SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBN* [2011] QCA 171
PARTIES:	**R** **v** **MBN** (appellant)
FILE NO/S:	CA No 319 of 2010 DC No 21 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	22 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2011
JUDGES:	Margaret McMurdo P, Muir JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **The appeal be allowed.** 2. **The conviction be set aside.** 3. **There be a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of unlawfully and indecently dealing with his step-daughter who was a child under 12 years of age – where there was evidence that the complainant had a strong dislike of the appellant and a clear motive for making the complaint – where there were inconsistencies in the complainant's evidence – where defence counsel at trial did not raise issue with an objection made by prosecution to his cross-examination of the complainant in relation to the circumstances surrounding her initial complaint to her mother – where one of the jurors delivered a note to the primary judge stating that he had been a member of the jury in an earlier trial against the accused involving sexual offences – where the appellant argued that there had been ample opportunity for the juror to have disclosed information about the previous trial to other jury members before he was discharged – whether cross-examination of the complainant by defence counsel was objectionable – whether the verdict was unsafe or unsatisfactory having regard to the evidence

Criminal Code 1899 (Qld), s 668E(1)

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
M B Lehane for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Muir JA that, for the reasons he gives, the appeal should be allowed and the conviction set aside. Unfortunately, the trial judge did not allow defence counsel to cross-examine the complainant's mother about the complainant's credibility. This amounted to a wrong decision on a question of law (s 668E(1) *Criminal Code* 1899 (Qld)). The complainant's credibility was the central question in the trial and was not a mere collateral issue. Despite the weaknesses in the complainant's evidence, a properly instructed jury after a trial according to law could convict the appellant. It follows that there must be a retrial.

[2] I agree with the orders proposed by Muir JA.

[3] **MUIR JA: Introduction** The appellant appeals against his conviction after a trial in the District Court of the offence of unlawfully and indecently dealing with his step-daughter, a child under 16 years with the aggravating circumstance that she was under 12 years of age. The appeal is on the ground that "A Jury properly instructed should not have returned a finding of guilt as the evidence was of such a nature that the onus of proof of beyond reasonable doubt was not established."

The evidence

[4] Before considering this ground and the arguments advanced in support of it, it is desirable to give an account of the evidence before the jury. An audio and video recording of a police interview of the complainant was played to the jury, as was the complainant's pre-recorded evidence. The appellant did not give or call evidence in his defence and the evidence, addresses and summing up were completed on the first day of the trial.

[5] Ms Williams, one of the complainant's teachers, gave evidence to the effect that on 8 August 2009 the complainant began to cry at school and then sobbed uncontrollably. Ms Williams referred the complainant to another teacher, Ms Hemphill. Ms Hemphill's evidence was to the following effect. The complainant told her that she was crying because she had had a disagreement with one of her friends who had told the complainant that she had seen the appellant in the street and that the appellant had looked at her strangely.

[6] The complainant then told Ms Hemphill that the appellant came into the bathroom when she was in the bath with her two step-brothers "… he started washing her and started touching her and asked her if it felt good." He touched her on the vagina and "started rubbing her". When she got out of the bath "he licked her on the vagina".

Then "[h]e asked if he could dry her and she said, 'No.', and he put the two boys outside and locked the door and she asked him to unlock the door and he said, 'Oh, but I didn't lock it.', and sort of laughed it off and then started drying her and then he licked her and asked her if it felt good and when she said, 'No.', he said, 'But it's meant to feel good.'"

[7] In cross-examination, Ms Hemphill said that she had been told by the complainant that she had told her mother about the matter and that her mother had responded, "You just want to wreck my life". Ms Hemphill said that she was not told by the complainant when the conversation between the complainant and her mother took place.

[8] The complainant's mother's evidence was to the following effect. At relevant times, she and the appellant lived with their two sons, the complainant and her three sisters. The girls were the children of the complainant's mother and her former husband. The two boys would normally bathe with one of their older sisters. She had never known the appellant to bathe the complainant or any of the other children. Asked why that was, she responded that she was always at home and that the appellant "was always the one working".

[9] The complainant told her of her allegations about the appellant "in the middle of a blazing row" in which the complainant said that she hated her and that she wanted to go and live with her father. She said that she had had difficult times with the complainant, who wouldn't respond to discipline and had showed animosity towards the appellant for a long time. The complainant's mother was unaware that the complainant had spoken to her teachers about her allegations and she arranged for the complainant to speak to the police.

