SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAK* [2010] QCA 187
PARTIES:	**R** **v** **PAK** (appellant)
FILE NO/S:	CA No 30 of 2010 DC No 220 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2010
JUDGES:	Chief Justice and Chesterman JA and Douglas J Judgment of the Court
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.** **3. Application for leave to adduce evidence, filed 2 July 2010, refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant convicted of a raft of sexual offences committed upon his stepdaughter and covered the period over which the complainant's age ranged from seven to fifteen years – where the most serious offence was that of maintaining a sexual relationship over that period with a child under 16 years of age including anal intercourse and indecent dealing for which the appellant was sentenced to seven and a half years imprisonment – where the appellant was sentenced to a concurrent term of five years for the anal intercourse – where the other convictions, three counts of permitting himself to be indecently dealt with and four counts of indecent dealing, attracted concurrent four year terms – where appellant was aged between 40 and 48 years when he committed the offences and had no prior criminal convictions – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where appellant convicted of a raft of sexual offences committed upon his stepdaughter and covered the period over which the complainant's age ranged from seven to fifteen years – where complainant's evidence was sufficiently cogent and her recollection sufficiently reliable to justify acceptance of her evidence by the jury – whether verdict was unreasonable in the circumstances

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where appellant applied for leave to adduce new evidence – where there was no evidence that the matters in question were not discovered or not reasonably discoverable prior to the trial – where the evidence sought to be adduced by the appellant would not ordinarily have been admissible at the trial – where the evidence sought to be adduced is vague and incomplete – whether leave should be granted

Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, applied
Nicholls v The Queen (2005) 219 CLR 196; [2005] HCA 1, cited
R v AAF [2008] QCA 235, cited
R v Lawrence [2002] 2 Qd R 400; [2001] QCA 441, cited
R v Ryan [1995] QCA 555, cited
The Queen v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

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

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

[1] **THE COURT:** The appellant was convicted of a raft of sexual offences committed upon his stepdaughter. They covered the period 31 July 1991 to 25 May 1999, over which the complainant's age ranged from seven years to 15 years. The appellant was acquitted on two other counts.

[2] The most serious offence was count one, maintaining a sexual relationship over that period with a child under 16 years of age including anal intercourse and indecent dealing, for which the appellant was sentenced to seven and a half years

imprisonment. For the anal intercourse (count six), he was sentenced to a concurrent term of five years. The other convictions attracted concurrent four year terms. They were three counts (two, three and five) of permitting himself to be indecently dealt with, and four counts (four, seven, nine and eleven) of indecent dealing, in each case with a complainant aged under 16 years and under the appellant's care.

[3] The appellant contends that the convictions are "unsafe and unsatisfactory and contrary to law". He also seeks leave to appeal against his sentence, on the basis it is manifestly excessive.

Appeal against convictions

[4] The evidence substantially comprised evidence from the complainant, the complainant's mother, Ms B a school guidance officer to whom the complainant made complaint, and the appellant.

[5] It is convenient to assess the safety of the convictions by reference to the respective counts. (we will refer to the maintaining count, count one, last.)

Count two

[6] The complainant's evidence was that while in grade three at the (AB) School, she was at home one afternoon at the (XY) house with the appellant when her mother was still at work. She was on a "waterbed" in her mother's room, and the appellant was also present. He had his pants down and he took the complainant's hand and placed it on his penis and moved her hand up and down the penis. When he had attained an erection, he released his grip on the complainant's hand, and she continued to masturbate him until he ejaculated. She said that she was never going to do that again, because it was "gross", whereupon the appellant laughed.

[7] This offence occurred between 31 July 1991 and 7 October 1992, when the complainant was seven years old.

[8] In his written outline, the appellant says that during this period he was helping in the building on (D) Island of a family home, "returning to the mainland in the evening". The evidence from Mrs (PAK) was that "[a]pproximately six months into that we were building a house on (D) Island, and to save money PAK would pick her up after school and look after her until I got home."

[9] In other words, the construction activity on (D) Island did not on the evidence exclude the appellant's being at home in that period in the afternoon with the complainant, at least from time to time, so that the relevant opportunity was there.

Count three

[10] This offence was committed between 31 July 1991 and 7 October 1992, the same period as specified for count two.

[11] This offence occurred in the same bedroom. The complainant's evidence was that the appellant applied a condom to his erect penis, whereupon the complainant masturbated him to the point of his ejaculating into the condom.

[12] In his outline, the appellant makes the point that he and his wife "never used condoms at Alexandra Hills, because Mrs (PAK) was trying to get pregnant".

