SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBC* [2011] QCA 169
PARTIES:	**R** **v** **HBC** (appellant)
FILE NO/S:	CA No 250 of 2010 DC No 235 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	22 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2011
JUDGES:	Muir and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of unlawful and indecent dealing with a child under 16 – where defence counsel applied to a judge of the trial division for an order excluding evidence of a pretext telephone call on the basis that it was equivocal and that it would be unfair to admit the evidence against the appellant as an admission – where the appellant argued that he did not hear the allegation due to over-talking and that he believed the complainant to be talking about another issue – whether the primary judge erred in refusing the application to exclude the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the complainant alleged the appellant drove her home from his daughter's house, stopped the car along the way and touched her on the vagina – where the appellant highlighted inconsistencies in the complainant's descriptions of the precise manner in which she was touched and the route driven, inconsistencies in the evidence regarding the day of the week on which the alleged incident occurred, and the fact

that the complainant took a long time to report the incident and had continued to visit the appellant's house after the alleged offence – whether the verdict was unreasonable or insupportable having regard to the evidence

Criminal Code 1899 (Qld), s 590AA

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied

COUNSEL: The appellant appeared on his own behalf
V A Loury for the respondent

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

[1] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by Fraser JA.

[2] **FRASER JA:** On 7 October 2010 the appellant was convicted of unlawfully and indecently dealing with a child under 16 years. On the following day he was sentenced for that offence to imprisonment for nine months, with orders that the term of imprisonment be suspended after serving a period of three months imprisonment for an operational period of three years. A period of two days which the appellant spent in pre-sentence custody was deemed to be time already served under the sentence.

[3] The appellant has appealed against his conviction. He represented himself in the appeal by telephone. The grounds of the appellant's appeal are that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence, and that the trial judge erred in admitting evidence of a pretext telephone conversation between the complainant and the appellant. In order to consider those grounds it is necessary first to outline the evidence adduced at the trial.

Summary of the evidence at the trial

[4] The complainant was 14 years old at the time of the relevant event. She was a friend of the appellant's daughter. The complainant gave evidence on 2 September 2009 at a pre-recorded hearing. She affirmed the truth and accuracy of her recorded police interview of 28 October 2008. In that interview the complainant referred to an occasion during the school holidays in January 2008 when she stayed with the appellant's daughter on a Saturday night. The complainant expected that on the following day her mother would collect her but she accepted the appellant's offer to drive her home instead. They left together in the appellant's car at about 10.00 am. The complainant said that the appellant took a longer route than was necessary. After driving around for a while the appellant stopped the car on a dirt road. They had earlier had a conversation in which the appellant told the complainant that she was more mature than most girls her age. The complainant said that the appellant then used one hand to push her shorts back out of the way, rubbed her leg, pulled her underpants away, and touched the outside of her vagina with his fingers. The

appellant said that it would be easier if she took her pants off. The complainant refused to do so and the appellant said "okay". The complainant asked the appellant to take her home and he did so. The incident occupied about a minute or half a minute. The complainant said that she had not since spoken to the appellant about this event. She had spoken about it only to her mother and to her boyfriend.

[5] The complainant maintained her account during a searching cross-examination, in which defence counsel put the appellant's version of events to her in detail. The complainant agreed that she did not complain to her mother that the appellant had touched her when the appellant dropped her off at her house and her mother, who was a bit frantic, asked her (in the appellant's presence) where she had been. The complainant said that was because the appellant had told her not to tell and that she was scared. The complainant agreed that the appellant responded to her mother's question by saying that they had been to Toowoomba "to get some things". The complainant did not correct that account. She did not complain to her mother after the appellant had driven away. The complainant agreed that she said "no" when her mother asked her later that day whether the appellant had ever done or said anything that made her uncomfortable or anything inappropriate, even something as simple as rubbing her leg. The complainant said that she did not talk to her mother about the incident because she did not know what the appellant would do if she told her mother.

[6] At about Easter in 2008, the complainant commenced a relationship with a young man who was in her grade at school. The complainant said that in about September or October 2008 she told her boyfriend that the appellant had done something to her. He told her to tell someone about it. He repeated that "every few weeks to a month". Eventually she did tell her mother at the end of October 2008. The complainant's mother was employed at the complainant's school. The complainant gave evidence that her mother told a more senior employee who then asked her if she was okay, but they did not discuss the incident.

