SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAP* [2012] QCA 64
PARTIES:	**R** **v** **WAP** (appellant)
FILE NO/S:	CA No 95 of 2011 DC No 555 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2012
JUDGE:	Margaret McMurdo P and Muir JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – where the appellant was convicted after a trial of committing various sexual offences against his two children – where the appellant disagreed with the manner in which his counsel conducted his trial – where the appellant cross-examined his former barrister on appeal regarding this conduct – where the appellant applied for leave to adduce further oral evidence – whether leave should be granted to allow the defendant to adduce such evidence – whether the appellant was bound by the conduct of his counsel *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9, considered *R v Birks* (1990) 19 NSWLR 677, considered *R v Vollmer* [2011] QCA 355, cited *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, followed
COUNSEL:	The appellant appeared on his own behalf D L Meredith 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's reasons for dismissing this appeal.

[2] The essence of the self-represented appellant's many complaints is that, having been convicted, he regrets the way his case was conducted at trial. He wants a retrial so that he can conduct it differently.

[3] His complex conspiracy allegations, which he now contends his trial barrister should have put to the prosecution witnesses, are extraordinary. They are that the complainants and their mother gave false evidence against him so as to gain access to about $120 million which should have come to the appellant through a patented invention. The many other witnesses who gave damning evidence against him at trial were part of this conspiracy for various reasons, including to gain access to his patent money. This was why his elderly mother was murdered in hospital. The witnesses, AC and DC, and KS and TS, gave false testimony because the appellant had informed on them in respect of drug matters when they lived in northern New South Wales long ago. KS and TS were friendly with CAM and CLM, who gave false evidence to cover up a pornographic video in which KS was involved. JG and BG were friendly with the complainants. They gave false evidence to assist the complainants and also to themselves benefit from the patent fortune.

[4] The appellant produced no evidence to prove any aspects of his conspiracy theory. He did not tell his trial barrister about many of these allegations. When he cross-examined his trial barrister during the appeal hearing, the barrister pointed out that the conspiracy theory did not sit comfortably with the complainants' reluctance to pursue these complaints which had been the subject of a *nolle prosequi* in 1995. The complaints were renewed and prosecuted, not at the complainants' request, but on a police initiative.

[5] For these reasons, as well as those given by Muir JA, the appellant has not demonstrated there has been any miscarriage of justice to warrant allowing the appeal against conviction. The appeal against conviction should be dismissed.

[6] **MUIR JA: Introduction** The appellant was found guilty after a trial of all eight counts on the indictment. The complainant in respect of count 8 is the appellant's son. The complainant in respect of the other counts is the appellant's daughter. The offences, as particularised by the prosecution, were:

- Attempted rape: the appellant tried to force his penis into [the complainant's] vagina. She was four and sitting on a stool (count 1); and the appellant tried to put his penis in the complainant's vagina on her birthday in 1991/1992 (count 3).
- Rape: the appellant had sexual intercourse with [the complainant] in her bed. This occurred on the same day that count 5 occurred but later in the night count (6).
- Indecently dealing with a girl under 16 years with the circumstance of aggravation that the victim was under 14 years of age: the appellant put his penis in [the complainant's] mouth. This occurred at the same time as count 1 (count 2); and the appellant put his penis between [the complainant's] legs and simulated intercourse (count 4).
- Indecently dealing with a girl under 16 years with the circumstance of aggravation that the victim was under 12 years of age: the appellant tried to

insert a dildo into [the complainant's] vagina. This occurred when [the complainant's] mother was away and [the complainant] was 10 years old and in grade 5 (count 5).

- Maintaining a sexual relationship with a child under 16 and raping in the course of that relationship: resulting from the charged acts in counts 3, 4, 5 and 6 and various uncharged acts arising from the evidence of witnesses (count 7).
- Unlawfully and indecently dealing with a child under the age of 16 years with the circumstance of aggravation that the child was, to the knowledge of the appellant, his lineal descendant: the appellant had [the male complainant] perform oral sex on him. He also had [the male complainant] insert a tube into his own (the appellant's) anus and fill it with beer and he also had [the male complainant] cut his penis. This occurred in January 1992 when the appellant and [the male complainant] returned to Broadwater after spending Christmas at [the male complainant's] grandmothers (count 8).