[13] Mrs (PAK) gave evidence that she and the appellant did not use condoms. Yet significantly she said that she found an opened packet of condoms in the appellant's bedroom drawer at (D) Island.

[14] The appellant relied also on the complainant's evidence that she was wearing the uniform of the (CD) School, which included a blue skirt, whereas in previous proceedings, she had said that she was wearing the pleated dark green skirt of the (AB) School uniform. Confronted with the inconsistency, the complainant explained that "[t]hey're very similar uniforms. One was dark green and one was dark blue." The jury presumably in the end saw this as a minor inconsistency, and plainly not something warranting their rejection of the complainant's testimony as unreliable.

Count four

[15] The complainant's evidence was that while in grade three the appellant collected her from school one afternoon and took her home. She said she was wearing the blue (CD) School uniform. She and the appellant were in the lounge room, and she was lying on the floor. The appellant removed her underwear and positioned himself between her legs and licked her vagina with his tongue until she experienced an orgasm. The appellant told the complainant they could not do this all the time, because she would get itchy and infected so as to arouse her mother's suspicions. The complainant said this was the only occasion on which the appellant licked her vagina while they were living at that particular house.

[16] The appellant relies on suggested inconsistencies as to "travelling times, TV show, colour of uniforms, after school care, where in the lounge room things happened", which he submitted "just don't stand up". He queried whether an eight year old could experience an orgasm.

[17] The TV show was "Wheel of Fortune". Part of the evidence upon which the prosecution relied in relation to the maintaining count, count one, was evidence from the complainant that the appellant frequently fondled her vagina under her underwear while the two of them watched "Wheel of Fortune" on weekday afternoons when they were living in a house at (XY). The appellant appears to contend that other commitments, such as his involvement in the construction of the house at (D) Island, meant that he could not be home by that time, but the evidence did not exclude that possibility.

Count five

[18] This count relates to the period 16 September 1992 to 18 January 1994.

[19] The complainant gave evidence that on this occasion her mother had left the house, possibly to go to the shop on the mainland. The complainant and her infant sister were in the master bedroom with the appellant. The appellant was on the bed. The complainant sat down beside him and masturbated him until he ejaculated. The complainant said that she did not believe that the appellant was wearing a condom on this occasion.

[20] The complainant indicated why she particularly recalled this occasion. She said:

> "The particular reason I remember this incident is (K)…was a baby. …she was in one of those bouncinette thingies and she had the…Fisher Price mobile play things…the bed was faced like up against the back of the wall, to the back of the house in the middle of the room. (K) was in a bouncinette and because of that, I was particularly worried, because there was another person in the room. It was my sister and she was a baby but that didn't really register."

[21] During her examination-in-chief, the complainant was asked "[d]o you remember how it started?", and having said that she did not recall that, she went on to speculate, drawing the Judge's statement: "If you can't remember, you can't really speculate…".

[22] The appellant, in his outline, relies on this as a basis for doubting the complainant's credibility generally, which is plainly not necessary.

[23] He also refers to her evidence that the bed was at the back of the house up against the back of the wall, whereas he claims "that is where the doorway to the en suite is as per drawing" Ex 12. That exhibit, which is reproduced in the record, is no more than a free-form sketch. It does not clearly indicate the position for which the appellant contends. At the hearing of the appeal, it emerged the appellant was in any event really challenging the accuracy of the sketch, which was the only sketch in evidence.

Count six

[24] This covers the period 22 December 1992 to 22 December 1995. The complainant's evidence was that one afternoon when her mother had left the Island to go shopping, she and the appellant were in the master bedroom. Both were naked. The complainant was face down on the bed. The appellant was on top of her, attempting to insert his penis into her anus. She told him to stop. He told her that she would be okay, that she would be fine. The complainant said the appellant achieved penetration to maybe two to three centimetres, and she told him to stop: she was crying. The appellant desisted and left the room. This was the only time the appellant committed sodomy upon her.

[25] The appellant raises the circumstance that he was employed during this period "leaving grave concern about these charges". He refers to his wife's evidence that he had jobs working for a builder and working at the local tavern. None of this, obviously enough, excludes the possibility that he had the opportunity, nevertheless, to commit this offence upon his stepdaughter as she described.

Count seven

[26] This count also related to the period 22 December 1992 to 1 January 1995.

