "No". He then said: "Good, because if you did I would have slapped you". He then started telling her that what he was doing was wrong but that he was trying to teach her so that she was ready for later on in life.

[18] The complainant's evidence was that she decided to ask to be allowed to return to Sydney after she saw some injuries to the leg of the appellant's daughter, which were consistent with her having been beaten. The complainant said that she told the appellant that she wanted to leave and return to her mother in Sydney.

[19] The appellant's son gave evidence that the appellant often disappeared with the complainant for substantial periods. He understood the complainant had come to them from an unhappy home, and thought his father had taken the complainant "under his wing".

[20] The appellant's former wife, the complainant's aunt, said the complainant and the appellant often went off together for walks in the fields. She said that, when the complainant first arrived, she was a happy teenager but after a couple of weeks she became quiet and withdrawn.

[21] The complainant first complained about the appellant's conduct to the woman who was the mother of her then boyfriend about 18 months after she left the appellant's farm. She was living in that woman's house, having moved in with her shortly after returning to Sydney.

[22] The complainant first complained about the appellant's conduct to the police in June 2002.

[23] In relation to the "Thursday incident", the complainant was adamant that the incident had occurred on a Thursday. The records of the Department of Education suggested that the complainant was absent only on a Monday at the relevant time. The appellant's counsel made a point of this discrepancy in the Crown case in the course of his address.

[24] The appellant gave evidence. He denied the allegations of misconduct made against him. He said that his middle finger, part of which had been cut off, was hypersensitive and caused him pain when it was touched. The appellant's counsel made a point of this in his address to the jury, suggesting that it cast doubt on the likelihood of the complainant's version of events in relation to the second count of indecent dealing.

[25] The appellant said that he and his wife were having troubles with the complainant, and, as a result of observing the complainant "behaving irrationally", he and his wife decided that they would "motivate [the complainant] into leaving the house on her own volition".

The appeal

[26] As has been noted, the appellant was represented at his trial by counsel. The appellant's outline of argument on the appeal was prepared by his brother, whose surname is not the same as that of the appellant. He is the appellant's twin and the complainant's father. The appellant's brother is not a qualified lawyer.

[27] The appellant sought to adduce further evidence on the appeal. In support of the application to call further evidence, it was argued that the witnesses now sought to be called were available at trial but were not permitted to be called by the learned trial judge. Reference to the record of proceedings shows that this assertion is without any foundation. The only reference at trial on the appellant's behalf to a possible witness for the appellant, other than the appellant himself, was to the appellant's brother. The evidence which it was said that the appellant's brother would give related to conversations with the complainant's mother before she went to stay with the appellant. The learned trial judge intimated, correctly in our opinion, that such evidence would be inadmissible hearsay. The appellant's counsel did not seek to take the matter any further; and no attempt was made to adduce any evidence from the appellant's brother or from any other witness.

[28] Accordingly, there is no reason to suppose that the witnesses whose evidence is now sought to be tendered could not have been made available at trial by the exercise of reasonable diligence on the appellant's behalf.

[29] The detail of the new evidence sought to be adduced has been put before the Court in affidavit form. The proposed evidence put before this Court included statements from the appellant's brother suggesting the appellant may have been the victim of concocted charges designed to found fraudulent claims for criminal compensation,

and an anonymous letter to the appellant's parents to similar effect. Additionally, there was material from other persons as to the complainant's apparent state of mind at various times, and as to the appellant's good character.

[30] The affidavits are replete with irrelevant assertion, speculation and hearsay in an attempt to suggest a conspiracy to concoct a case against the appellant. There is no apparent basis in this material for regarding the complainant as a member of this conspiracy. This material does contain, it may be noted, some hearsay statements which are distinctly prejudicial to the appellant. There are, for example, statements attributed to one of his daughters that the appellant had "been beating the shit out of us for years" and to his former wife that "He can't remember what he did yesterday". The harm that such material might have done to the appellant's case at trial confirms the wisdom of restricting the privilege of representation in Court to those who are legally qualified. In any event, none of this new material would give rise to the possibility of an acquittal which is the standard that must be met if it is to be admissible.[1]

[31] In our opinion, this new material does not meet the conditions of admissibility of fresh evidence on appeal.[2] In this regard, to the extent that any of it might have been admissible, it could have been made available by reasonable diligence on the part of the appellant or his legal advisers. And, in any event, it was most unlikely to have affected the verdict against the appellant. It should not be received as evidence relating to the issue of the appellant's guilt or innocence.

[32] In addition to the new evidence which is said to bear upon the appellant's guilt or innocence, there is an affidavit by the appellant's brother which seeks to advance a claim of actual bias against the learned trial judge.

