SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCC* [2011] QCA 324
PARTIES:	**R** **v** **BCC** (appellant)
FILE NOS:	CA No 50 of 2011 DC No 31 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2011
JUDGES:	Muir and Chesterman JJA and Margaret Wilson AJA 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 – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after a trial of raping his daughter – where the appellant submitted that the complainant was an unreliable witness – where the appellant relied on inconsistencies in the complainant's own evidence – where the appellant argued that the complainant's evidence was inconsistent with evidence given by other witnesses – where the evidence was before the jury and commented on by the trial judge in his summing up – where the appellant sought to rely on appeal on other matters not raised at trial by defence counsel – whether defence counsel was negligent in failing to rely on these other matters – whether the verdict was unreasonable or insupportable having regard to the evidence *Evidence Act* 1977 (Qld), s 21AK *Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45, considered *R v Birks* (1990) 19 NSWLR 677, considered *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, considered

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: Introduction** The appellant was convicted on 2 March 2011, after a trial in the District Court, of one count of rape. He appeals against his conviction on grounds that the verdict was "unreasonable, or cannot be supported having regard to the evidence".

The evidence

[2] The complainant was the appellant's natural daughter. She was eight or nine years of age at the time of the offence and staying with the appellant in accordance with shared custody arrangements entered into between the appellant and the complainant's mother. In his sentencing remarks the trial judge summarised the complainant's evidence about the subject incident as follows. He said that on the night on which the incident occurred the arrangement was that the complainant would sleep in a bed in a particular bedroom and the appellant would sleep on a mattress on the floor of the bedroom. He explained that the appellant came into the bedroom and either climbed straight into bed with the complainant or moved from his mattress on the floor to the bed. His Honour said:

> "Upon getting into her bed you started rubbing your hand on her hips on the outside of her clothing. You then moved your hand to the inside of her pants and commenced touching her vaginal area. You then took your hand out of her pants and started rubbing or tickling her legs in the upper leg area before putting your hand back inside her pants. [The complainant] recalled that the touching of her vaginal area was soft a first, but that it got harder and harder. At some stage you have then penetrated her outer labia with your finger and rubbed the area of her vulva between the outer labia and the clitoris. After that you rubbed [the complainant's] bottom.
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> She awoke during this activity, but pretended to be asleep.
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> When you were rubbing between her labia, she rolled over and away from you in the hope that such action would cause you to desist. It didn't and, in fact, you moved your hand with her. That movement caused your finger to become removed from the area that it had been, the area that she described as, "Between her vagina flaps", and, in fact, out up to near her belly, but you immediately reinserted your hand into her pants and inserted your finger back into the position where it had been.
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> After [the complainant] said that she had been awake for, in her estimation, 5 or 10 minutes, during the behaviour she sneezed and coughed in an attempt to let you know that she was awake. You immediately asked if she was awake and she told you that she was. You then said words to the effect of, "Oh, shit, don't tell anyone. Oh, fuck, fuck, fuck" – words of that nature. You also gave her an obvious false story that you had been having a dream, that you thought she was someone else. You told her you were sorry and

> begged her not to tell anyone. You told her that if she did tell anyone, you and she would no longer have a relationship. [The complainant], in fact, did not tell anyone for some considerable time. Some approximately three years passed before she told her best friend, her friend's mother, and her own mother."[1]

[3] In evidence given pursuant to s 21AK of the *Evidence Act* 1977 (Qld), the complainant said that prior to the subject incident her relationship with the appellant was "very good". She said that the first person she told about the incident was her best friend T. All she could remember saying to T was that her dad had touched her. She did not recall providing T with any other detail. She recalls telling T's mother about the incident as well. In cross-examination, the complainant admitted that she told an interviewing police officer that the appellant was drunk at the time of the incident. Asked if she had told T "he wasn't drunk. I just said that so it wouldn't sound so bad", she responded "I can't remember". The complainant also said that she had told T "that it hurt". She admitted that although told by a person from the Office of the Director of Public Prosecutions not to discuss her evidence with T, she had done that.

[4] The complainant was cross-examined about being interviewed by a Family Court officer, Mr Hugall, on 14 March 2007 in connection with his preparation of a report. She professed no recollection of any such interview. It was put to her that after the alleged incident she was happy to continue seeing the appellant and that all of her contact with him "was good". She agreed that the contact was good but said "it was awkward". She also said that she did not like going to the appellant's house after the incident.

[5] The complainant accepted that she had made a complaint about being touched inappropriately by her uncle and that this had occurred after the subject incident. She accepted that when interviewed, after being taken by the appellant to the police station, she had made no complaint about the appellant.

[6] She said that she had told T about the incident on 16 June 2008. She said, in effect, that at T's urging she telephoned her mother, who came straight over to T's house, where the complainant was staying at the time. Before her mother arrived she told T's mother about the incident and T's mother repeated to the complainant's mother what the complainant had told her.

