SUPREME COURT OF QUEENSLAND

CITATION:	*R v Yeo* [2011] QCA 52
PARTIES:	**R** **v** **YEO, Garry Colin** (appellant)
FILE NO/S:	CA No 225 of 2010 DC No 499 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2011
JUDGES:	Chesterman JA, and Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal is allowed;** **2. The convictions on counts 1, 2, 3, 5 and 7 are set aside and verdicts of acquittal are entered instead.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was charged with one count of maintaining an unlawful relationship of a sexual nature with a child under 12 years, four counts of unlawfully and indecently dealing with a child under 12 years, one count of wilfully and unlawfully exposing a child under 16 years to an indecent act, and one count of attempting to procure a child under 16 years to commit an indecent act – where one count of unlawfully and indecently dealing with a child under 12 years was withdrawn for lack of particularity – where the appellant was acquitted of the count of wilfully and unlawfully exposing a child under 16 years to an indecent act – where the complainant's mother had been in a relationship with the appellant – where the complainant was an inconsistent witness – whether the complainant's evidence lacked credibility – whether the jury could have been satisfied beyond reasonable doubt of the appellant's guilt

Criminal Code 1899 (Qld), s 229B

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied

COUNSEL: J R Hunter SC for the appellant
D C Boyle for the respondent

SOLICITORS: Guest Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA:** The appellant stood trial on an indictment which charged him with:

> (i) Maintaining an unlawful relationship of a sexual nature with M between 30 June 1996 and 1 January 1999 at Brisbane in the course of which he unlawfully and indecently dealt with M who was at the time a child under 12 years;
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> (ii) Unlawfully and indecently dealing with M, a child under 12 years between 30 June 1996 and 1 January 1999 at Brisbane;
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> (iii) Unlawfully and indecently dealing with M, a child under 12 years, between 31 December 1996 and 1 January 1999 at Noosa;
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> (iv) Unlawfully and indecently dealing with M, a child under 12 years between 31 December 1996 and 1 January 1999 at Brisbane;
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> (v) Unlawfully and indecently dealing with M, a child under 12 years between 30 June 1996 and 1 January 1999 at Brisbane;
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> (vi) Wilfully and unlawfully exposing M, a child under 16 years, to an indecent act on or about 25 December 2000 at Brisbane; and
>
> (vii) Attempting to procure M, a child under 16, to commit an indecent act between 31 December 2000 and 1 January 2002 at Brisbane.

[2] The prosecution withdrew the fourth count because the circumstances alleged could not be particularised.

[3] On 3 September 2010 the appellant was convicted of counts 1, 2, 3, 5 and 7. He was acquitted of count 6.

[4] Section 229B of the *Criminal Code* as it was with respect to the times alleged in count 1 provided:

> "(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime … .

> A person shall not be convicted of the offence … unless … the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship … done an act defined to constitute an offence of a sexual nature in relation to the child … on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions. … ."

[5] With the deletion of count 4 from the indictment the offences alleged in counts 2, 3, and 5 were the only ones which could support a conviction on count 1. Count 7 was alleged to have occurred on an occasion after the cessation of the period alleged for the relationship.

[6] The appellant argued two grounds of appeal. The first was that count 2 should not have been allowed to go to the jury because it was insufficiently particularised. Should that ground succeed and the conviction on the ground be quashed the precondition for a conviction on count 1 would not have been satisfied. By amendment to the notice of appeal made by leave the appellant sought an order that his conviction on count 1 be quashed should the conviction on count 2 be quashed.

[7] The second ground of appeal is that in all the circumstances the convictions were unreasonable. If this ground succeeds it is unnecessary to consider the others.

[8] M was the complainant in each of the charges. She was born on 16 June 1988 and was therefore between eight and 10 years in the timeframe alleged in counts 1, 2, 3 and 5, and 12 or 13 for the time alleged in count 7.

[9] The appellant and M's mother were in a relationship for about two and a half years, from June 1996 to December 1998. It was broken off when M's mother began seeing another man but recommenced in about May 2000, finally coming to an end in October 2001. During the initial period of the relationship M and her mother stayed overnight at the appellant's house once or twice a week. The appellant reciprocated by staying overnight at the complainant's house twice a week so that, according to M:

"Most nights … he was at our place or we were at his."

