SUPREME COURT OF QUEENSLAND

CITATION:	*R v WQ* [2006] QCA 518
PARTIES:	**R** **v** **WQ** (applicant/appellant)
FILE NO/S:	CA No 137 of 2006 DC No 428 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2006
JUDGES:	Keane JA, White and Philip McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - appellant convicted by jury of two counts of rape - two counts of indecent treatment of a child under 16 years of age - one count of wilfully and unlawfully exposing a child under 16 years of age to an indecent act with a circumstance of aggravation in that the complainant was his son - appellant sentenced to seven years imprisonment for one count of rape and lesser concurrent terms for other offences - complainant previously abused by a male friend of the appellant - appellant pointed to alleged vagueness in details of the evidence - appellant complained about alleged discrepancies or inconsistencies in the complainant's evidence - appellant argued jury did not consider its verdict for a sufficient length of time - whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt 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 - SEXUAL OFFENCES - rape of a young teenage child by the child's father - no criminal history - 56 years of age - betrayal of trust - appellant aware of complainant having previously been subject to sexual abuse by another person - whether sentence was manifestly excessive

Evidence Act 1977 (Qld), s 21AM, s 21AW(2), s 93A
Penalties and Sentences Act 1992 (Qld), s 13A

M v The Queen (1994) 181 CLR 487, cited
R v F [2001] QCA 416; CA No 90 of 2001, 1 October 2001, cited
R v P [2001] QCA 25; CA No 298 of 2000, 9 February 2001, cited

COUNSEL: The appellant appeared on his own behalf
C W Heaton for the respondent

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

[1] **KEANE JA:** On 23 May 2006, the appellant was convicted upon the verdict of a jury of two counts of rape (counts 1 and 2), two counts of indecent treatment of a child under 16 years of age (counts 3 and 4), and one count of wilfully and unlawfully exposing a child under 16 years of age to an indecent act with a circumstance of aggravation in that the complainant was his son (count 5). The appellant was sentenced to seven years imprisonment in respect of one count of rape, and to lesser concurrent terms for the other offences. One day was declared to be time already served.

[2] The appellant challenges the convictions on the ground that the "verdict was unsafe and unsatisfactory having full regard to the evidence". The appellant also seeks leave to appeal against his sentence on the ground that it was "manifestly excessive". I shall deal first with the appeal against conviction and then with the sentence application.

The conviction

[3] The ground of appeal on which the appellant relies in this regard must be understood as involving the contention that, on the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[1]

The Crown case at trial

[4] The complainant, born on 16 September 1990, is the appellant's son. The Crown case at trial was that, between March 2003 and June 2004, the complainant, then 12 to 13 years old, was staying with the appellant in the appellant's caravan. The complainant said that, one day, the appellant came into the complainant's room and lay down behind him. The appellant put some oil onto his fingers and then inserted his fingers into the complainant's anus (count 1). The appellant then positioned himself so as to put his penis into the complainant's anus. The appellant inserted his

1 *M v The Queen* (1994) 181 CLR 487 at 493 - 494.

penis into the complainant's anus and moved his penis in and out for about five minutes (count 2). The complainant said that, while this was happening, he said to the appellant "Don't", and told the appellant to leave him alone, but this was to no avail.

[5] The complainant said that, on another occasion, the complainant was sleeping but awoke to find the appellant rubbing his penis against the complainant's leg. When the complainant realised what was happening, he ran out the door (count 3). The complainant said that the appellant pulled the complainant's pants down and pushed his penis against the complainant's buttocks. The complainant said that this hurt, and that he pulled his pants up and saw that the appellant was smiling.

[6] The complainant also said that, during the Easter school holidays in 2004, the complainant was sleeping when he awoke to find the appellant pushing his legs open. The appellant touched the complainant's legs and testicles (count 4). The complainant said "No", and the appellant went away.

[7] The complainant said that, on a Saturday in about June 2004, the complainant was sleeping when he awoke to see his father standing naked in front of him masturbating (count 5).

[8] On 7 July 2004, the complainant attended at the Tweed Heads office of the New South Wales Department of Community Services. There, he complained of sexual abuse by his father. He took part in an interview with New South Wales police on that occasion. He took part in another interview with New South Wales police on 13 July 2004. It was on this latter occasion that the complainant made the complaints reflected in counts 1 and 2.

[9] The Crown case depended upon the evidence of the complainant. The Crown relied upon the complainant's records of interview made by the police pursuant to s 93A of the *Evidence Act 1977* (Qld). Pre-recorded evidence, including the complainant's cross-examination, was tendered under s 21AM of the *Evidence Act*. The jury were given the instructions required by s 21AW(2) of that Act in relation to this pre-recorded evidence.

[10] The complainant was cross-examined to the effect that the complainant's evidence was a rehash of allegations previously made by the complainant of sexual abuse by a male friend of his father's. These allegations led to the conviction of his father's friend, "Roy", pleading guilty to charges of sexual abuse in mid-2000. It was suggested to the complainant in cross-examination that the allegations made against his father were false and that the allegations mistakenly or falsely reflected those previously made by the complainant against his father's friend.

[11] The Crown called Dr McGregor who examined the complainant on 24 February 2005. Dr McGregor's examination revealed no abnormality in the complainant's anus, but Dr McGregor said that, having regard to the lapse of time since the alleged act of penetration and the use of lubricant to achieve that penetration, that was unsurprising.

[12] The Crown called the complainant's mother who gave evidence that, on 18 June 2004, he complained of nightmares which he said had been caused by seeing his father and his father's friend, Roy, "sucking each other". On the following day, the complainant said that he wanted to tell her something else, but he was "too scared

… of dad". He went on to say something about his father "sucking him". Later on, about 4 July, the complainant complained to his mother of anal penetration by the appellant.