[7] The appellant is self-represented. His grounds of appeal, with the exception of ground 5, relate to the way in which the trial was conducted by defence counsel. They are:

> "1. as much as 70% of my evidence to prove my innocence was not used including video and audio tapes.
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> 2. i was not allowed to have any witnesses for my defence.
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> 3. my barrister ... argued continuously with me and did not act on my instructions.
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> 4. he told me to plead guilty on several occasions.
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> 5. he had previously acted as prosecutor in a case against the key witness in my trial.
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> 6. none of the previous statements from my daughter were entered into evidence neither were personal letters she had written to me.
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> 7. i was not allowed to elaborate on my version of events, in fact i was cut off by my barrister."

The evidence before the jury

[8] The appellant is the father of both complainants. There was cogent evidence of the existence of a sexual relationship between the appellant and his complainant daughter whom, for convenience, I will refer to as "the complainant". Three typed and three handwritten letters, identified by the complainant as letters from the appellant to her, were tendered. Ms W, the appellant's former wife and the mother of the complainant, identified the handwriting as that of the appellant. The letters were redolent of the existence of a sexual relationship between the complainant and the appellant.

[9] Ms W swore that the appellant admitted to her, when she and the appellant were in the company of her friend CLM, that he had a "sexual relationship" with the complainant. She swore also that when the complainant was "around seven", the appellant admitted to her that he had oral sex with the complainant on the way home from Toowoomba.

[10] Mrs JG and her husband gave evidence of an occasion at the appellant's house when the appellant left the table having been told that the complainant wanted a goodnight kiss. Both said that the appellant, who was away from the table for a lengthy period, returned puffing and had to lean over the table. Ms W gave similar evidence but added that when she noticed the appellant was absent she went to the complainant's room where she found the appellant "bending over" the naked complainant. She said the complainant had been dressed in pyjamas when she had gone to bed.

[11] Mrs JG gave evidence of seeing the complainant sitting on the appellant's lap kissing him passionately on an occasion on which she and Mr BG visited the appellant's property. She said that the "agitated" and "emotional" appellant said to her, "I'm having sex with my children". She said that about six months later, the appellant and Ms W came to the G's house uninvited. Ms W, in the appellant's presence, said, "… that [the appellant's] not doing that any more and he is seeked (sic) help". Mr BG gave evidence to similar effect.

[12] Mr CAM gave evidence of observing conduct between the appellant and the complainant when they resided in the SB Caravan Park in the early 90's. He said, in effect, that he saw the appellant kissing the complainant passionately on the lips and touching her breasts. Mr CAM's wife also said that she had observed the appellant "… always fondling [the complainant] – touching her on the breasts and commenting about her breasts", as well as kissing the complainant in a way she "didn't think was very fatherly". She said that she recalled the appellant telling her "…that he had taught [the complainant] everything about sex and orgasms, but he had never gone all the way".

[13] Mr AC gave evidence of having been told by the appellant in 1994 at the SB Caravan Park that the appellant admitted to him that he was having sexual relations with the complainant. The appellant also said that he and the complainant had "been lovers in a previous time and were destined to become lovers again". Mr AC said his son DC and the complainant were both present during this conversation. Mr AC made a complaint to authorities a few days later.

[14] Mr DC gave evidence that he became friendly with the complainant when they both resided in the caravan park in SB. She was "a couple of years younger than" him. He recalled an occasion on which, as he approached the appellant's caravan, he looked inside and saw the appellant pulling down the complainant's pants. He said that he informed his father and was later present during a conversation between his father and the appellant in which the appellant "admitted that he'd been touching [the complainant] since she was around about eight years old". He recalled that the appellant and the complainant left the caravan park "Maybe a couple of days after" the conversation.

[15] Ms KS, a childhood friend of the complainant, gave evidence of an occasion when she was with the complainant in the cabin of a truck on which the appellant was working. She said that she observed the appellant rubbing the complainant's inner thigh "leading up to the vaginal bits" and rubbing her breasts outside her shirt. On that occasion, she said that the complainant told her that she was "having sex" with the appellant. She also observed the appellant and the complainant kissing passionately and "french kissing". She and the complainant were then pre-pubescent teenagers. Ms KS's mother gave evidence of being told by the appellant that he had oral sex with the complainant and that he thought she was pregnant. On

another occasion the appellant told her that he wanted her help to get the complainant back and "to keep her drugged and have sex with her and have a child…".

[16] Mr TS, Ms KS's father, gave evidence that the complainant pointed to her genitalia in response to a question by him as to where "daddy" kissed her. He also recalled that when the complainant was aged about seven or eight, he saw the appellant taking photocopies of the complainant's genitalia. He also recalled the appellant admitting on a "couple of occasions" that he sexually touched and kissed the complainant. Mr TS admitted that he had found out that the appellant had been writing sexually explicit letters to his wife.