[33] The gravamen of this affidavit is that in 1993 the appellant's brother met the learned trial judge, while her Honour was practising at the Bar, in connection with proceedings in which she had been engaged to represent him. His affidavit suggests that he declined her Honour's services in acrimonious circumstances such that her Honour could be expected to have had reason to remember him for his disparaging comments. It is said that her Honour should, therefore, have recused herself from the trial of the appellant.

[34] The appellant asserted that the learned trial judge was actually asked to recuse herself. A perusal of the full record of the trial shows that this assertion is baseless, and that her Honour was not asked to recuse herself from the trial. She was not reminded of her dealings, 11 years before, with a person whose surname was not the same as the surname of the appellant. In these circumstances no reasonable layman would entertain for a moment the possibility that a judge would be unable to bring an unbiased mind to the discharge of her duties in relation to the trial of the appellant.[3]

[35] It is unfortunate that the appellant did not have the benefit of legal representation on the appeal. The written arguments presented on his behalf and his oral submissions raised many points which obliged the Court to exercise special care in scrutinizing

---

1 *Ratten v The Queen* (1974) 131 CLR 510 at 516 and 525 - 526. See also *R v Long; ex parte A-G (Qld)* [2003] QCA 77 at [180]; (2003) 138 A Crim R 103 at 146.

2 *Ratten v The Queen* (1974) 131 CLR 510 at 516.

3 See *Webb v The Queen* (1994) 181 CLR 41 at 47 - 50.

the record to ensure that there is no reason for concern that the appellant may have been the victim of a miscarriage of justice. Our close scrutiny of the record reveals no reason to apprehend that the appellant did not have the benefit of a fair trial.

[36] The appellant's written submissions raised numerous allegations, which nevertheless may conveniently be grouped into three categories.

[37] The first concerns the learned judge's failure to discharge the jury because of misconduct on the part of jurors. On one occasion, the appellant noticed jurors standing near non-jurors during the course of an adjournment. A juror referred to a "farm". On seeing the appellant, a non-juror said "that's him". Her Honour noted the lack of detail about what was said, and declined to discharge the jury, saying that she was not satisfied that any communication had occurred between jurors and non-jurors. That was plainly right, given the facts presented to her.

[38] The other occasion arose from a juror's acknowledgement that she had, during an adjournment, spoken with her hairdresser about the case and asserted that most of the jurors had already made up their minds. This occurred prior to the commencement of addresses. The learned judge appropriately discharged that juror. Again, her ruling was clearly correct. There was no basis for concluding that she should have discharged the entire jury.

[39] The second area of complaint concerns alleged bias on the part of the learned judge. There is no indication in the record she was asked to stand aside on this ground. We have examined the material to which the appellant has referred. In our view, there is absolutely no basis for suspecting that the judge was biased and no reasonable person could have apprehended bias in this case, either from the summing up given by her Honour or by her Honour's conduct during the trial. Significantly, her Honour comprehensively warned the jury why it may be dangerous to convict on the complainant's testimony alone. Defence counsel did not dispute the sufficiency of that warning. Her Honour concentrated on the evidence from the Crown witnesses, certainly, but that was unavoidable. She was subject to a duty to identify the evidence relating to the respective counts, and the evidence of preliminary complainant. Her Honour adequately identified defence counsel's principal submissions, particularly in relation to those aspects of the appellant's evidence, such as his hypersensitive finger, which might, if accepted by the jury, tend to cast doubt on the reliability of the complainant's evidence.

[40] The third area of complaint rested in the contention that the convictions are unsafe. Our review of the record, in the context of the submissions made, leads us to the conclusion that it was reasonably open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[4] The strength of the complainant's evidence was not significantly diminished notwithstanding thorough cross-examination. This cross-examination did not bring to light any major inconsistencies which should have caused the jury to entertain a reasonable doubt about the appellant's guilt.

[41] In his oral submissions before us, the appellant made a number of points to which reference may be made. He referred to the complainant's evidence that particular events took place on a Thursday, being the day she stayed home from school, which was inconsistent with the school record which showed her having been away on a Monday. The appellant complained that the indictment should not have been

---

4 *M v The Queen* (1994) 181 CLR 487 at 493.

amended; but s 572 of the *Criminal Code* 1899 (Qld) expressly permits amendment of an indictment where the evidence is a variance with the indictment.[5] The date of the alleged offence was essentially a matter of detail, albeit arguably important detail,[6] for the jury's consideration, and the matter was properly laid out before them.

