SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAH* [2011] QCA 35
PARTIES:	**R** **v** **RAH** (applicant)
FILE NO/S:	CA No 297 of 2010 DC No 326 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	8 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2011
JUDGES:	Chief Justice, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an extension of time within which to appeal against sentence and conviction is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the applicant applied for an extension of time within which to appeal against sentence and conviction – where the applicant signed a notice of abandonment of his appeal – where the applicant was found guilty of one count of rape by digital penetration of his granddaughter – where parts of the complainant's evidence were inconsistent – whether there was any injustice in the conduct of the trial, the directions of the primary judge or the verdicts returned by the jury *Criminal Code* 1899 (Qld), s 564, s 668D(b), s 671 *Criminal Practice Rules* 1999 (Qld), r 69, r 70 *Evidence Act* 1977 (Qld), s 93A *Grierson v The King* (1938) 60 CLR 431; [1938] HCA 45, cited *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited *R v Abdulla* (2010) 200 A Crim R 361, [2010] SASC 52, cited

R v Ali [2008] QCA 39, cited
R v CX [2006] QCA 409, cited
R v Jacobs [1993] 2 Qd R 541, cited
R v MacDonald (1995) SASR 322; (1995) 84 A Crim R 508, cited
R v MAM [2005] QCA 323, cited
R v MBC [2008] QCA 263, cited
R v Nudd [2007] QCA 40, cited
R v SBL [2009] QCA 130, cited
R v Swan (1987) 27 A Crim R 289, cited
R v TU [2009] QCA 386, cited

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

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

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree with the orders proposed by her Honour, and with her reasons.

[2] **MUIR JA**: I agree that the application for an extension of time with which to appeal should be refused for the reasons given by White JA.

[3] **WHITE JA**: On 8 October 2009 the applicant was convicted after a trial of one count of rape by digital penetration of his granddaughter, who was aged eight at the time of the offending, and acquitted on another count of digital rape and a count of exposing a child under the age of 12 years to an indecent film. The applicant was sentenced to imprisonment for two and a half years with parole eligibility after serving 15 months. The applicant filed a notice of appeal against conviction on 27 October 2009, that is, within time. The respondent filed an outline of submissions in the absence of any outline from the applicant in response to that notice. On 12 February 2010 the applicant appeared for himself in this court and was granted an adjournment to obtain legal representation. Legal aid was declined. The appeal was set down for hearing on 27 May 2010. On 29 April 2010 the applicant signed a notice of abandonment of his appeal.[1]

[4] The applicant now seeks an extension of time within which to appeal against his conviction. It was not entirely clear that he did not also include an application for leave to appeal against sentence, as the document which is attached to his application for an extension of time is said to be the grounds of his appeal and includes as ground seven that the sentence was manifestly excessive. The application for an extension of time was filed on 1 December 2010, some 14 months after conviction and sentence. The applicant offers no explanation for the delay in pursuing his appeal. He did not seek to withdraw his notice of abandonment.

[5] By s 668D(1)(b) of the *Criminal Code* a person convicted on indictment may appeal to this court

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1 That notice refers to abandoning both the appeal against conviction and against sentence.

> "on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal".

By s 671 any person desiring to obtain the leave of the court to appeal from any conviction or sentence must give the relevant notice within one calendar month of the date of the conviction and/or sentence. However, that time may be extended "at any time" by the court.[2]

[6] It is well established that where an appeal has been dismissed on its merits, the court has no jurisdiction to hear a further appeal.[3] In *R v MAM*[4] Keane JA (as his Honour then was) said:

> "The High Court, in *Grierson v The King* (1938) 60 CLR 431 at 435, confirmed that this Court's jurisdiction to hear criminal appeals 'is statutory, and the court has no further authority to set aside a conviction upon indictment than the statute confers'.
>
> It is clear that the right of appeal conferred by section 668D … is exhausted once an appellant has been afforded one opportunity to have his or her appeal considered on its merits. See *R v Pettigrew* [1997] 1 Qd R 601 at 606 and *R v A* [2003] QCA 445; CA No 435 of 2002 and CA No 133 of 2003, 17 October 2003 at [37] to [39]."

His Honour expressed this view again in *R v Nudd*.[5]

[7] What is important is the emphasis on a hearing *on the merits*. In *Grierson* Dixon J noted[6] that in England the Court of Criminal Appeal would exercise a discretion to allow a prisoner to withdraw his notice of abandonment of his appeal notwithstanding that such a notice operated as dismissal of the appeal. To the same effect is r 69 of the *Criminal Practice Rules* 1999 (Qld). By subsection (4) if the court considers it necessary in the interests of justice, "the court may set aside the abandonment and reinstate the application", similarly, with r 70 which relates to criminal appeals *strictu sensu.* In *R v MBC*[7] Keane JA said:

> "…[W]here an appeal has been abandoned, whether its reinstatement is necessary in the interests of justice requires a satisfactory explanation for the applicant's change of mind. The rules which regulate the bringing of appeals within prescribed time limits serve the important purpose of bringing finality to litigation; they should not be set at nought save for good reason. The abandonment of an application or an appeal brings the process of litigation to an end: that process should not be re-enlivened without good reason."