[17] Each complainant gave evidence of the count or counts which related to him or her. The complainant gave evidence that the appellant would regularly place one end of a tube in his anus, connect the other end to a big brown bottle containing beer and get the complainant to shake the bottle while "he played with his penis". The appellant would also get her on such occasions "to cut his lower stomach area near his genitals with a grey knife".

[18] The male complainant, who was about three years older than the complainant, also gave evidence of participating in such conduct with the appellant. He said that at the appellant's request he made cuts of varying depth "all over" the appellant's penis which caused bleeding and that, whilst this was happening, the naked appellant would play with his (the male complainant's) penis. He recalled an occasion on which he saw the complainant lying on her back on a beach with the appellant lying on top of her "thrusting his hips". He said that at SB the appellant and the complainant spent long periods in a cabin on the back of the appellant's truck.

Grounds 1-4, 6 and 7

[19] It is convenient to dispose of grounds 1 to 4, 6, and 7 together.

[20] The appellant applied for leave to adduce oral evidence from a Mr Steinbeck. He said Mr Steinbeck had been present for all or much of the appellant's trial and submitted that he would have useful evidence to give. He was unable to identify that evidence, except in so far as it related to events in the trial. The appellant conceded that Mr Steinbeck had no personal knowledge of the circumstances surrounding any of the subject offences and it became apparent that there was nothing to be gained by Mr Steinbeck giving evidence about events at the trial. There was no material dispute between the appellant and defence counsel in that regard. Accordingly, leave to adduce further evidence from Mr Steinbeck was refused.

[21] The respondent put in evidence on the appeal an affidavit by the appellant's defence counsel. In his affidavit, defence counsel addressed the grounds of appeal as follows.

[22] In relation to ground 1, he said that much of the "evidence" on which the appellant sought to rely on the trial was inadmissible or irrelevant. He said that it was "mainly biographical in nature". On the hearing of the appeal, the appellant placed particular emphasis on a recording of an interview by Ms W on Channel 7 in relation to complaints made by her concerning the conduct of the Department of Family Services. He complained that the recording was not played to the jury, but it

is by no means apparent that putting the recording into evidence would have advanced the appellant's case. Defence counsel cross-examined the complainant and Ms W concerning the programme and, at the conclusion of his cross-examination of Ms W, made no attempt to renew his request that the recording be played to the jury.

[23] In relation to ground 2, defence counsel referred to two witnesses whom he said the appellant wanted him to call. The evidence of one of the witnesses was rendered irrelevant as the sole point of calling him was to contradict evidence a proposed prosecution witness was expected to give. That witness failed to appear at the trial. The other witness, in defence counsel's view, could say little, if anything, that was useful. He explained that to the appellant, who gave written instructions confirming that no witnesses were to be called in his case.

[24] As for ground 3, counsel swore that he was at pains to check with the appellant "at the end of significant cross-examinations to see if there were any other matters he wished to be raised with the witness". He admitted having some minor arguments with the appellant in the course of the trial and said, in effect, that Mr Steinbeck raised issues which were invariably unhelpful, ill-informed and repetitive with the appellant who in turn raised these issues with him. He said that he bluntly told the appellant that the time would have been better spent addressing "other issues naturally arising in the case".

[25] As to ground 4, defence counsel accepted that he had advised the appellant that given the strength of the Crown case it was desirable that he plead guilty. However, the decision was left to the appellant and he did not follow the advice.

[26] In relation to ground 6, defence counsel said that it was plain from the evidence already before the Court that the complainant was a dishonest and unreliable witness and that it was unnecessary and possibly counterproductive to seek to raise "every single inconsistency" in her evidence.

[27] As for ground 7, defence counsel observed that the transcript would speak for itself. Perusal of it does not bear out the appellant's complaint. Nor does it suggest that the defence was not competently conducted by counsel and, indeed, the appellant makes no allegation of incompetence.

[28] The appellant cross-examined defence counsel at some length on the hearing of the appeal but the core of counsel's evidence was unshaken. The appellant did not give evidence on oath and it probably would not have been of any benefit to him if he had. Defence counsel was careful during the trial to ensure that he had written instructions from his client. In particular, he had written instructions that no witnesses were to be called.