[42] The appellant also referred to aspects of the victim impact statement put before the learned judge at the time of sentencing, apparently contending that these matters were put before the jury at the trial. There is no basis at all for that suggestion, or indeed for any suggestion that the prosecution conducted the matter unfairly in any degree. In this regard, we should also mention that the appellant complains that the Crown Prosecutor opened to the jury that the complainant would give evidence that the appellant's attempts to have sexual intercourse with her were painful because she was a virgin, that such evidence would have been led in contravention of s 4 of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) and that as a result the appellant was prejudiced in the eyes of the jury even though that evidence was, at the direction of the learned trial judge, not adduced. In our view, it is not conceivable that this incident could have adversely affected the appellant's prospects of acquittal.

[43] The appellant's arguments included the bizarre contention that the learned trial judge was not able to perform her functions because she was deaf. He focussed on instances where the learned judge asked witnesses to speak up. The appellant was unable to point to any material suggesting any related irregularity or deficiency in the fairness of the trial.

[44] Finally, the appellant submitted that the anonymous letter referred to above was admissible evidence. That was plainly untenable, as was his contention that, since evidence of the complainant's complaint to her boyfriend's mother was admitted, hearsay material from the defence should also have been admitted. As was explained to the appellant at the hearing, evidence of the latter variety falls into a special category of exception to the rule against hearsay.[7]

[45] The delay in the bringing of a complaint against the appellant is a matter to which the Court adverted in the course of its scrutiny of the record of proceedings below. The learned trial judge instructed the jury that because of the delay in bringing a complaint against the appellant, and more precisely because of:

> "… what the delay means to the accused or might mean and because of the delay I must warn you that it would be dangerous to convict upon [the complainant's] testimony alone unless, after scrutinizing it with great care and considering the circumstances relevant to its evaluation and paying heed to this warning, you are satisfied beyond reasonable doubt as to its truth and accuracy.
>
> … because of the delay and because that has put the accused in difficult circumstances or might have done as to whether or not he could call evidence, I warn you it would be dangerous to convict unless, having scrutinised the matter with care, great care, thinking about all the circumstances surrounding the evidence and paying attention to my warning, you are satisfied that he is guilty. If after all

---

5 Amendments to an indictment may be made pursuant to the order of the court at any time before or during the trial as well as after verdict: *Criminal Code* 1899 (Qld), s 571(3).

6 Cf *R v Swan* (1987) 27 A Crim R 289; *R v Jacobs* [1993] 2 Qd R 541.

7 See *R v Robertson; ex parte Attorney-General* [1991] 1 Qd R 262 at 263 and 274 - 275.

> that you are you can convict, but you should take great care to scrutinise the evidence and heed the warning."

[46] That warning suffices, in our opinion, to allay concerns which might otherwise have arisen because of the delay in the complainant's making a complaint to the police.

[47] In our opinion, there is no reason to apprehend that the appellant was denied a fair chance of acquittal by reason of the matters of which he complained or any other matter. The evidence adduced provided the jury with a basis for being satisfied of the appellant's guilt beyond a reasonable doubt.

[48] The appeal against conviction must be dismissed.

Sentence

[49] The appellant was born in 1944. He was 46 years of age at the time of the offending, and 60 years of age at the time of sentence. He has no previous criminal history.

[50] In sentencing the appellant to seven and a half years imprisonment for each offence, the learned sentencing judge recorded that the appellant was guilty of a grave breach of trust in relation to a troubled girl. Her Honour noted:

> "Most importantly, you have shown a complete lack of remorse, a complete lack of perception about your role in relation to this girl and what you have done to her."

[51] The learned sentencing judge also referred to evidence that the complainant had suffered difficulties in her relationship with her husband and in her dealings with her children because of the appellant's misconduct.

[52] The learned sentencing judge was particularly concerned to ensure that the appellant was not prejudiced by the delay in bringing the complaint to trial. Accordingly she looked to decisions which would assist in determining the range of sentences imposed for offences which occurred in about 1991. Her Honour was referred in particular to *R v J*.[8] That was a case in which a sentence of seven years was imposed in respect of offences of unlawful carnal knowledge. There was no allegation in that case of sodomy.

[53] Having regard to the nature of the offending, which involved grossly criminal conduct and a serious breach of a position of trust, and to the appellant's lack of remorse, we do not regard the sentence of seven and a half years imprisonment imposed globally in this case as outside the range of a sound exercise of the sentencing discretion.

Conclusion and Orders

[54] The appeal against conviction is dismissed. The application for leave to appeal against sentence is also dismissed.

---

[8] [1992] QCA 425; CA No 264 of 1992, 4 December 1992.