[8] Here the applicant has offered no explanation for his abandonment although it might be supposed that his failure to obtain legal representation would be a likely explanation. There is no explanation for the delay in seeking the extension of time. The applicant explained that he had significant difficulties reading and writing and struggled before us to articulate with any clarity the basis of his application except

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2 s 671(3).
3 *Grierson v The King* (1938) 60 CLR 431 at 435.
4 [2005] QCA 323.
5 [2007] QCA 40. See also *R v Ali* [2008] QCA 39.
6 (1938) 60 CLR 431 at 436-7.
7 [2008] QCA 263 at [5].

to assert that he was innocent of the offence for which he was convicted. The opinion of counsel to Legal Aid about the applicant's prospects of success on appeal, with underlining which would appear to draw attention to the inconsistencies in the complainant's evidence and the verdicts, together with the outline filed on behalf of the respondent for the original appeal hearing with some markings and comments by the applicant were handed up as supporting submissions.

[9] The grounds of appeal in the original notice of appeal are set out both in counsel's opinion to Legal Aid and in the original outline of the respondent and were expressed as follows:

> "Unsafe and unreasonable verdict on the evidence. Jury found not guilty of 2 out of 3 counts, came to a compromised verdict."

The record prepared for that appeal was not available to the court.

[10] The grounds are as follows:

> "Due to the Restrictions in place in relation to Privileges such as Computer Access Combined with the fact I need and have gained the Assistance of a fellow inmate to assist me with this Document I ask you allow further time to enable me to submit further Material in relation to my Court Proceedings as I am an indigent Person I have had to Prepair my own case Due to my ability and less movement of my Computer (DIETRICH V HCA 1992) Self Represented) As I need the help of a Friend this type of assistance was also helped in (RONALD MALCOLM STEWART As a Mackenzie Friend to the Qld Parole Board (7-10-2009)
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> (GROUND (1) Inconsistent Statements made by the Plaintiff and her Versions of her Statement and her Evidence (R V GOLDER V JONES 1960 45 CLR)
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> GROUND (2) Independent Testimony which connects or tends to Connect the Accused with the Crime it must Confirm in some Material particular not only the evidence that the Crime was committed but also that the Accused Committed it (R V BASKERVILLE 1916 2 KB)
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> GROUND (3) that there is an Injustice in Relation to my matter is that I am not guilty of the said Offence (FINGLETON V R 2005 HCA 34)
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> GROUND (4) The Accused is an Indigent Person who has a very low IQ He needs help to Prepair his case He has been Refused Legal Aid (DIETRICH v HCA 1992) Unrepresented Accused He has a McKenzie Friend to support him in a Similar Case RONALD MALCOLM STEWART V QLD PAROLE BOARD (7 10 2009)
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> GROUND (5) All the Evidence is Circumstantial there was not a full Independent Assessment of the Evidence [the applicant] is innocent of all charges (STAFFORD V HCA) MORRIS V HCA) R V CHARLTON 1972) VR 758)
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> GROUND (6) The Judge Should of Requested the Voir-Dire on the Testimony and the facts of the case and the Competence of the

> witness (Under Section (189) of the evidence Act 1995 to the Complaintives Confession of the case and her Competence and Voluntariness and her Statement of Misleading Facts to the Court and in her Statement
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> GROUND (7) The Sentence was Manifestly Excessive [the applicant] should not of been Convicted of this unseen Act for which he is being Accused of
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> GROUND (8) Inconsistent(Versions and Facts) O'MALLEY V FRENCH Supreme Court Walters JJ October 4 27 1971 That the Verdict of the Jury was Unreasonable the Crown could not exclude beyond Reasonable Doubt with Innocence Pursuant to Section 668E 305 of the Criminal Code In another case of a innocent man BUTTON-2001 He spent 10 months in custody and was found innocent of all charges in Qld Due to DNA evidence DNA tested on the bed sheeting was never tested by the JOHN TONG CENTRE LABORATORY" (errors as in original)

As can be seen, this document contains a mixture of submissions and grounds but it can be discerned that the applicant complains of inconsistent statements made by the complainant and inconsistent verdicts.

[11] If it is in the interests of justice that the applicant either be permitted to withdraw the abandonment of his appeal or be granted an extension of time within which to appeal, even the fact that the applicant has offered no explanation for his delay may not prove insuperable.