[10] In her police interview, the complainant gave an account of events which was substantially consistent with the account given by her to Ms Hemphill. In the police interview she said that after the incident in the bathroom, the appellant came to her in another room. He asked her two sisters who were with her to leave "and then he was like I wasn't supposed to hurt you." She said that the incident had taken place "about four months ago" during the Easter holidays. She couldn't recall the day of the week, but said that it was on a week day and that she thought it was on a Friday.

[11] Asked how the appellant washed her in the region of her vagina, the complainant responded, "He kept putting his finger up and down." She said that this lasted for about five minutes and that "[h]e was like oh, does that feel good and I said, kept saying no." In relation to the location of the alleged vaginal licking, she said variously: "he started licking me in that bit", "[i]n the vagina", "just on top of it". The complainant had earlier identified as her vagina the area in between her legs.

[12] She said she didn't speak to her mother about the matter because she "…was scared because [the appellant's] like really mean and everything …[and she] was scared he was gonna do something to like threaten me or something." She said she had told her mother about the matter "a couple of months ago but I don't think she heard me." A little later in the interview, she said "[s]he didn't hear me".

[13] The day of the police interview was the day after the complainant had spoken to Ms Hemphill. She said she had not told anybody else about the matter except her sister, Crystelle, whom she had informed the day before the interview. Asked what Crystelle said, she responded, "[s]he got really scared". Crystelle did not give evidence.

[14] Asked what one thing she would change if she had a big magic wand, she responded, "[The appellant] not being there anymore," and "mum and dad" being back together. Asked what the appellant had said or done to make her "feel a bit scared" she responded, "He yells really loud." She said the last time that he had yelled at her was about a month ago and that was because she didn't clean her room.

[15] It was implicit in the complainant's evidence that the appellant had not been living in the family home for some time prior to the date of the police interview but that he visited from time to time. Two of the sisters were residing with her natural father at the time of her police interview.

[16] In cross-examination, the complainant admitted that she first spoke to her mother about the incident the day before she had her police interview. She explained that her delay in informing her mother was because she was scared that the appellant would threaten her. She accepted that she had been fighting with her mother just before she told her about the subject incident and that she had told her mother that she hated her and wanted to live with her father. She admitted that she didn't like the appellant and that she had told teachers that. She admitted also that she wanted to live with her father. She accepted that by telling her mother that she had been touched by the appellant, she "got to go and live with [her] father." She accepted also that she had told a teacher that she had had a discussion with her mother about the incident in which her mother had said, "You're just trying to wreck my life."

[17] The complainant agreed that in her police interview she had said, in effect, that she had told her mother about the incident "but [that] she didn't hear me." The complainant was not re-examined on the inconsistency between her evidence in cross-examination concerning the timing of her complaint to her mother and the version given to police and Ms Hemphill.

The appellant's contentions

[18] In a written outline of submissions, the appellant, who was self represented on the appeal, dealt extensively with matters not raised on the trial and, thus, not in the appeal record. The extraneous matters were not supported by affidavit evidence. By the latter remark, I do not mean to suggest that it was likely that the appellant could have obtained leave to adduce further evidence on the hearing of the appeal. It was not necessary, however, for the appellant to rely on such matters to show that the complainant had a strong motive for fabricating allegations of sexual interference. She readily conceded in her cross-examination that she did not like the appellant, that she wished to live with her mother and father and recognised that the making of the subject allegations could assist in bringing about that result.

[19] These matters, unsurprisingly, were relied on by defence counsel and remarked on by the trial judge in his summing up.

[20] The appellant relied on the absence of evidence such as: "physical evidence, photographs, independent witnesses, and medical evidence." The absence of corroboration for the complainant's version of events was something of which the jury was well aware. It was mentioned by the trial judge and, no doubt, by defence counsel. It was made plain to the jury by the trial judge that they could not convict unless they were satisfied beyond reasonable doubt that the complainant was telling the truth.

[21] The appellant also relied on inconsistencies in the complainant's evidence. Some of these inconsistencies were raised by defence counsel in his address to the jury, as

was the lateness of the complaint and the circumstances in which it arose. The fact of a late complaint will not normally, of itself, destroy a complainant's credibility in a sexual offence case. It is but one relevant consideration in the determination of a complainant's credibility and it is well recognised that there are many possible reasons why a complainant, particularly a child, may delay in making a justified complaint of sexual misconduct or even fail to make such a complaint.

