SUPREME COURT OF QUEENSLAND

CITATION:	*R v HZ* [2005] QCA 468
PARTIES:	**R** v **HZ** (appellant/applicant)
FILE NO/S:	CA No 155 of 2005 DC No 5A of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	14 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2005
JUDGES:	McPherson and Keane JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal against conviction and application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR WHERE MISCARRIAGE NOT SUBSTANTIAL - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - where appellant was convicted after a trial of unlawful carnal knowledge of a girl under 16 years of age in his care and sentenced to three and a half years imprisonment - where the appellant had been the only adult present at a sleepover party organised by the 15 year old daughter of his de facto wife for a number of her female friends - where large quantities of alcohol were consumed during the course of the evening - where it was alleged that the appellant had sexually interfered with two of the young women who were present - where evidence was proposed to be led that one of the complainants had told the appellant's de facto wife that the allegations against the appellant had been made deliberately as part of a conspiracy to punish the appellant and his de facto - where this complainant had given pre-recorded evidence - where the trial judge refused to allow the

relevant complainant to be recalled to be cross-examined about what it was that had allegedly been said to the appellant's de facto - whether the decision by the learned trial judge to exercise his discretion in this way had led to a miscarriage of justice

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where the appellant had been found guilty of unlawful carnal knowledge as an alternative to rape - whether it was reasonable for the jury to accept the evidence of the complainant that penile penetration had occurred while rejecting her evidence that such penetration had been non-consensual

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 was convicted after a trial of unlawful carnal knowledge of a girl under 16 years of age in his care and sentenced to three and a half years imprisonment - where the appellant had a minor criminal history - where the appellant's conduct involved a serious abuse of his position as the step-parent of one of the complainant's friends - whether the sentence imposed could be said to be manifestly excessive

Evidence Act 1977 (Qld), s 21AK, s 21AM, s 21AN, s 93A

R v T; ex parte Attorney-General of Queensland [2002] QCA 132; CA No 30 of 2002, 12 April 2002, considered

COUNSEL: The appellant/applicant appeared on his own behalf
M J Copley for the respondent

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

[1] **McPHERSON JA:** I have read the reasons of Keane JA and I agree with them.

[2] The appeal against conviction and the application for leave to appeal against sentence should be dismissed.

[3] **KEANE JA:** On 13 May 2005, the appellant was convicted after a trial by jury of the offence of unlawful carnal knowledge of a girl under 16 years of age who was in his care. The appellant was sentenced to three and a half years imprisonment. He desires to appeal against both conviction and sentence.

[4] The appellant was also charged with a number of other offences of which he was acquitted. Of these, count 1 was a charge of indecent dealing with V, the daughter of his de facto wife, IM, on a date between 1 April 2003 and 31 May 2003. The other offences of which the appellant was acquitted were alleged to have occurred on 7 February 2004. Count 2 was a charge of indecent dealing with V on that date. Count 3 was a charge of raping V on that date. Count 4 was a charge of raping K on that date. It was in relation to count 4 that, although the appellant was acquitted of rape, he was convicted of having unlawful carnal knowledge of K.

[5] The appellant seeks to appeal against his conviction on the grounds that a miscarriage of justice resulted from the learned trial judge's refusal to recall V for further cross-examination; and that the verdict of the jury was unreasonable. He seeks to appeal against his sentence on the ground that it is manifestly excessive.

[6] In order to better understand the appellant's grounds of appeal in relation to his conviction, it is necessary to summarise the salient aspects of the evidence at trial.

The evidence at trial

[7] V was born on 18 April 1988 and K was born on 30 November 1989. The appellant was born on 29 August 1951. V, K and the appellant were thus 15, 14 and 52 years of age respectively as at 7 February 2004.

[8] The Crown case was that the offences charged in counts 2, 3 and 4 occurred in the course of a party at the house shared by the appellant and IM, with whom the complainant V was then living. Present were the appellant, the complainants V and K and their school friends KP and N who were also teenage girls. The complainant V had invited K, KP and N to her home for a party on that Saturday evening. The appellant collected K and KP with V, and had bought alcohol for them in accordance with a "wish list" that the girls had prepared. N arrived at the appellant's house on her own.