Circumstances

[12] The complainant, C, aged eight, her sister, D, aged nearly six and their brother, E, aged two and three quarters were staying with the applicant at his house during the September school holidays in 2008. The applicant, their maternal grandfather, was then aged 67 years. The particulars of the charges were that the applicant had digitally penetrated the complainant on at least two occasions during that visit which the prosecution further particularised as the first and the last occasion. The complainant gave three taped interviews admitted under s 93A of the *Evidence Act* 1977 (Qld). There were significant inconsistencies between those versions.

First interview – 4 October 2008

[13] The complainant was taken to the police station by her mother and her aunt on 4 October 2008 after she disclosed things done to her by the applicant during her recent visit. The complainant said that she stayed at "Poppy's" house in the holidays. She said she slept with her sister, D, on a mattress in the lounge room and that Poppy came into the lounge room, pulled her pants down and put his finger in her private part and it hurt. She said that she stayed all four nights with him and it happened every night. She told him to stop but he did not.

Second interview – 23 October 2008

[14] The child was questioned again about where she slept at "Poppy's" house and said she slept on the mattress and denied having slept anywhere else in the house. She said she had slept in "Poppy's" bed but not in the September school holidays.

Third interview – 25 May 2009

[15] In May 2009 the complainant told her grandmother that the applicant had shown her movies where people were naked. The grandmother took her back to the police station where she was again interviewed on 25 May 2009. Police executed a search warrant at the applicant's residence and located two videos, one X-rated and one R-rated. The child described the videos as containing swearing, rude fingers, people had no clothes on in a pub, there were a thousand people, the people were having sex, parts of their bodies were touching at the tops of the thighs or groin area.

[16] The complainant thereafter wrote a letter containing the allegations of digital penetration and exposure to the indecent films. In that letter she stated:[8]

> "Poppy made me watch dirty movies and he has them in the lounge room, every time we went over there, it happened, he made me sleep in his bedroom, he said swear words in front of us and he smacks, ah he smacks D and E across the face. Poppy touches my private part, Poppy puts his fingers in my private part. From C."

The complainant's mother gave evidence that the child had written this note herself but the complainant's evidence was that her mother had written a note and she had copied out what her mother had written. The complainant's sister, D, gave evidence and did not say that she had seen any movies.

Court evidence

[17] The complainant accepted in court that when she stayed with the applicant she would stay one or two nights at his neighbour's house with a 14 year old girl, F. The complainant was cross-examined:[9]

> "So you were at Poppy's for about four nights were you? That's what – is that right? – Yes.
> And most of the nights, you slept actually at F's? – Yes.
> Okay. Now when you did sleep at – did you sleep at any nights at Popp's? –
> Yes.
> All right. One Night? – No.
> More than on[e] night? – Yes
> So possible two nights? – Yes.
> So two nights at Poppy's and then two nights at F's? – Yes."

She denied sleeping on the mattress with her sister and said Poppy made her sleep in his bed. She was further cross-examined:

> "And then, finally, C, that – when you say that Poppy – Poppy put his finger in your private part four times; is that right? – Yes.
> On each night you stayed there, yes? – Yes."

[18] The sister, D, was interviewed and said that the complainant slept with her grandfather and she always slept by herself. She offered no further information that was relevant.

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8 Contained in the bundle of material handed up by the applicant.

9 This passage and others is taken from the respondent's outline in respect of the original appeal which has been underlined in part by the applicant.

Preliminary complaint

[19] The complainant's mother said that her children were left to stay with the applicant for a week in the school holidays. She was told by the complainant the night she collected them after their stay, "Poppy pulls my pants down while I'm asleep". She recalled her daughter talking about watching dirty movies at her grandfather's and that it happened every time she went there. The complainant's grandmother gave evidence of a conversation with her granddaughter who told her "Poppy has been pulling my panties down" and, "he makes me sleep in his bed". The complainant told her that the applicant woke her up pulling her panties down and that "she had seen his 'willy'". On Mother's Day 2009 the complainant said to her:

> "'He's always touching my private part when I go over to stay. I asked him to stop', she said, 'and he wouldn't'. She said, 'And he makes us – makes us watch dirty videos of people doing dirty things to each other'."

[20] The complainant's maternal aunt gave evidence that after a visit to the grandparents the complainant said to her:

> "Poppy pulled my pants down in bed, and then used his finger in my private parts; and that I asked him to stop and he wouldn't."

The complainant had told the aunt that she slept in her grandfather's bed.

[21] The two videos of interest found at the applicant's home were not put into evidence although their contents were described by one of the police witnesses. It is unnecessary to set out that evidence. It is sufficient to note that one showed explicit sex scenes and the other has crowd scenes inside a night club with coarse language.

[22] Hearsay evidence was led by consent that the complainant had stayed overnight at the neighbour's house on a number of occasions but that neighbour could not specifically remember what had occurred in the 2008 September school holidays.