[7] The police arranged for the complainant to make a pretext telephone call to the appellant in November 2008. The phone call was recorded. The recording, which was in evidence, included the following:

> "[Complainant]: [u]m, okay, 'cause, um, yeah. I was, um, [the appellant's daughter] said something really weird to me the other day about, she said you acting really weird.
> [Appellant]: What?
> [Complainant]: Um, it was a while ago, she said, she said something about you in the car and you said, how do you know about me and [the complainant], or something, so I was just wondering if you had told anyone about that day at the start of the year [INDISTINCT]
> [Appellant]: [INDISTINCT]
> [Complainant]: When you, um--
> [Appellant]: No.
> [Complainant]: Put your hand down my pants and you--
> [Appellant]: When did she say something like that?

[Complainant]: I dunno. Youse were just, she said youse were on the way [INDISTINCT] and she said something about me and you said, how do you know? So, I was just wondering if you'd told anyone else or?
[Appellant]: I've said nothing.
[Complainant]: Oh okay. So, it's still just me and you that know about it?
[Appellant]: Yeah.
[Complainant]: Okay, that's good. I was just kind of wondering.
[Appellant]: No, nothing ever said.
[Complainant]: Okay. She's just acting a bit weird and I just kind of thought, yeah.
[Appellant]: No, no, she wouldn't have known what she was talking about.
[Complainant]: Oh okay, that's good."

[8] The complainant gave evidence in cross-examination verifying that she had that conversation with the appellant. She said that the appellant's daughter told her that during a conversation she had with the appellant he said, "[h]ow do you know about me and [the complainant]?" and that the appellant's daughter responded that she didn't know what the appellant was talking about.

[9] The complainant's boyfriend gave evidence that in 2008 the complainant told him that the appellant had touched her. In cross-examination he said that this conversation occurred around Anzac Day. He repeatedly told the complainant to tell her mother but the complainant preferred to forget about it. After some months the complainant did tell her mother, shortly after he had again asked complainant to do so whilst they were both at school. He heard the complainant tell her mother that the appellant had touched her "down [the complainant's] pants".

[10] The complainant's mother gave evidence that when the complainant arrived home with the appellant in January 2008 she said to the appellant words to the effect of "[w]here the hell have you been?" The appellant responded that he had to go to Toowoomba to get a few things and thought that the complainant would like to come for a drive. At that time the complainant was quiet and looking down at the ground. Later that day the complainant's mother asked the complainant whether the appellant had said or done anything that made her feel uncomfortable or anything inappropriate, even something as simple as rubbing her leg, to which the complainant responded "[n]o, but I know what you mean." Her husband gave evidence to similar effect. The complainant's mother said that the complainant told her nothing further about what had happened until October 2008, when the complainant's boyfriend approached her at school and said that the complainant needed to tell her something. The complainant was crying. The complainant referred to the occasion when her mother had asked her if the appellant had touched her and then said that "something did happen." The complainant's mother took the complainant and her boyfriend into an office, told a more senior employee about the complainant's disclosure, and was present when that employee spoke to the complainant.

[11] A police officer gave evidence of an interview with the appellant on 9 December 2008 and a subsequent formal record of interview on the same day. The appellant consistently denied that he had indecently touched the complainant. The police

officer also gave evidence of having driven with the complainant along what she said was the route taken by the appellant between his house and the complainant's house. That route differed in some respects from that which the complainant described in her recorded police interview.

[12] The senior school employee gave evidence that on 28 October 2008, in the presence of the complainant's mother and boyfriend, the complainant said that the appellant had offered to drive her home, whilst doing so he had stopped the car and put his hands down the complainant's pants, and the appellant had told her, "[i]f you're smart you won't tell anybody".

[13] The defendant gave evidence in his own defence. He denied the complainant's allegations. He was "stunned" by them. He said that he had never touched any child inappropriately. The appellant's recollection was that in January 2008 he had driven the complainant home on a Monday, rather than on a Sunday, as the complainant alleged. The appellant gave evidence that he picked up some supplies from a shop on the way. He said that during the drive the complainant talked about having had problems with her mother, who had caught her in bed with a former boyfriend. The appellant told the complainant that she was not old enough to be making those sorts of decisions, she had to wait until she got a bit older, and she should probably take advice from her mother. The appellant was distracted by the conversation and missed a turn off he intended to take to get to the complainant's house. At one point he stopped the car on a dirt road because the complainant was upset and he did not want to worry the complainant's mother by taking her home whilst she was crying. The appellant put his arm around the complainant and tried to comfort her, before driving her home. Upon arriving there, the complainant's mother asked him where he had been. He explained that he had been to town to get a couple of things, which had seemed to be alright with the complainant. He said that he did not realise that the complainant had to be home by a certain time. The appellant said that after that occasion the complainant continued to ride a horse he owned and came to his house at least once a week. The appellant had other contact with the complainant, including taking his daughter with the complainant and her boyfriend to the pictures. The appellant did not do that again after he found out that the complainant was "carrying on" with her boyfriend at the pictures.