[10] M's evidence about the circumstances which constituted count 2 on the indictment were that she could remember "the first thing anything ever happened." Weeks or months after the appellant and her mother "started dating":

> "… he came into my room and he was naked and he just stood there and masturbated. And then he came over to the bed and lifted up my nightie and he pulled my undies down … he masturbated and he put his fingers inside my vagina. And then he, after a while, moved down the bed and performed oral sex on me. I think he was there for 15 minutes."

[11] M's description of the facts contained in count 3 was that she and one of her friends, Amanda M, went with M's mother and the appellant to Noosa on holiday. They rented a two bedroom apartment. The girls slept in a double bed in one of them. Early one morning, but after dawn, the appellant:

> "… came into the room and did the same thing as what he usually did, lifted up my nightie, pulled down my undies and masturbated me sort of under the covers, without pulling the covers back. … Amanda woke up and he quickly ducked down beside the bed and sort of pretending that he was stealing our lollies … .
>
> (Amanda) laughed about it, (the appellant) stealing our lollies and then (the appellant) got up and left."

[12] Count 4, which the prosecution withdrew, was initially alleged as an act of indecent dealing when M slept on a mattress in the same room as her mother and the appellant in the appellant's house. The evidence was insufficiently precise or cogent to support the count.

[13] The offence contained in count 5 occurred, according to M, in a spa pool the appellant has bought and installed in the yard of his house. M and another friend, Talia R, were in the spa when the appellant joined them. M's evidence was that:

> "… he hopped in the spa with us. That was [Talia] and … he started playing a tickling game with us … and [Talia] was tickling me and he was pretending to tickle me but he was again pulling my swimmers aside … and masturbating under the water, but the jets in the water were on so you couldn't see anything … ."

[14] Count 6, of which the appellant was acquitted, was a charge of exposing M to an indecent act on Christmas Day 2000. M identified the occasion as the last Christmas she and her mother spent with the appellant. Very early in the morning when she was opening presents left on the end of her bed the appellant entered, naked and masturbating.

[15] The likely explanation for the acquittal on count 6 is that the evidence demonstrated that M spent Christmas 2000 with her father in Coffs Harbour. She also spent Christmas 1998 in Coffs Harbour with her father. In Christmas 1999 M's mother and the appellant had broken off their relationship temporarily. The mother was then seeing another man.

[16] This difficulty for the prosecution of count 7 emerged at the committal hearing. M's evidence at the trial was that the date of the occurrence was "the last Christmas that (she) spent in Brisbane." M admitted that the change to her testimony was made to fit the circumstance revealed at the committal.

[17] M's evidence as to count 7 was that at school one day she felt unwell. The school nurse unsuccessfully attempted to telephone M's mother but did contact the appellant who drove to the school and then took M to his house. On the way:

> "[H]e asked me if he could look at my boobs and he would give me a few dollars, it was like $2 or $5 … and I just said, "No." and … ignored him for the rest of the day."

[18] M gave other evidence of sexual improprieties committed by the appellant which were not charged as separate counts. She said, for example, that "he would display pornographic videos". Further questioning established that it happened once on a weekday when M's mother was out.

[19] M testified that the appellant would often come into the bathroom when she was showering:

> "… to wash his hands or shave and he would stand and watch me in the shower and masturbate or try and touch me… . I would … try and hide myself in the corner of the shower. I started wearing swimmers into the shower and I tried to stop it by locking the bathroom … but Mum used to worry about the door being locked … so I couldn't do that."

[20] In this context M gave evidence that the appellant had built a laundry chute the entrance to which was inset from a tiled wall of the bathroom adjacent to the shower recess. The chute was a plywood box built into a cupboard behind the bathroom wall. It extended downwards from the bathroom itself to a storeroom/garage at the lower level of the house. A hinged flap could be opened to allow the laundry to fall into some receptacle.

[21] The photographic evidence shows the entrance to the chute in the bathroom to have been neatly finished with a varnished timber surround and a white plastic flap, hinged at the top, to conceal the void behind. The flap could be pushed inwards and upwards to give access to the chute.