[9] After the girls had drunk some alcohol, they went for a swim in the pool. The appellant joined them in the pool for a time. The girls got out of the pool and the appellant went with them. The girls drank some more alcohol, and V showed a pornographic video from the appellant's collection. They all participated in a kissing game while sitting on a fold-out bed while the girls drank more alcohol. It was apparent that the girls had become quite intoxicated. The appellant was also drinking alcohol. V and K, at some stage, were kissing and fondling each other on the bed. V and K then returned to the pool. The appellant followed them into the pool where the incidents the subject of counts 2, 3 and 4 were alleged to have occurred.

[10] V said that while they were in the pool, the appellant fondled her breasts (count 2), and inserted his finger in her vagina (count 3). At this point V left the pool. K said that the appellant then inserted his penis some way into her vagina (count 4).

[11] I pause to note that count 1 related to an incident which was alleged to have occurred almost 12 months before the incidents comprising the other three counts. The complainant V mentioned this incident to investigating police in the course of an interview in relation to the events that took place on the evening of 7 February 2004.

[12] The complainant K immediately complained to KP and N that the appellant had "entered her". She showed them by using her fingers that the appellant had "entered her" by about five centimetres. They told V of this and she became violently agitated. She telephoned W, the male cousin of one of her best friends, who came to the house, confronted the appellant and called the police.

[13] V, K and N gave interviews to the police which were video-taped and admitted into evidence pursuant to the provisions of s 93A of the *Evidence Act* 1977 (Qld) ("the Act"). KP and W gave evidence at the trial in the usual way. There were some inconsistencies in the evidence of V, K, N and KP. These were drawn to the attention of the jury by the learned trial judge. Having regard to the issues raised on appeal it is not necessary to set out at length the evidence of these witnesses. It is sufficient to note here that N's evidence was that she saw the appellant and K together in the pool with the appellant making movements as if he was having sexual intercourse with K while she was being held against the side of the pool. KP gave evidence that, after K had complained to her about the appellant, she spoke to the appellant and asked him if he had touched K. KP said that the appellant said that he had and that K "had wanted it". KP said that she then said to the appellant that K was a virgin before then and that the appellant's response was a shocked look on his face.

[14] The appellant was interviewed by police. The record of that interview was tendered by the Crown. The appellant denied the allegations against him, but did say that the complainant K had rubbed herself against him while they were in the pool together, and that he had "a stiffy". He also said that he had told her that he did not "want to be into that". He had earlier made a similar statement to W in the course of which he said that he "gave her the finger". He said that by this he meant that he had made the "one raised finger" gesture at K to indicate his dismissal of the advances which he said she was making to him.

[15] On 18 February 2005, the evidence-in-chief and cross-examination of V, K and N that was to be presented at the trial was pre-recorded pursuant to s 21AK of the Act. These recordings were admissible at trial in the same way as if the complainants had given evidence orally in person by virtue of s 21AM of the Act.

[16] The appellant did not give evidence at trial. He did, however, call evidence from IM, who was, as I have noted, his de facto partner and the mother of V. IM said that on 14 February, after V had been taken into care by the Family Services Department, V came to the house shared by the appellant and IM to collect her clothes and some other effects. IM said that V said to her on this occasion that she had promised IM "a long time ago to destroy you and [the appellant] because you steal my father's house" - apparently a reference to the property settlement between IM and V's father. According to IM, V went on to say "I plan everything", that she had "set up everything" and that "your assets and [the appellant's] assets will be liquidated to pay us all [sic] victims … it's a pity that I have to share with [W] and the three other girls". When IM asked why V had to share with W, V replied that that was their "agreement". This conversation had not been put to V when she was cross-examined on 18 February 2005. It is said by the appellant that this was due to the inadvertent failure of his solicitor to provide details of the conversation to the counsel who represented the appellant on that occasion.

The appellant's grounds of appeal

[17] The appellant's first ground of appeal relates to the refusal by the learned trial judge of an application by the appellant's counsel pursuant to s 21AN of the Act for permission to cross-examine V further in order to put to her the evidence of the conversation between V and IM to which I have referred.

[18] The learned trial judge's ruling was based on the view that V had already been cross-examined, and there was no sufficient reason to allow her to be cross-examined again. His Honour was not satisfied, in accordance with s 21AN(3) of the Act, that it would "be in the interests of justice" to make an order for V to be further cross-examined.