[7] Mr Hugall gave evidence to the following effect. He prepared a report following an interview with the complainant on 14 March 2007. In the interview, the complainant informed him that she would like to spend more time with her father and wanted him to be more involved in her activities. This was in the context of shared custody arrangements. The complainant told him that her uncle had touched her genitals outside her clothes and had been thrown out of the house by her mother.

[8] T's mother gave evidence of being told at her house by the complainant, in the presence of T, of an occasion when her father had put his fingers "in there". The complainant told her "He thought I was asleep, but I wasn't. I was too scared to move, and I pretended I was asleep." She said that the complainant had been coming to her place for 18 months or so prior to this time and that T and the complainant were close friends.

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1 AR 174-175.

[9] The complainant's mother gave evidence of being telephoned by the complainant from T's home and being told "dad touched me". She said that she went over to the house where she spoke with the complainant who told her that the appellant had got into bed with her, touched her "when he was drunk" and thought she was asleep. She moved and he said, "Are you awake?" She said, "Yes" and he went "Oh, fuck, fuck, fuck. Don't tell anybody, I'm sorry." The complainant gave her some more detail about the incident the following morning.

[10] In an interview with police officers on 10 September 2008, T gave evidence of being told of the incident by the complainant. What she said was consistent with what the complainant had told T's mother and her own mother. The complainant, according to T, had also said at the time of the revelation that the appellant had told the complainant not to tell anyone or she would get the appellant into trouble and "ruin the friendship we've got". A few days later, after making the initial complaint, the complainant told her that the appellant had not been drinking and that "she was just trying to make it not sound as bad". This changed account was said to have been given on the day T's mother was first interviewed by police officers.

The appellant's arguments

[11] The appellant, in his outline of argument, identified a number of grounds or "issues" which I will now address. The first contention concerned the complainant's "changed … story" about the inebriation of the appellant at the time of the incident. The appellant used this as evidence supporting the conclusion that the complainant was an unreliable witness. The complainant explained to T why she had initially said that the appellant was drunk.

[12] The evidence in relation to the change in the complainant's account was before the jury and was commented on by the trial judge in his summing up. What weight was put on the change in the complainant's account was a matter for the jury. It was open to them to take the view that the complainant's explanation was credible. That is so despite the fact that the complainant also told the interviewing police officer that the appellant was drunk at the time of the incident.

[13] The second complaint, which was not clearly identified, appeared to be that the evidence given by the complainant about her change of attitude to the appellant conflicted, in particular, with the evidence of Mr Hugall and Mr Davies. Mr Davies was a friend of the appellant's who met the complainant in about 2006 when the appellant lived with him. He then saw the complainant about once a month. He said that the relationship between the complainant and the appellant was normal and that the complainant would "just follow [the appellant] around, follow him wherever he went to cuddle him, give him a cuddle, a kiss, put her to bed at night to give her a kiss at night, put her in bed and – just the normal."

[14] Emphasis was placed on Mr Hugall's evidence that the complainant had a strong and positive attachment to both parents, had a desire to spend more time with the appellant and wanted him to be more involved in her activities.

[15] The complainant's evidence in this regard received some support from the evidence of her mother and also from T's mother. The complainant's mother gave evidence of the complainant telling her why she had not informed her of the incident earlier. She said that the complainant was not happy to visit her father and that on "numerous times she didn't want to go or she'd try and make up excuses …".

[16] The inconsistencies relied on by the appellant were matters for the jury to resolve. Having regard to the complainant's age, it was hardly inevitable that the impact of the incident would have severed the ties of affection between her and the appellant or removed any desire by her to improve their relationship and the extent of their contact. The complainant's account of feeling uneasy in the appellant's company after the incident when alone with him was not necessarily incompatible with what Mr Hugall was told. Nor is it remarkable that the complaint took as long as it did to emerge. Such delays are a common enough feature in cases of this nature.

[17] The appellant also relied on:

1. the complainant's disobeying her instructions not to discuss her evidence with anyone;
2. the alleged faulty recollection of the complainant about the make of car owned by Mr Davies and the time during which his car was in need of repairs. The complainant said that she was "pretty sure" it was a Ford Falcon or Fairmont. Mr Davies identified it as a Holden Calibra;
3. the unlikelihood of his having taken the complainant to a police station to make a complaint about her uncle's indecent touching if he was guilty of the alleged offence;
4. an allegation that the complainant's accounts to the appellant, the Director of Public Prosecutions and her mother had changed "a couple of times";
5. evidence given by the complainant's mother at the committal hearing in relation to the uncle's conduct which, explicitly, was claimed to cast doubt on the mother's credibility;
6. an assertion that a complaint made against the complainant's uncle by the complainant's elder sister, which pre-dated the subject complaint, was so similar to the subject complaint as to give rise to the inference that the latter had been fabricated;
7. evidence given at the committal hearing concerning the possibility of the appellant seeking compensation for an injury at work and the suspicion that the complainant may have been motivated by thoughts of a criminal compensation claim;
8. an alleged erroneous statement by the complainant's mother in her evidence at the committal hearing concerning whether the complainant's uncle was welcome to stay at her house.