[22] M said she remembered an occasion when she was about to have a shower and noticed that:

> "…the flap in the laundry chute had moved up and … there was a hole in the inside of the laundry chute and … there was a camera sitting in the hole video-taping the bathroom. … The way that the laundry chute was pointing into the … bathroom … the reflection in the mirrors meant that there wasn't really anywhere in the bathroom to hide … . I, later on, walked around the other side and opened up the … linen cupboard and … saw that it was a video camera."

[23] Photographic exhibits do not show a hole in the side of the chute, but do show a join, in the shape of a semi-rounded rectangle, in the side wall, where part of the lining may have been cut out and then replaced.

[24] M described the camera she saw in the cupboard as a "black Sony camera" and, in answer to the question:

> "… in the course of your dealings with police … and the prosecution, has anyone ever shown you a picture of a video camera?"

She answered "No".

[25] M's evidence at committal about the camera was that "It was a big black filming camera. … A normal video camera. … It was … black … ." In cross examination she was shown a photograph of a Sony camera. At trial she had accepted that she described the camera as a Sony because of the photograph, and she accepted that the addition to her evidence was:

> "… another example of (her) changing … evidence as a result of what (she) (was) … shown in the Magistrates Court."

[26] M's mother was as frequent a visitor to the appellant's house as was M. The first time she mentioned ever seeing a hole in the laundry chute was in the days preceding the trial. It was not mentioned in her statements to police nor in her evidence at the committal. As far as the evidence goes M never told her mother about the extraordinary discovery of the camera focused on the bathroom.

[27] It does not appear from the photographs that a camera located behind the lining of the chute where the timber appeared to have been cut could film someone in the shower. To have any chance of doing so the flap would have to be fully opened, and held up, and the camera lens pushed beyond the alignment of the side wall of the chute. It would be in plain view.

[28] M testified that she told her mother she wanted more privacy from the appellant. The origin of the conversation appears to have been her concern that the appellant entered the bathroom when she was in the shower. She did not tell her mother of the appellant's much more disturbing behaviour in the bathroom.

[29] M told police before they searched the appellant's house that "the flap on the chute would only have to open a little bit for the hole and the camera to be exposed." In fact, as mentioned, the flap needed to be fully open and the camera lens protruding for it to film anything in the bathroom. The appellant owned a Sony video camera. There were no images of M naked or in the bathroom.

[30] Both Amanda M and Talia R were called as witnesses in the prosecution case because, on M's evidence, they could corroborate M's evidence concerning counts 3 and 5 respectively. Neither could recall anything of the occasion.

[31] M claimed to have told a number of friends, in general terms, about the appellant's conduct. They included Amanda Klingberg and Bevan Kershaw. Ms Klingberg was overseas when police investigated M's complaints and she could not be contacted, or was uncooperative. Mr Kershaw was contacted but declined to provide a statement. M also identified a cousin, Mr Veasey with whom M was on close terms as someone to whom she had complained about the appellant. M said that she wrote Mr Veasey a letter "about how (the appellant) was abusing me" and, as well, spoke to him "very briefly" about the abuse whilst it was going on.

[32] Mr Veasey gave evidence in which he confirmed that when younger he had a close relationship with M and would share confidences with her. They spoke regularly but, according to the witness, M did not mention that she had been the victim of sexual abuse and did not say that she had been abused by the appellant. M did complain about the appellant: she did not like him but did not, according to Mr Veasey's recollection, complain about any sexual misconduct on his part. He had no recollection of receiving a letter written by M which made such complaints.

[33] The prosecution tendered an undated letter which M described as a draft of the letter she wrote to Mr Veasey and from which she made a clean copy. It expresses attraction to Mr Veasey, regrets an alienation between them, and suggests a closer friendship. The only part that might bear upon the charges against the appellant read:

> "At the age of seven my mum started going out with the (appellant). I would be scarred (sic) to go to bed every night. Because I was scarred (sic) I would get rapped (sic). (I don't think I've even got

> my virginity). From the age 10½ to the age of 12½. Me and my mum lived with a drunk. Every night I would go to bed hering (sic) the screeming (sic) and slaming (sic) like someone was being thrown across the room. And I would wonder if I would wake up with a mum in the morning."

[34] There is no explicit depiction of any act of molestation but the expressed fear of rape and the doubt that her virginity was intact is a distinct hint that the appellant had committed some kind of sexual misconduct.