[27] The complainant's evidence was that on an occasion when her mother travelled to the mainland with a television which needed repair, she – the complainant – remained at home with the appellant and her baby brother. She said he was then aged seven to eight months old. The incident occurred after Christmas. She knew this because she was wearing what she described as "a baby-doll" dress she had been given as a Christmas present by an aunt. She was watching television in the

lounge room when the appellant came over to her and inserted his thumb into her vagina. It was the first time anything of that character had occurred. He made a thrusting motion with his thumb until she experienced an orgasm. Not long after that her mother telephoned from the jetty to inform them she had returned, and the complainant went down to the jetty to meet her.

[28] Under cross-examination the complainant conceded that on a previous occasion she had stated she could not recall if her baby brother had been born by this time. She explained that the boy had been born, and that on the earlier occasion she had become confused because nervous when recounting the details.

[29] While the appellant describes this evidence as "doubtful to the extreme", it gained credibility from the particular circumstances which the complainant advanced as reinforcing her recollection.

Count eight

[30] This relates to the period 22 December 1992 to 13 November 1994. The jury acquitted the appellant on this count.

[31] The complainant's evidence was that her mother had to attend the Family Court, on 29 November 1994, in proceedings concerning the mother's friends Mr and Mrs (N). The complainant's mother left the island to do so. After the complainant came home from school that afternoon, the appellant suggested they do something special because the mother would be away for some time to come. The complainant said that she put on a pair of her mother's blue lacy knickers. She put a light pink "minnie-mouse" dressing gown over the top. She then went to the lounge room where the appellant was present, and turned on some Michael Jackson music and danced for the appellant and removed the dressing gown, her clothing and the knickers. The appellant laid her down in the hallway and performed oral sex on her, until there was a creak in the stairs. The mother had come home. The appellant fled through the back door and descended from the house by a ladder. The complainant quickly put her clothes back on and concealed the knickers. The blinds in the room had been drawn. Her mother asked her why the blinds were closed.

[32] Under cross-examination the complainant agreed her mother had asked her whether there had been something going on between her and the appellant. The complainant said nothing had been going on.

[33] The complainant's recollection was that her brother (P) had not been born at the time of this incident. (P) had been born on 18 January 1994, and the Family Court hearing occurred on 29 November 1994. Accordingly, if the incident occurred on the occasion when the mother was required to attend the Family Court, (P) would have been born.

[34] The jury's acquittal on this count is sufficiently explained by that discrepancy. In addition, the complainant's evidence about her mother's arriving and effectively interrupting the encounter, was not supported by the mother's own evidence.

Count nine

[35] This relates to the period 14 August 1998 to 31 December 1998.

[36] On an occasion when the mother was out of the house, the complainant and the appellant were together on a bed. The appellant had by then developed the habit of inserting fingers into the complainant's vagina and telling her she was ready for sex. The complainant said she had come to the realization that what the appellant was doing was wrong. She had started attending church and had resolved she would not permit the appellant to have sexual intercourse with her. On this occasion, the appellant positioned himself on top of the complainant and pushed her breasts together and started thrusting his penis between her breasts until he ejaculated.

[37] Under cross-examination, the complainant accepted that she would be familiar with the appearance of the appellant's penis, and said that her "clear recollection" was that his penis was circumcised. Mrs (PAK) said that the appellant's penis was not circumcised. This is a matter which falls to be considered in the context of other matters to which we will refer when assessing overall the safety of the convictions.

Count 10

[38] The appellant was acquitted on this charge, which related to the period 30 November 1998 to 1 March 1999.

[39] The complainant's evidence was that after the family had been swimming one hot day during the summer, the complainant went home and showered. When she emerged from the shower she dried herself and put a towel around her body. The appellant entered the bathroom and asked her to remove the towel, which she did. He then exposed his penis from his pants and stood there while the complainant masturbated him to the point of ejaculation.

[40] The appellant urges that "there is a similarity in the evidence to all the charges which leaves a considerable doubt to the appellant being found guilty", whereas he has been acquitted on two of the counts.

[41] There was limited evidence in relation to count 10. The jury sought to be reminded of the complainant's evidence about this count (and was), and was apparently giving careful consideration to the sufficiency of that evidence. We accept the submission for the respondent that "the jury may simply have not been prepared to convict due to the paucity of the complainant's recollection of the details of the incident. There was no cross-examination concerning it so it cannot be said that the complainant was shown up to be unreliable in her recollection of it thus explaining the acquittal."

Count 11

[42] This related to the period 1 March 1999 to 22 May 1999.

[43] The complainant's evidence was that from Easter 1998 she attended Mass at a hall at (Q), and continued to do that until a year later when she made her first communion and was confirmed. The last occasion on which the appellant interfered with her occurred at about that latter time. Relations had come to stay for the weekend, so that the complainant slept in the lounge room. During the night she awoke to find that the appellant had his hands under her blanket and under her underwear, and he inserted a finger into her vagina and moved it around until she experienced an orgasm.