[14] The appellant gave evidence that he received the recorded telephone call from the complainant in November 2008. He heard the introductory part of the conversation, when the complainant referred to the appellant's daughter saying "something really weird to me the other day about – she said you acting really weird". He did not then know what the complainant was talking about. When the complainant said that she "was just wondering if you had told anyone about that day at the start of the year", he assumed that the complainant was talking about the time when they pulled up in the car, and she thought that he had told somebody about that. The appellant gave evidence that he did not hear the complainant say, "when you put your hand down my pants". He thought that he was talking at the time the complainant said that. If he had heard the complainant use those words he "would not have taken that very lightly at all" and he "might have used some expletives." The appellant thought that the subsequent statements made by the complainant in the telephone call were about the conversation about the complainant and her boyfriend. The appellant denied that he had ever had a conversation with his daughter about any allegation that he had touched the complainant, or about the conversation with the complainant on the side of the road.

[15] The appellant's daughter gave evidence in the defence case that she had never told the complainant anything about the appellant "acting really weird" or asking, "how do you know about me and [the complainant]". She also gave evidence that the complainant and her boyfriend had come to her place (when her father was not at home) on an occasion after the alleged offence.

Admissibility of the pretext telephone conversation

[16] Before the trial the appellant applied under s 590AA of the *Criminal Code* 1899 (Qld) for an order excluding evidence of the pretext telephone conversation. Defence counsel argued that what the appellant said was equivocal and that it would be unfair to admit the evidence against him as an admission. The judge who heard the application listened to the recording of the telephone conversation and concluded that, whilst there were some passages in which the complainant and the appellant spoke at the same time, there was no over-speaking when the complainant said "put your hand down my pants". The appellant could clearly be heard saying, "[w]hen did she say something like that?" The appellant's explanation that he was speaking about a conversation he had with the complainant about another topic was a matter for the jury to consider. The application to exclude the evidence was refused.

[17] The appellant argued that the evidence should have been excluded because he had not heard the complainant refer to him putting his hand down her pants. Having carefully listened to the recording, my own impression coincides with that of the judge who refused the application to exclude the evidence. No over-talking is evident in the critical passage of the conversation. The recording was admissible evidence. There was no reasonable basis for excluding that evidence. The appellant's explanation was a matter for the jury to consider.

[18] The trial judge gave appropriate directions to the jury. Her Honour directed the jury that: it could only rely on the pretext telephone conversation if the jury could determine precisely what was said; the jury needed to consider carefully what was said by the complainant and what was said by the appellant; and the jury needed to consider whether what was said by the appellant in response to the allegation was an admission of guilt. The trial judge directed the jury that it could only rely on the conversation as evidence to support the complainant's version of events if the jury was satisfied beyond reasonable doubt that the appellant was talking about the allegations that she made and that he did make an admission to them. The trial judge referred to the appellant's evidence about the conversation and summarised defence counsel's submissions about it.

[19] It was a matter for the properly instructed jury to consider what weight, if any, should be attributed to the recording of the conversation, but it would not have been unreasonable for the jury to regard that evidence as providing substantial support for the Crown case.

The verdict of the jury was unreasonable and cannot be supported having regard to the evidence

[20] Under this ground of appeal the question is whether, having regard to the whole of the evidence before the jury, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[1]

---

[1] *MFA v The Queen* (2002) 213 CLR 606 at 614-615 [25] per Gleeson CJ, Hayne and Callinan JJ and 624 [59] per McHugh, Gummow and Kirby JJ, applying *M v The Queen* (1994) 181 CLR 487.