[19] On the appeal, the respondent was not disposed to seek to support the decision by his Honour to exercise his discretion in this way.[1] Whether or not the learned trial judge erred in the exercise of his discretion in this regard, it is impossible to see how the appellant was prejudiced in any way by this ruling. The main reason advanced to his Honour by counsel appearing for the appellant at trial for allowing V to be recalled so that the alleged conversation with IM might be put to her was that:

> "… if the [appellant] was prohibited from placing [IM's evidence about the conversation with V] before the Court because compliance with the rule in Brown and [sic] Dunn had not occurred, in my submission, then it would be in the interests of justice to make an order of the kind that I foreshadow, your Honour, that [V] be recalled and that proposition put to her."

The concern raised by the appellant's counsel was that IM's evidence would not be admitted into evidence if V was not recalled. IM was permitted to give evidence of her conversation with V. The effect of the learned trial judge's ruling was that IM's evidence of her conversation with V was uncontradicted. Importantly, of course, the appellant was acquitted of the charges involving the complainant V. In contrast, no application was made to recall K to put to her that she was a party to a conspiracy with V to fabricate charges against the appellant and had actually given false evidence about what had transpired between her and the appellant. That suggestion had never been put to her on the appellant's behalf, and no attempt to do so was made at trial. When KP and W were called to give evidence at the trial, it was not suggested to either of them that they and K had been parties to a conspiracy with V to fabricate charges against the appellant, and that they had given false evidence pursuant to that conspiracy. At the highest for the appellant, it may be said that because V was not further cross-examined the appellant lost the theoretical possibility that V would have admitted that she was a party to a conspiracy with K falsely to accuse the appellant.

[20] In relation to the conversation between IM and V, the learned trial judge directed the jury that:

> "It is a matter for you to make up your own mind about the evidence and whether you accept that evidence. But on the face of it, it amounts to an admission by [V] that what had happened here involved a set up. A conspiracy between the four girls and [W] to

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[1] Cf *Brown v Petranker* (1991) 22 NSWLR 717 at 728 - 729; *R v Masters* (1992) 59 A Crim R 445 at 473; *R v Burns* [1999] QCA 189 at [35] - [38] per Muir J; (1999) 107 A Crim R 330 at 336 - 337.

> frame the accused. That is a matter for you. You make up your own assessment of that."

[21] It must be said immediately that this direction, coupled with the refusal to allow V to be further cross-examined in relation to this conversation, was very favourable to the appellant. In my respectful opinion, it was unduly advantageous to the appellant. That is because V's statement to IM was a hearsay statement of no probative value so far as the truth of the facts of which K gave evidence in relation to count 4. Neither K nor N had made an admission that she was a party to any such conspiracy, and that proposition was not put to W or KP. There was no other evidence linking K with any such conspiracy apart from IM's hearsay statement of V's assertion. Further, and importantly, V's assertion to IM could not, on any view, be regarded as a statement made in furtherance of the conspiracy.[2]

[22] Accordingly, there was no basis on which the admission by V of which IM gave evidence could have been treated as an admission by K of a conspiracy involving K, or as evidence relevant to the existence of a conspiracy involving K, or as evidence relevant to the facts of the complaint by K against the appellant. As a result, far from the appellant being prejudiced by the learned trial judge's refusal to allow V to be further cross-examined, the appellant obtained the substantial forensic advantage of having IM's uncontradicted version of V's admission to her placed before the jury, not merely as evidence relevant to V's complaints against the appellant, but also in relation to K's complaint. In my respectful opinion, the appellant was not entitled to this advantage for these reasons and for reasons which are distinct from the rules of evidence limiting the reception of hearsay statements, and which I will shortly seek to explain. But whether or not my opinion in that regard is correct, it is clear that the appellant suffered no prejudice by reason of the learned trial judge's refusal to allow V to be recalled for further cross-examination. The substance of any advantage which the appellant could have hoped to obtain from further cross-examining V was secured to him by the direction to which I have referred and the absence of any contradiction of IM's version of her conversation with V.