[35] When M and her mother moved to Adelaide in the year 2001 M's mother found the draft letter as their possessions were unpacked. She read it and understood that it alleged sexual abuse against the appellant. When asked about the letter M denied that the appellant had abused her.

[36] By 2003 M's mother had formed a new relationship and had moved with her partner and M to Tasmania. One day when shelling peas at the kitchen table M's mother spoke about the appellant. M "went quiet" and her mother asked whether the appellant "had abused (her)". She answered "yes". M was, and told her mother she was, reluctant to make any formal complaint about the abuse. Her mother became upset and insisted that M inform the police. She became "obsessed" by M's revelation and "wouldn't let up about (M) going to the police". M remained reluctant and the tension between mother and daughter was such that M left home and resided for a while at her boyfriend's house. Eventually she decided to make a formal complaint. She went first to a counsellor on 4 October 2006 who referred her to the Launceston police. The counsellor made notes of what M told her. It was that the appellant made M touch him, masturbate him and perform oral sex on him. She was offered money for these acts. She was made to watch pornography and to wear white underwear while in the spa. The counsellor distinctly remembered M telling her she was required to wear white underwear in the spa.

[37] When M's mother learnt that she was about to speak to police she gave her a typed document to assist her to make a statement. It is six pages in length and lists commonplace events the mother remembered occurring in the course of her relationship with the appellant, with occasional reference to dates. The last two pages comprised questions the purpose of which was said to be to prompt M's memory about the details of the abuse she was to relate to the police officers. The questions are not directed to any particular type of misconduct but cover a wide variety of possibilities and are suggestive. Examples include:

> "Did he expect oral sex or give you oral sex
> Did he ask you to touch his penis
> Did he want you to watch him get changed, have a shower
> Did he walk through the house naked when you were alone together
> Did he play with his penis or masturbate in front of you"

[38] The legal test is well established. In *M v The Queen* (1994) 181 CLR 487, Mason CJ, Deane, Dawson and Toohey JJ said (492-493):

> "… The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand". … .

> And as the Court observed in *Davies and Cody v The King*, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:
>
> > "not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because...there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled."
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations." (footnotes omitted)

[39] The manner in which a court of criminal appeal should approach a complaint that a verdict is unreasonable or unsafe and unsatisfactory was explained by their Honours (494-5):

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty." (footnotes omitted)

[40] The task of the court is to analyse the evidence to ascertain whether, considered as a whole, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. If the evidence lacks credibility or otherwise gives rise to a reasonable doubt which this Court experiences, the jury ought to have entertained the same doubt.

[41] Save with respect to count 6 the jury believed M and found her evidence credible. Her testimony was not contradicted by the appellant. Nevertheless there are aspects of M's account which reveal discrepancies, and lack credibility, despite the persuasive manner in which M obviously testified.

[42] The first point is the lack of any corroboration for the commission of the offences contained in counts 3 and 5 and of the making of preliminary complaints. A friend was present, and close, when the appellant indecently dealt with M in the spa pool and in the bedroom of the Noosa unit. Neither girl had any recollection of the occasion. Given the ages of the children at the time of the alleged offences and the time that elapsed before they were asked about it the lack of recollection is not surprising and does not itself raise the question about M's credibility.

[43] There is, however, a serious question about her claim that she told Mr Veasey orally and in writing of the abuse. Mr Veasey was a cousin on friendly terms with M. A complaint that she was sexually abused by her mother's partner is not a communication he would be likely to forget. He could not recall such a complaint and believed it had not been made.

[44] Equally concerning is M's testimony that when asked about the draft letter prepared for posting to Mr Veasey she told her mother she had not been abused by the appellant.

[45] The summary of this aspect of the appeal is that there was no corroboration from any of the persons M identified as being those to whom she complained about the appellant's abuse where, if her evidence is correct, corroboration could be expected, and, when there was evidence of an uncommunicated complaint in the form of a draft letter she denied its truth.