[13] The Crown called another witness, AT, who was present at the conversation of 4 July between the complainant and his mother, to confirm the complaint of anal penetration by the appellant.

The appeal

[14] Before this Court, the appellant argued that the evidence of the complainant was too vague as to details of events and the times when the offences were alleged to have occurred to be reasonably capable of satisfying the jury of the appellant's guilt beyond reasonable doubt. It is the case that the complainant's evidence was clearly short on detail and vague as to dates. It is also the case that the complainant's account of the most serious offences alleged by him against his father did not emerge until his interview with police on 13 July 2004.

[15] The appellant also complained about discrepancies or inconsistencies in the complainant's evidence. In relation to counts 1 and 2, for example, the appellant pointed to differences in the complainant's account of the nature of the appellant's conduct, as to whether the appellant pushed his penis against the complainant's bottom or between his cheeks, and to the different descriptions which the complainant gave of the container from which the complainant said the appellant obtained oil used as a lubricant when he digitally and anally raped the complainant. The complainant first described the oil as "an orangey colour" to the police, but, in the pre-recorded evidence, he described it as "a clear colour". The complainant also gave evidence that, on the occasion of count 5, he had been picked up by his father, but later said that he had subsequently ridden his bike home. The appellant pointed to the complainant's evidence in relation to count 3 and suggested that it was self-contradictory. Further, in that regard, the appellant's counsel suggested that the inconsistency in relation to the complainant's evidence on count 3 was further compounded by a statement made by the complainant in relation to what may have been the occasion of count 3 that the complainant "rolled over and went to sleep".

[16] The appellant's counsel at the trial attacked the Crown case in his address to the jury on the basis that the complainant's inconsistencies and lack of detail in relation to these points demonstrated that the complainant was not a reliable witness. The learned trial judge commented in her summing-up to the jury upon these aspects of the complainant's evidence, referring to "[t]he inconsistency, the lack of detail, the way the story changes". The learned trial judge directed the jury to subject the complainant's evidence to "careful scrutiny".

[17] The jury were, thus, well aware of the arguable deficiencies in the complainant's evidence. The weight given by the jury to these considerations was a matter for them. The jury could well have come to the view that none of the deficiencies identified by the appellant's counsel were incapable of explanation consistent with the reliability of the core of the complainant's account. The jury may have been willing to accept the complainant's uncontradicted evidence on the basis that the vagueness and inconsistencies in the complainant's accounts, and his dilatoriness in giving a full account, were explicable by reason of his age and the nature of the case especially bearing in mind that, as was common ground, the complainant had

previously been sexually abused by the appellant's friend. This Court cannot say that such a view was not reasonably open to the jury.

[18] On the hearing of the appeal, the appellant made a number of complaints about the trial process which were not the subject of any ground of appeal. These complaints may be disposed of shortly.

[19] The first was that, because of his poor hearing, he was unable to follow the course of the trial. During the course of the hearing of the appeal, the appellant acknowledged that he was able to hear the submissions being advanced, in a quiet voice, by counsel for the respondent, and it was readily apparent that he had no difficulty hearing questions and comments by members of the Court.

[20] The appellant's second complaint was that the jury could not have given proper consideration to the case as it considered its verdict for only "about 10, [or] 15 minutes" at most. Reference to the transcript of the trial shows that this complaint is without any foundation. The jury retired to consider their verdict after the learned trial judge's summing-up at 12.20 pm on 23 May 2006. The trial judge gave the jury further directions between 12.56 pm and 12.57 pm. The jury sought further assistance of the trial judge at 2.43 pm. At 2.49 pm, the audio tape of the complainant's second interview with the police was replayed to the jury at their request. They were given further directions and retired at 3.35 pm. They were recalled for further directions at 3.37 pm and retired again at 3.43 pm. The jury returned with a verdict at 4.01 pm. The appellant's complaint is without foundation.

Sentence

[21] The appellant was 56 years of age when he was sentenced. He had no criminal history.

[22] The Crown Prosecutor submitted that the appropriate range of sentence was between seven and nine years imprisonment. Counsel for the appellant submitted to the learned sentencing judge that a sentence "in the order of five to six years may well be appropriate".

[23] The decisions of this Court in *R v F*[2] and *R v P*[3] show that the criminality, aggravated by the betrayal of trust, involved in the rape of a young teenage child by that child's father is regarded as warranting a sentence of the order of eight years after a trial.

[24] The Crown submitted that a further aggravating feature of this case was the circumstance that the appellant was aware that the complainant had previously been subjected to sexual abuse by another person, and that the complainant had been adversely affected by that abuse. This feature of the case is a matter of special concern, in that the appellant callously preyed upon his own son for sexual gratification in a way which was likely to compound the ill effects of the earlier abuse to which his son had been subjected. There was no suggestion of any remorse on the appellant's part for his abuse of his son in this way.

[25] In these circumstances, the submission that the sentence was manifestly excessive cannot be accepted. Indeed, having regard to the special circumstances of

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2 [2001] QCA 416; CA No 90 of 2001, 1 October 2001.

3 [2001] QCA 25; CA No 298 of 2000, 9 February 2001.

aggravation in this case, considerations of deterrence and denunciation of the appellant's conduct suggest that the sentence imposed on the appellant was at the lower end of the range that could properly have been imposed.

Conclusion and orders

[26] In my opinion, the appeal against conviction should be dismissed. The application for leave to appeal against sentence should be refused.

[27] **WHITE J:** I agree with the reasons of Keane JA and the orders which his Honour proposes.

[28] **PHILIP McMURDO J:** I agree with Keane JA.