[23] As I have noted, it was not suggested to KP or W when they gave evidence, and there was no attempt to recall K or N to put to them, that their evidence relating to the complaint by K was the product of a conspiracy to pervert the course of justice. The possibility of an acquittal on this basis was not fairly open to the appellant, having regard to his conduct of the trial. It is at this point necessary to emphasise the fundamental nature of a criminal trial as an adversarial process.[3] The appellant may well have preferred that IM's evidence of her conversation with V should stand effectively uncontradicted as evidence casting grave doubt on the credibility of V's charges against the appellant rather than to risk resuscitating V's credibility by putting the alleged conspiracy to K, N, KP or W. If, as was likely, they had rejected the suggestions that they had agreed to give false testimony against the appellant, and had done so, that rejection could have thrown doubt on the credibility of IM's version of her conversation with V, and would, at the very least, have raised the likelihood that, even if the conversation between V and IM had occurred, the jury would conclude that IM's recollection about what V said in that conversation was

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2 Cf *Tripodi v The Queen* (1961) 104 CLR 1 at 6 - 8; *Ahern v The Queen* (1988) 165 CLR 87 at 92 - 95, 100.

3 *Ratten v The Queen* (1974) 131 CLR 510 at 517; *RPS v The Queen* (2000) 199 CLR 620 at 632 [22]; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34], 65 [88]; *Ali v The Queen* [2005] HCA 8 at [7], (2005) 79 ALJR 662 at 664 [7].

itself unreliable. Further, having regard to the fact that the appellant had made admissions to the police of intimate contact between himself and K, the view may well have been taken by the appellant and his counsel that a suggestion that K had deliberately fabricated a story of partial penile penetration by the appellant would have been regarded by the jury as distinctly unconvincing, and that the jury would have taken a similar view of the appellant's case that V's complaints were deliberately false.

[24] Further, and importantly, the mere circumstance that V had, in fact, planned the events of the evening of 7 February 2004, and had "set up everything" to inculpate the appellant, would not, of itself, afford the appellant a defence to K's complaint. Even if V had pre-arranged the events of the evening with K and the others, and K had gone along with V's plan to entrap the appellant, that would not have exculpated the appellant on the charge of having unlawful carnal knowledge of K: K's consent was irrelevant to his guilt on that charge. No doubt the appellant's trial counsel appreciated that it would not be sufficient, so far as count 4 was concerned, to suggest that the appellant had been "set up" by V with the connivance of the others. It would have been necessary to suggest that their evidence inculpating the appellant in relation to count 4 was deliberately false. In the circumstances, one can well understand the reluctance of counsel to risk provoking an adverse reaction on the part of the jury by suggesting that these witnesses had deliberately given false evidence. Again, it is to be emphasised that the account of the evening's events that was given by the appellant was broadly congruent with that of the complainants. So far as K was concerned, the appellant admitted to knowing she had been drinking and that there was intimate contact between them in the swimming pool.

[25] Whatever reasons lay behind this aspect of the conduct of the trial on behalf of the appellant, it was not fairly raised as part of his case that the evidence of K, as to penile penetration by the appellant, or that of W or KP or N were to be rejected because they were the dishonest product of a conspiracy in which they were involved to pervert the course of justice. The appellant did not raise this suggestion with W or KP, and did not seek to raise it with K or N, as a hypothesis consistent with his innocence of the charge made against him by K. As a result, the appellant was not entitled to the forensic advantage conferred on him by the learned trial judge's direction that the existence of a conspiracy to frame the appellant was a live issue on all counts at the trial including the count involving K.

[26] For these reasons, I would reject the appellant's first ground of appeal.

[27] As to the appellant's second ground of appeal, it is apparent that the jury rejected the evidence of K that she had not consented to penile penetration by the appellant but accepted her evidence that it did occur as a basis for finding the appellant guilty of unlawful carnal knowledge.

[28] In my view, having regard to the evidence of what occurred, it was reasonably open to the jury to be satisfied beyond reasonable doubt that there had been some penetration of the complainant's vagina by the appellant's penis.[4] The appellant sought to emphasise in his argument on appeal that Dr Menon, a medical practitioner who examined K on 8 February 2004, found no genital injury and no

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[4] That this is the relevant test for determining whether or not the verdict of a jury can be said to be unreasonable was confirmed by the High Court in *MFA v The Queen* [2002] HCA 53 at [25], [59] - [61]; (2002) 213 CLR 606 at 614 - 615, 624.

signs of recent damage to the hymen. Dr Menon's evidence was, however, that the absence of any such injury or damage did not indicate one way or the other whether penetration had occurred. K's evidence that penetration occurred was uncontradicted at trial; and her evidence was not shaken in cross-examination. She made an immediate complaint to KP and N. N's evidence was that she saw the appellant and K together in the swimming pool and the appellant was forcing K against the side of the pool while the appellant was making movements as if he was having sexual intercourse. The appellant made admissions of intimate contact between K and himself both to KP and the police, and made what might be regarded as distinctly strained attempts to put an innocent complexion on his part in that contact.