[22] The prosecutor submitted to the jury that the complainant's explanation that she did not make an earlier complaint because she was scared of the appellant should be accepted. Another explanation put forward by the prosecutor for her reluctance to complain was the unhappy relationship between the complainant and her mother at relevant times.

[23] The differences in the complainant's accounts concerning the complaint to her mother were squarely raised for the jury's consideration but it must be said that the account, not repeated in cross-examination or re-examination, that she had told her mother a couple of months ago but that she didn't think her mother had heard does not seem particularly plausible. The evidence that the complainant had stayed with her natural father after the incident but had made no complaint to him is of concern. So too is the complainant's evidence that she told her elder sister about the allegations only on the same day that she told her mother. The explanation that the complaint was not made promptly because the complainant was scared is less than compelling. The evidence does not suggest that the appellant's conduct was likely to engender fear in the complainant or her siblings. And the appellant was not resident in the family home for some time before the complaint was made.

[24] If the complainant's evidence is to be accepted, the appellant shortly after indecently dealing with the complainant, ordered her sisters from their bedroom in order to be alone with the complainant so that he could apologise for hurting her. Yet her evidence was that she was not hurt physically by the appellant. Also, such conduct on the appellant's part, one would think, would have been likely to have aroused the curiosity of the complainant's sisters and to have resulted in their seeking an explanation from the complainant. There was no evidence of any discussion between the complainant and her sisters in this regard.

[25] The timing and circumstances of the complainant's complaint to her mother and others were, perhaps, the matters which most affected her credibility. Yet what passed between the complainant and her mother in respect of the complainant's allegations about the incident was only cursorily raised in cross-examination.

[26] In cross-examination, defence counsel asked the complainant's mother:

> "Now, are you aware that [the complainant] told [Hemphill] that – when she spoke to you, you said, 'You're just trying to wreck my life.'?"

[27] The trial judge interposed saying, "You can't cross-examine her about hearsay." Defence counsel withdrew the question and this exchange occurred:

> "[Defence counsel]: Do you remember the discussion that you had with your daughter about [the appellant] touching her?-- No, I don't actually, no.
>
> All right. So, who arranged for her to talk to the police?-- I did.
>
> And when were those arrangements made?—I'm not sure if it was the following day.

> All right. When you made those arrangements to talk to the police, were you aware that she'd spoken to her teachers?-- No.
>
> During the course of this - this difficult time that you've had with [the complainant], she's lied to you before in an attempt to get her own way?
>
> [Prosecutor]: Well, objection, your Honour.
>
> HIS HONOUR: Yes. Yes, you can't cross-examine her about that.
>
> [Defence counsel]: Sorry, your Honour.
>
> HIS HONOUR: I don't think you can cross-examine her. Do you want to argue about that?
>
> [Defence counsel]: No, your Honour."

[28] The trial judge was correct in his assertion about the Ms Hemphill conversation. Without more, the complainant's mother's knowledge or lack thereof of what the complainant may or may not have said to Ms Hemphill was irrelevant. I apprehend, however, that the question posed to the complainant's mother about her awareness of the "wreck my life" statement was by way of an attempt to introduce that topic as a basis for further cross-examination. However, defence counsel, after the trial judge's proper intervention, pursued the matter only to the extent of asking a general and non-leading question. The jury thus had no direct evidence from the complainant's mother as to what passed between the complainant and her mother concerning the incident.

[29] The question concerning the complainant's credibility to which objection was successfully taken, in my respectful opinion, was unobjectionable. The complainant's credibility was a critical issue in the case and it was legitimate for an attack to be mounted on it by the defence. The answer to the question asked by defence counsel may have been to the effect that the complainant had been untruthful on a number of occasions when attempting to get her own way but it is now impossible to know what answer would have been given. It is reasonable to conclude, however, that the question was but the first in a series of questions designed to elicit evidence concerning the lack of credit-worthiness of the complainant. Regrettably, defence counsel did not take up the trial judge's implicit invitation to argue that the question was unobjectionable.