[21] The appellant submitted that there was no evidence that, as the trial judge reminded the jury, around Anzac Day 2008 the complainant told her then boyfriend that the appellant had touched her down her pants. I have already referred to the evidence to that effect. Contrary to another of the appellant's submissions, there was evidence, to which I have also referred, that on 28 October 2008 the complainant told the senior employee at her school that the appellant had offered to drive her home and whilst doing so he had stopped the car and put his hands down the complainant's pants.

[22] The appellant submitted that the complainant's mother's evidence was tainted because she did not admit in cross examination that she had found the complainant in bed with her boyfriend. That was not clearly put to the complainant's mother. In any case, the jury might reasonably have regarded this point as not having any particular significance in relation to the truthfulness and accuracy of the complainant's evidence. It was her evidence, rather than her mother's evidence, that was critical for the Crown case.

[23] Defence counsel cross-examined the complainant with a view to establishing an inconsistency between her statement that the appellant had put his hand "down" her pants and her evidence that he had put his hand "up my shorts". It is not at all clear that this involved any real inconsistency. The jury might reasonably have regarded the point as having no significance. Defence counsel also relied upon the appellant's evidence and the evidence of his daughter that the appellant drove the complainant home on a Monday rather than on Sunday, and on differences in the descriptions the complainant gave of the route by which the appellant drove her home. However there was no issue that the appellant had driven the complainant home on or about the day she alleged. Both the complainant and the appellant gave evidence that: the appellant drove the complainant from his house to her house during the January 2008 school holidays; that occurred on a day after she had stayed the night with his daughter at his house; during the trip home the appellant stopped the car on a dirt road for a short time; the appellant spoke to the complainant whilst the car was stationary; and the appellant then touched the complainant (innocently on the appellant's evidence but indecently on the complainant's evidence). The jury might reasonably have concluded that any mistakes in the complainant's evidence about the particular day when those events occurred, and about the details of the route taken by the appellant, did not bear significantly upon the question whether the Crown had proved the offence of unlawful and indecent dealing beyond reasonable doubt.

[24] The appellant submitted that it was significant that the complainant took a long time to report her complaint against him and also that, after the alleged offence, the complainant continued to visit his house. Those points cannot be discarded as having no significance, but the jury might reasonably have accepted that the complainant was scared of the consequences of complaining and reluctant to destroy her friendship with the appellant's daughter. Those were matters for the jury to consider. They fall short of creating such a doubt as would justify this Court in regarding the verdict as unreasonable.

[25] No complaint was made about the trial judge's directions to the jury. In particular, appropriate directions were given about each of the points upon which the appellant relied. The trial judge directed the jury that the prosecution relied "pretty much entirely" on the complainant's evidence to prove the case, there was no one else and

no other eye-witnesses, and because of that it was necessary for the jury to scrutinise the complainant's evidence with care and to look at it "very closely" before relying upon it to convict the appellant. Her Honour referred to the fact that the complainant had not made an immediate complaint to anyone about what had happened, even in the face of her mother giving her the opportunity and prompting her on the very night of the alleged events. The trial judge reminded the jury that the complainant did not make any complaint until she spoke to her boyfriend, which he said was around Anzac Day, and that it was not until October that she told her mother and others. Her Honour referred to other matters, including the variation in the complainant's language between being touched "down the pants" and "up the pants." The trial judge reminded the jury that the complainant had apparently continued contact with the appellant after the incident. Her Honour directed the jury that it should consider those and any other factors the jury thought were relevant to the complainant's credibility. The jury was directed that it should only act on the complainant's evidence if, after considering what the trial judge had said and all the other evidence, the jury was "convinced of its truth and accuracy": "[y]ou cannot rely up [sic] it to convict [the appellant] unless you're satisfied that she being, not only truthful, but accurate as well."

[26] The complainant's evidence seems persuasive. If accepted by the jury, as it plainly was, her evidence established the Crown case. The version the complainant gave in evidence was not objectively improbable, her evidence was consistent in all its essential aspects, and the recorded telephone conversation provided further support for the Crown case. There were some mistakes or inconsistencies in details, but it would be surprising if there were no such mistakes or inconsistencies in a truthful complainant's account of events such as those the complainant alleged. The jury, which had the advantage this Court does not possess of seeing and hearing the appellant give evidence, was not bound to harbour a reasonable doubt that the complainant's evidence was truthful and accurate in all its essential aspects. I am persuaded that on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

Order

[27] The appeal should be dismissed.

[28] **ATKINSON J:** I agree with the reasons for judgment of Fraser JA and the orders proposed by his Honour.