[46] The circumstances in which the complaint was eventually made to police are themselves odd. Some time in 2003 M told her mother she had been abused. Her mother insisted that she tell police but M resisted, for two years, despite her mother's importunity. The mother's insistence led to a breakdown in the relationship between mother and daughter which was not restored until M went to the police. Her mother assisted her account to police by the documentary "prompts". It is obvious that M was under considerable pressure exerted by her mother to provide police with details of sexual abuse against the appellant.

[47] Of particular significance is the account M gave to the counsellor before speaking to police. That account is quite inconsistent with the substance of the charges laid against the appellant. Ms Dean was told that the appellant made M masturbate him and perform oral sex on him for which she was offered money. There was as well the remarkable evidence that the appellant insisted that M wear white underwear when in the spa. None of these events was the subject of any evidence from M in support of the indictment. There was no account to Ms Dean of the appellant inserting his fingers into her vagina or him performing oral sex on M. It is disturbing that her account of things should change in what appeared to have been a few weeks between speaking to the counsellor and the police. What happened between the two interviews is that M was given the typewritten prompts by her mother.

[48] There are other aspects of M's evidence which have been mentioned and deserve comment. One is that she was shown to be wrong in relation to the offence alleged

in count 6 which was the only one she could particularise by date. When she realised the error she altered her testimony.

[49] The same thing occurred in relation to her description of the video camera she said she saw in the linen cupboard. She described it as a Sony, the brand of camera found in the police search of the appellant's house, only by reference to what she learned at the committal. The enhancement of her evidence tended to incriminate the appellant.

[50] The evidence concerning the hole cut in the wall of the laundry chute is distinctly odd. For a start M's mother appears never to have noticed it and claimed to have done so only days before the trial. For a camera to record anything occurring in the shower the lens would have to protrude conspicuously beyond the wall of the chute and the flap to be fully open making the presence of the camera immediately obvious. Evidence that the appellant attempted surreptitiously to photograph M in the shower is doubtful.

[51] The evidence shows that M did not complain about the appellant's conduct to police until about nine years after it commenced. She was reluctant to complain and did so only after her mother importuned her to do so. When the complaints were made they differed very significantly in content so as to make them complaints of an entirely different character to that prosecuted. One aspect at least of M's testimony was shown to be wrong. In two respects M was prepared to alter her testimony which had the effect of improving the prosecution case.

[52] A Court of Criminal Appeal should not lightly set aside a jury's verdict. A jury is the tribunal of fact entrusted with the responsibility of determining the appellant's guilt or innocence. Nevertheless there is an obligation on this Court to make its own independent assessment of the evidence. The factors I have identified lead to the conclusion that the verdicts were unreasonable because they detract from M's credibility. They are the marked inconsistency between the substance of the complaints, the lack of corroboration, the delay in complaining and the distinctly odd circumstances in which the complaint was eventually made to police, and the changes in M's testimony. These features give rise to the "significant possibility that an innocent person has been convicted." I would accordingly allow the appeal, set aside the convictions on counts 1, 2, 3, 5 and 7 and order that verdicts of acquittal be entered instead.

[53] **ANN LYONS J:** I agree with the reasons of Chesterman JA and with the orders he proposes. In my view the verdict of the jury was unsafe and unsatisfactory given the inadequacies and discrepancies in the evidence. Of particular concern to me are the circumstances surrounding the complaint to the police. It is of great concern that the complainant's mother prepared an "aide memoir" to assist the complainant in relation to the details of her allegations of abuse. The complaint was also clearly made on the insistence of the complainant's mother after the breakdown of her relationship with the appellant.

[54] It is also significant that the complainant's evidence was that she told her cousin of the fact she had been sexually abused by the appellant but her cousin's evidence was that he had no memory of such a complaint. Furthermore the account the complainant gave to police was not consistent with an earlier account she gave to a counsellor. At a later point in time the complainant altered her testimony yet again which had the effect of enhancing the case against the appellant.

[55] Further details of the inconsistencies and inadequacies are set out in great detail in Chesterman JA's reasons and I agree with his Honour's analysis. An appellate court has to be satisfied that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. I agree with his Honour's conclusion that when viewed as a whole all of those features which he has outlined give rise to a significant possibility that an innocent person has been convicted.

[56] I would accordingly also allow the appeal and agree with the orders proposed.

[57] **MARTIN J:** I agree, for the reasons given by Chesterman JA, with the orders he proposes.