[30] The appellant contended that there was an inconsistency between the complainant's evidence in cross-examination that there was no one else present when the appellant dealt with her indecently and the complainant's statement in her police interview that she was in a room with her sisters who were told to get out by the appellant. There was, in fact, no inconsistency as asserted. The more obvious meaning of what the complainant was saying in the subject part of the cross-examination was that when she was indecently dealt with, after getting out of the bath, there was no one apart from herself and the appellant physically present and in view.

[31] After the jury had been empanelled and the names of the appellant, the complainant and prospective witnesses had been read to the jury, one juror handed a note to the trial judge which stated, in effect, that he had been a member of the jury in an earlier trial of the appellant in a sexual offence case. The victim in that matter was one of the complainant's sisters and the jury was unable to reach a verdict. The juror was

discharged and another juror was empanelled. The appellant argued that there had been ample opportunity for the discharged juror to have observed him in the Gympie courtroom and precincts and to have disclosed information about the case to one or more members of the jury panel. He submitted that the jury should have been discharged and that, because it wasn't, he may not have had a fair trial.

[32] Normally, such a submission would gain little traction if defence counsel failed to request that the jury be discharged. Defence counsel made no such request here. However, the content of the discharged juror's note was not conveyed to counsel until after the close of evidence and the discharged juror was not asked if he had had any relevant communication with panel members who had subsequently been empanelled. After the jury had retired to consider its verdict, the trial judge was given a note which enquired: whether the complainant or her siblings had "experienced anything like this before"; how long the appellant had been the complainant's stepfather; whether the complainant's mother still had regular contact with her daughters and, if there was a report from the Department of Children's Services, what were its contents. The fact that those questions were asked provides some support, albeit slight, for the appellant's contention that the jury may have been made aware of the other proceedings against him.

Relevant principles

[33] As was observed by McHugh, Gummow and Kirby JJ in *MFA v The Queen*,[1] "...against the background of the tradition of jury trial over the centuries, the setting aside of a jury's verdict is, on any view, a serious step."

[34] The test to be applied in determining whether a verdict is unreasonable or cannot be supported having regard to the evidence was stated in the joint judgment in *M v The Queen*[2] as follows:

> "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."

That test was reaffirmed by the court in *MFA v The Queen*.[3]

[35] In *MFA v The Queen*,[4] McHugh, Gummow and Kirby JJ, referring to the foregoing test, said:

> "The majority in *M* pointed out that '[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced'. In such a case of doubt, it is only where the jury's advantage of seeing and hearing the evidence can explain the difference in conclusion about the accused's guilt that the appellate court may decide that no miscarriage of justice has occurred:
>
> > 'If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise

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1 (2002) 213 CLR 606 at 621.
2 (1994) 181 CLR 487 at 493.
3 (2002) 213 CLR 606.
4 At 623.

> 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'."

Conclusion

[36] As discussed above, the case has number of troublesome features. In particular, the complainant had a strong dislike of the appellant and a clear motive for making a false complaint. The circumstances and timing of the complaints and the inconsistencies in the evidence in that regard are of concern. The jury had before it only the complainant's account of relevant events. The appellant elected not to give evidence and there did not seem to be anything in the complainant's accounts of the subject incident or in the way in which she gave those accounts, which required the conclusion that she was acting out of malice or for an ulterior motive. As was pointed out in *MFA v The Queen*[5] by McHugh, Gummow and Kirby JJ, "There are, it is true, some aspects of the evidence that are less than wholly satisfactory. But that is not uncommon in most trials." It is the role of the jury to evaluate such matters. It then becomes the role of the appellate court to "ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention."[6]

[37] In this case, an accumulation of troublesome matters leads me to the conclusion that there was a "significant possibility that an innocent person has been convicted" and that the verdict should be set aside. Those matters are: the inconsistencies in and difficulties with the complainant's evidence discussed above; the concern that the jury may have been aware of the other proceedings against the appellant; the possible consequences of the evidentiary ruling which had the effect of curtailing defence counsel's cross-examination on credit; the complainant's deep seated dislike of the appellant; her strong desire to remove him from the household and her appreciation that such an objective could be achieved by the making of a complaint.

[38] Consequently, I would order that:

(a) The appeal be allowed;
(b) The conviction be set aside; and
(c) There be a retrial.

[39] **DALTON J:** I agree with the reasons of Muir JA.

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5 (2002) 213 CLR 606.

6 *MFA v The Queen* (2002) 213 CLR 606 at 634.