[29] In the light of this evidence, it was reasonably open to the jury to reach their conclusion about penetration. The jury did not have to find that such penetration amounted to an act of rape. K's evidence as to whether or not she had consented to penetration was more equivocal than her evidence as to whether the act had occurred. She gave evidence that she had made some attempts to evade the grasp of the appellant while in the pool but accepted in cross-examination that she had said nothing to the appellant to communicate that she did not wish to participate in intercourse until after penetration had taken place. Her evidence was that the incident came to an end when she said "no" and pushed the appellant away. K also accepted in cross-examination that the appellant did not attempt to do anything further to her after she had registered her disapproval of what he was doing. The effect of K's evidence was such that the jury was entitled to find that penetration had occurred while being left with a reasonable doubt as to whether or not that penetration had taken place without K's consent.

[30] It should also be said that the doubts which the jury obviously entertained in relation to the evidence of V had no necessary bearing on K's credibility. Especially is that so when one bears in mind the other evidence which provided support for K's version of events.

[31] It follows that the appellant's challenges to his conviction must be rejected.

Sentence

[32] I turn then to the application for leave to appeal against the sentence imposed on the appellant as a result of his conviction on the charge of having unlawful carnal knowledge of the complainant K.

[33] The appellant, who emigrated from Sweden to Australia in 1992, has only a minor criminal history which his Honour regarded as being of no significance.

[34] The offence of which the appellant was convicted involved a serious abuse by the appellant of his position as the step-parent of K's friend. When he committed the offence, K was under his care. He was the only adult in the house. She was then 14 years of age. The appellant's conduct exhibited some predatory features in that he provided the girls with alcohol and permitted them to become intoxicated. He took advantage of K's intoxication to have carnal knowledge of her. These circumstances are hardly mitigated by the circumstance that the appellant himself may also have been intoxicated at the time of committing the offence. There is no suggestion that there was any pre-existing emotional intimacy between the appellant

and K, or that the appellant saw his interaction with her as anything more than an opportunity for his own physical gratification.[5]

[35] There was not, prior to sentence, any suggestion of remorse on the part of the appellant. The appellant's decision to proceed to trial, while a decision the appellant was entitled to make, also means there can be no discount for an early plea of guilty.

[36] The learned sentencing judge also took into account the circumstance that the maximum penalty that may be imposed on a person for the offence of having unlawful carnal knowledge of a child under the age of 16 who was in that person's care is life imprisonment.[6]

[37] Having particular regard to the decision of this Court in *R v T; ex parte Attorney-General of Queensland*,[7] where a sentence of three years imprisonment was imposed on a man who was 43 years of age at the time of an offence of unlawful carnal knowledge against a 12 year old girl, which was repeated, but where there had been an early plea of guilty and the complainant was not put through cross-examination, the sentence in this case was well within the range of a sound exercise of the discretion reposed in the learned sentencing judge.

Conclusion and orders

[38] I would dismiss the appeal against conviction and the application for leave to appeal against sentence.

[39] **MACKENZIE J:** I agree that the appeal against conviction and the application for leave to appeal against sentence should be dismissed for the reasons given by Keane JA.

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5 Cf *R v AS* [2004] QCA 220; CA No 160 of 2004, 2 July 2004, where the plainly consensual nature of the acts alleged, demonstrations of real remorse and an early guilty plea resulted in a sentence of one year's imprisonment suspended after six months.

6 *Criminal Code* 1899 (Qld), s 215(4).

7 [2002] QCA 132; CA No 30 of 2002, 12 April 2002. See also *R v B; ex parte A-G (Qld)* [2002] QCA 308; CA 141 of 2002, 23 August 2002 esp at [15] - [17]; *R v Waerea; ex parte A-G (Qld)* [2003] QCA 20; CA No 287 and CA No 307 of 2002, 7 February 2003 esp at [12] - [17].