[23] The appellant did not give or call evidence. His case as put to the complainant was that the acts did not occur and the only contact was drying her after a bath and when she soiled her underpants. Those events were denied by the complainant.

The summing-up

[24] The court was provided with the summing-up of the learned trial judge. The applicant makes no particular complaint about the summing-up but it is important to consider it to understand that the jury were made firmly aware of the many inconsistencies in the complainant's evidence and the other weaknesses in the prosecution case. Her Honour gave broad directions that the case depended upon the jury accepting the complainant as a credible and reliable witness; that each charge needed to be considered separately; that the verdicts need not be the same in respect of each offence; the effect of a reasonable doubt as to the complainant's truthfulness or reliability on one count and the effect on the other counts; uncharged acts and their relationship to the acts the subject of the charges; and that, given the significant inconsistencies in her evidence and her age, the complainant's evidence was required to be scrutinised carefully before acting upon it.

[25] Her Honour took the jury through each of the interviews carefully pointing out the inconsistencies in the complainant's evidence, not just in the interviews, but arising out of cross-examination. Her Honour particularly focussed on the inconsistencies

about the location where the digital penetration occurred – on the mattress or in the bed - and the number of times that it occurred. The preliminary complaint which the complainant made to her mother had the acts occurring in her grandfather's bed and that was her evidence in court. There were other inconsistencies but they were not central. It seems the sister, D, was not asked any questions about the videos in the course of her interview. Her Honour explained the use which the jury could make of the recent complaint evidence, namely, that it related to the complainant's credibility but it did not independently prove anything.

[26] In *R v TU*[10] this court considered the principles to be applied where there is complaint that the verdicts returned by the jury are inconsistent. In *MacKenzie v The Queen*[11] Gaudron, Gummow and Kirby JJ stated that in cases of alleged inconsistency in verdicts the test is one of "logic and reasonableness". Their Honours said:

> "…[I]f there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."[12]

Following *MacKenzie*, in *R v CX*[13] Jerrard JA said that the onus was on the party alleging inconsistency to persuade the appellate court that the different verdicts were an affront to logic and commonsense

> "…which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law."[14]

[27] Her Honour directed the jury, arguably favourably to the applicant, that the prosecution had to prove that the offences occurred between 18 and 27 September 2008.[15] In the course of their deliberations the jury requested a 2008 calendar which request was declined. That would suggest that they were concerned about the direction that the offences had to have occurred within the precise dates mentioned in the indictment and may have assumed more importance than was necessary.[16] The jury may have been satisfied beyond reasonable doubt that the applicant had digitally penetrated the complainant on the first occasion, as she said, but had a doubt about whether the subsequent charged act occurred on the last night of the alleged period. This was because of the complainant's confusion about how many nights she had spent at her grandfather's house during the September school holidays in 2008 and how many and which nights at the neighbour's house.

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10 [2009] QCA 386.
11 (1996) 190 CLR 348.
12 At 367. See also *R v SBL* [2009] QCA 130.
13 [2006] QCA 409.
14 At [33].
15 *Criminal Code*, s 564; *R v Swan* (1987) 27 A Crim R 289 at 300-301 per Carter J; *R v Jacobs* [1993] 2 Qd R 541 at 542-546 per Derrington J; *R v Abdulla* [2010] SASC 52 at [89] per Bleby J.
16 *R v McDonald* (1995) 84 A Crim R 508.

[28] It was more than six months after the holiday visit that the complainant mentioned the indecent videos and the little sister did not mention it in her interview, although, according to the complainant, she was present at the time. It could well be the case that even if the video was played it did not impact upon that child, leaving the complainant's credibility intact. There was ample evidence of fresh complaint which supported the complainant's credibility. The complainant's evidence about the subject matter of the films was rather muddled.

[29] The different verdicts on the rape counts are not an affront to logic and commonsense, particularly bearing in mind the difficulty about the dates.

Sentence

[30] Although the applicant did not clearly abandon any application with respect to the sentence imposed he made no submissions about it. The sentence was a very lenient one in view of the gross breach of trust by the child's grandfather. His conduct had serious affects on other members of the family and the child. Furthermore, he had previous convictions including a conviction in 1995 for exposing three different children under the age of 12 to indecent written matter which occurred when he left graphic sexual notes for them while working at their school. Her Honour took into account the applicant's age and that he was not in good health. There are no possible prospects of a successful appeal against sentence.

[31] The application for an extension of time within which to appeal should be refused because the applicant has failed to demonstrate that there was any injustice in the conduct of his trial, the directions of the judge or in the verdicts returned by the jury. Neither, had he sought to do so, should he be permitted to withdraw his notice of abandonment of his earlier appeal. To the extent that the application for an extension of time includes an application to appeal against sentence, that application should be refused.