Count one

[44] This is the count of maintaining. In addition to the misconduct involved in the preceding counts (those on which the appellant was convicted), the prosecution relied on other sexual acts to establish the maintaining. We have referred already to the fondling of the vagina while the complainant and the appellant watched "Wheel of Fortune" during weekday afternoons. There was also evidence from the complainant that she was required to masturbate the appellant two or three times a week during the period they lived at (D) Island. Such conduct was required of her whenever her mother left the house for the mainland. Digital penetration of her vagina occurred once every couple of weeks while they were living there.

Other evidence

[45] There was evidence of the complainant's reporting of the conduct to others. She first complained to her school guidance officer Ms (B). Ms (B) said that in August or September 2001 she realized that the complainant (then in grade 12) was trying to tell her something so she said: "When did it start?" The complainant said: "I was eight". Ms (B) asked: "When did it finish?" Ms (B) said that the complainant gave a definite age, but Ms (B) could not recall whether it was 14 years or 15 years.

[46] The complainant gave evidence that in June or July 2003 she telephoned her mother and told her of the interference covering the period from when she was eight years until 15 years. The complainant's mother gave evidence of a complaint about touching. The complainant denied penetration. The complainant's mother telephoned the appellant and told him that the complainant had told her everything. Mrs (PAK) gave evidence that the appellant denied the allegations and hung up. They spoke again shortly after that. Mrs (PAK) went to K in New South Wales to speak with the appellant. She asked him "why" and he said that he did not know why. He said that he had wanted to tell her but was too scared to do so. She asked him why he touched a child and he again said he did not know.

[47] The appellant gave evidence denying having made those responses, but accepted his wife challenged him in those respects. Acknowledging the difficulty in assessing the credibility of evidence from a transcript one can see in the record of the appellant's account of his conversation with Mrs (PAK) why the jury could have thought it unconvincing, and preferred her testimony.

[48] The appellant relies on some arguable deficiencies in the evidence of Ms (B). For example, when asked whether the complainant actually used the words "sexual abuse", Ms (B) said "[s]he may have", but went on to say that her memory was unclear. The appellant also relies on her evidence, when effectively apologizing for vagueness, that "[p]robably a little bit of dementia [was] coming in at this stage…so my apologies for that…" It is not clear what Ms (B) meant to convey by that, and nothing much appears to have been made of it at the trial.

Assessment

[49] The complainant's evidence was sufficiently cogent, and her recollection apparently sufficiently reliable, to justify the acceptance of her evidence by the jury.

[50] Her evidence gained independent support from three pieces of evidence:

(a) the mother's evidence of discovering an opened packet of condoms in the appellant's bedroom drawer, in circumstances where on her evidence the appellant did not use a condom, but on the complainant's evidence he did from time to time;
(b) the mother's evidence, recently referred to, of the appellant's arguably incriminating responses when ultimately challenged by her; and
(c) evidence from the mother that one morning when she was downstairs in the house at (D) Island, having put the baby (P) to sleep, she heard the sound of breathing which she associated with the appellant masturbating. She said she rushed up the stairs and the appellant got up from the couch. The complainant was sitting on it. She asked what was going on and the appellant told her to ask the complainant.

[51] The circumcision aspect need not of itself have overwhelmed those considerations, taken with the relative consistency and cogency of the complainant's evidence.

[52] We mention that the appellant gave evidence, denying having committed any of the offences and denying that he made any admission in relation to them. The jury was entitled to reject that evidence, in the context of that led by the prosecution.

[53] The appellant, before us, focused on whether the offences could have occurred. He submitted they could not for various reasons, such as his absence from the family home, and the complainant's absence from the home at school or in after-school care. The complainant's mother's evidence about pick-up times from school was far from dogmatic: see for example pp 88-89, evidence concerning events many years before. The evidence did not exclude the appellant's having the opportunity to commit these offences, in accordance with the complainant's account.

[54] The acquittals are sufficiently explained for reasons previously advanced.

[55] It remains to mention the appellant's query in relation to what the learned trial Judge told the jury about previous proceedings. There had been two previous trials. The Judge directed the jury not to speculate on what happened during those trials. The previous proceedings were raised solely in relation to questions of consistency or inconsistency between evidence given at the instant trial and in those other proceedings. The direction given by the Judge, which appears at page 69 of the record, was in orthodox terms.