[18] The matters agitated in paragraphs 4, 5, 7 and 8 above were either not the subject of evidence at the trial or were touched on only peripherally. The appellant's complaint in relation to them and in respect of some of the other matters was, in part, to the effect that defence counsel's failure to rely on them constituted negligence which affected the outcome of the trial.

[19] It was submitted that the prosecution failed to disclose the lies told by the complainant, her mother, T and her mother and that, had the jury scrutinised the evidence as the appellant did, he would not have been convicted.

[20] The prosecutor's duty was "to call all available material witnesses unless there [was] some good reason not to do so."[2] Moreover, as Gaudron and Hayne JJ observed in *Dyers v The Queen*:[3]

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2 *Dyers v The Queen* (2002) 210 CLR 285 at 293.

3 (2002) 210 CLR 285 at 293.

> "The fact that a witness will give an account inconsistent with the prosecution case is not a sufficient reason for not calling that person."

[21] It was the jury's role, not the prosecutor's, to determine where the truth lay, to the extent that it was necessary to do so in order to determine guilt or innocence. There is no reason to conclude that the jury misunderstood their role or that they failed to act conscientiously.

[22] The appellant's complaints about his counsel do not assist him. In *R v Birks*,[4] Gleeson CJ summarised the relevant principles as follows:

> "(a) A Court of Criminal Appeal has a power and duty to intervene in a case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
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> (b) As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
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> (c) However, there may arise cases where something has occurred in the running of a trial, perhaps as a result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible and undesirable to attempt to define such cases with precision. When they arise they will attract appellate intervention."

[23] The following passage from his Honours' reasons in *TKWJ v The Queen*[5] is as applicable to forensic choices in respect of cross-examination topics and the structure and content of counsel's addresses as it is to the calling of evidence.

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of

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4 (1990) 19 NSWLR 677 at 678.

5 (2002) 212 CLR 124 at 130-131.

> counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."

[24] I do not intend to imply from the foregoing discussion that I accept the validity of the criticisms of defence counsel's conduct of the case. I have perused his address to the jury. It appears to me to be well structured and well judged.

[25] Defence counsel made as much as he could of the change in the complainant's account about the appellant's being drunk at the time of the incident. He dealt with the evidence given by the complainant's mother concerning her daughter's character and their relationship with each other. He pointed to the evidence that the complainant was "very forthcoming" and discussed details of her visits. This was in the context of querying why the complaint was not made earlier to the mother and why, if the complainant's account was correct, her mother had not detected anything untoward in her daughter's attitude to the appellant.

[26] Defence counsel referred to the evidence that sexual abuse was a "live issue" in T's household and had been discussed by T's mother in the complainant's presence. He referred to the evidence of the closeness between the complainant and her much older sister who had also been handled indecently in a similar way. He invited the jury to think it improbable that in such an environment and in those circumstances the complainant would not have known the detail of what had happened to her sister and that a complaint, if justified, would not have been made. He said that, to the contrary, there was "not a whiff, not a hint of a difficulty."

[27] Considerable time was spent by defence counsel in contrasting Mr Hugall's evidence of the complainant wanting more time with the appellant with her and her mother's evidence of some reluctance on her part to visit him. He queried why the complaint did not emerge in the course of discussion with Mr Hugall, why the complainant did not seek to limit the appellant's access rights when she had the opportunity and why the complaint was not first made earlier to the complainant's sister or mother.

[28] Defence counsel took issue with the prosecutor's submission that the complainant was a good witness. He pointed out that she stubbornly declined to make concessions and that, although claiming a clear memory of words used three or so years ago, professed not to remember what was said in her conference with Mr Hugall or even that there had been a conference.

[29] The prosecutor's contention that the complainant's description of the incident was "full of detail" was also debunked. He pointed out, quite effectively, that what passed for detail of the circumstances surrounding the incident were no more than a recitation of matters which took place on a routine basis at around the time of the incident. In this regard he pointed out that the complainant's evidence that the incident took place before 4 November 2005 was contradicted by the seemingly cogent evidence of Mr Davies.

[30] Defence counsel also highlighted the conflict between T's evidence concerning what the complainant told her initially about the pain and discomfort she experienced as a result of the appellant's "fingering" and the complainant's evidence in cross-examination. In cross-examination, T accepted that she had been given some different or, arguably, further detail about the nature of the complainant's pain the day before the cross-examination.

[31] Although defence counsel mounted some substantial arguments in his address to the jury, I am not persuaded that it was not open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt. The jury saw and heard the complainant and the other witnesses give their evidence. There was no competing account of relevant events from the appellant.

[32] Although signalling the need for careful scrutiny of the complainant's evidence, none of the matters relied on by defence counsel or by the appellant on this appeal, either alone or in combination, necessitated a conclusion by the jury that the complainant was untruthful or that her evidence was unreliable to the degree that the substance of her complaint had to be rejected.

[33] The grounds of appeal have not been made out and I would order that the appeal be dismissed.

[34] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by Muir JA.

[35] **MARGARET WILSON AJA:** I agree with the order proposed by Muir JA and with his Honour's reasons for judgment.