[56] Before us, the appellant queried whether this direction should have been given earlier. It was given on the second day. The appellant was represented at the trial. One may infer Counsel was unconcerned about the timing of the direction: there is no basis for thinking the appellant was materially disadvantaged in this respect.

[57] An independent review of the evidence leads to the conclusion that it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of guilt, in terms of *M v The Queen* (1994) 181 CLR 487, 494-5. See also *Weiss v The Queen* (2005) 224 CLR 300, 316; *The Queen v Hillier* (2007) 228 CLR 618, 630, 635; *Libke v The Queen* (2007) 230 CLR 559, 581.

New evidence on appeal

[58] The appellant has separately applied for leave to adduce new evidence on his appeal. He has made a statutory declaration, to which he has attached another

statutory declaration dated 23 June 2010, made by his daughter (K). (K) is the eldest child born to the appellant and Mrs (PAK), and was not the complainant.

[59] In her declaration, (K) says that when she was 13 years of age, which was in the year 2005, her mother asked her to tell the police that the appellant had "touched" her, and had asked her to touch him, on the basis that (K) would be paid money which she would share with her mother. Her mother was upset over the appellant's failure to pay her maintenance. (K) says that her mother was under the influence of drugs or alcohol. The mother has made a statutory declaration denying those allegations.

[60] The fundamental problem faced by the applicant is that there is no basis upon which this should be characterized as "fresh" evidence, in that it was not available to him at the time of the trial. In his application, the applicant has not answered the question: "If the witness was not called at your trial, why wasn't the witness called?" There is no evidence at all on the point. Before us, the applicant asserted at one stage that he did not know of these matters until after the trial. It was mere assertion, not sworn to. There was no evidence the matters in question were not discovered or not reasonably discoverable prior to the trial.

[61] There is no need to go further. But in any event, to justify setting aside the conviction and ordering a fresh trial, the court would need to be satisfied, first, of the admissibility of the proposed evidence, and second, that if admissible, "there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial" (*Mickelberg v The Queen* (1989) 167 CLR 259, 273).

[62] The content of (K)'s declaration would not in ordinary circumstances have been admissible at the trial. Its use would ordinarily have been confined to providing a basis for cross-examination of Mrs (PAK), as potentially bearing on her credit. See *Nicholls v The Queen* (2005) 219 CLR 196, 216; *R v Lawrence* [2002] 2 Qd R 400, 402, 405-6. (That is so even accepting the applicant's assertion before us that the exchange between (K) and his wife preceded his being charged with the instant offences.)

[63] But acknowledging the exceptions to the collateral evidence rule (see *Nicholls* pp 290, 292), we add some observations on the cogency of the matter raised by (K).

[64] First, it does not relate to the offences committed on the complainant, and concerns alleged events some years after the time span covered by those offences. It is vague and incomplete: it is not said, for example, whether (K) actually made any complaint to the police.

[65] But even more importantly as to its cogency, the complainant raised her allegations, if somewhat cryptically, with the guidance officer in the year 2001. There was no suggestion the complainant did so at the behest of her mother. Then followed the mother's challenge to the appellant in mid-2003 (after her conversation with the complainant), and his inculpatory response. All of those things substantially preceded the events alleged by (K), thereby impairing the credibility of those later claims, if they were to be advanced as impinging in some way on the credibility of the complainant's account, and it was the credibility of the complainant's evidence which was of central (though not exclusive) concern here.

[66] If these matters be regarded as "new" though not "fresh" potential evidence, that it was not led, in these circumstances, produced no arguable miscarriage of justice.

[67] No basis for the admission of this further evidence on appeal has been established. The application for leave to adduce the evidence, filed 2 July 2010, should be refused.

Application for leave to appeal against sentence

[68] The applicant was aged between 40 and 48 years when he committed the offences. He had no prior criminal convictions. The Crown Prosecutor advanced a range of seven to nine years, while Defence Counsel submitted for a range of six to seven years.

[69] As mentioned, for the maintaining offence, which was the most serious offence, the applicant was imprisoned for seven and a half years, with shorter concurrent terms imposed in respect of the other offences.

[70] In his sentencing remarks, the learned Judge observed that the unlawful relationship began when the complainant was as young as eight years, and persisted for about eight years, involving a gross breach of trust by a stepfather. The complainant was ultimately compelled to remove herself from the family home, and the victim impact statement shows that the commission of the offences had a serious impact upon her.

[71] Counsel for the respondent has referred to *R v AAF* [2008] QCA 235 and *R v Ryan* [1995] QCA 555, which offer adequate justification for the seven and a half year term imposed here.

[72] The penalty imposed was not manifestly excessive, and the application for leave to appeal against sentence should be refused.