[29] Even if it had been the case that defence counsel disregarded the appellant's instructions in some respects, that would not necessarily give rise to an entitlement to have the guilty verdicts set aside. In *R v Birks*,[1] Gleeson CJ stated the following principles which have application for present purposes:

> "1. A Court of Criminal Appeal has a power and a duty to intervene in the 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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1 (1990) 19 NSWLR 677.

2. 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.

3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the 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."

[30] The following passage from the judgment of Gleeson CJ in *TKWJ v The Queen*,[2] which is directed to tactical decisions made by counsel in the course of the trial, is of particular relevance to the present discussion:

> "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 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."

[31] In *TKWJ*, McHugh J observed:[3]

> "The role of counsel in a criminal trial is so important that it hardly needs argument to conclude that his or her conduct of the trial can bring about a miscarriage of justice. *Tuckiar v The King* – where counsel's statement and conduct in front of the jury reinforced the presumption of guilt arising from the judge's charge – is a well-known, if extreme, example. Where an appellant contends that the conduct of his or her counsel has caused a criminal trial to miscarry, however, the appellant carries a heavy burden. This is a consequence of the adversarial nature of our legal system and the role and function of counsel. Criminal trials are not inquisitions. They are contests 'in

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2 (2002) 212 CLR 124 at 130-131 [16].

3 At 147-148 [74].

> which the protagonists are the Crown on the one hand and the accused on the other'. Ordinarily, a party is held to the way in which his or her counsel has presented the party's case. That is because counsel is in effect the party's agent. Counsel is 'ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted'. The discretion retained by counsel in the running of a case is very wide. Counsel may even settle a case without seeking the client's consent. Blackburn J noted in *Strauss v Francis* that 'the apparent authority with which [counsel] is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause'. In *Strauss* – where the issue was whether counsel had authority to consent to the withdrawal of a juror, notwithstanding the client's dissent – Mellor J added:
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> > 'No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause ... without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief.' (citations omitted)"

[32] The appeal, in order to succeed, must show that there was a miscarriage of justice on the trial and:[4]

> "…the inquiry about miscarriage must be an objective inquiry, not an examination of what trial counsel for an accused did or did not know or think about. The critical question is what did or did not happen at trial, not why that came about."

[33] No miscarriage of justice in any of the ways alleged in grounds 1-4, 6 and 7 was made out. The evidence does not support grounds 2, 3 and 7. Ground 4 does not raise a relevant consideration. The matters raised in grounds 1 and 6, objectively viewed, are explicable as rational decisions by defence counsel as to the evidence to be called. The appellant is bound by the way in which his case was conducted and there is no reason to suppose that the outcome of the case would have been any different had defence counsel adopted the many suggestions made to him by the appellant during the course of the trial. This assumes that the adoption of such suggestions would have been compatible with defence counsel's obligations.

Ground 5

[34] Defence counsel said in relation to count 5 he, as senior Crown prosecutor, had the carriage of the complainant's prosecution in 1997 or 1998 for attempted murder of the appellant. The charges were reduced by him to being in a dwelling and committing an offence and common assault. When he came to appreciate his prior involvement with the complainant, some weeks before the appellant's trial, he and his instructing solicitor raised the matter with the appellant who advised that he had no objection to defence counsel's continuing to act for him. The fact that defence counsel had prosecuted the complainant did not disqualify him from appearing for the appellant.

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[4] *Nudd v The Queen* (2006) 80 ALJR 614 at [27]; see also [157] per Callinan and Heydon JJ and *R v Vollmer* [2011] QCA 355.

Miscellaneous arguments

[35] On the appeal, the appellant relied on a 14 page handwritten submission, a 17 page handwritten document entitled "contradictions within transcript", a four page handwritten document entitled "points of law", a two page handwritten document entitled "plea to Court of Appeal" and a handwritten list of potential witnesses. He also produced quite extensive typed submissions. Most of the submissions are taken up with matters which are irrelevant or, at best, peripheral. Where matters referred to in the submissions may be relevant, they are generally matters in respect of which evidence could have been adduced on the trial.

[36] The "contradictions within transcript" document deals mainly with inconsistencies in the evidence of the complainant. Some of those were exposed on the trial by defence counsel. Many are merely unsubstantiated allegations by the appellant and much of the appellant's commentary is in respect of matters which were marginal at best. For example, there are references to: the complainant being interviewed by police officers with no female present; the complainant's habit of clinging to the appellant; the complainant allegedly being in trouble for having sex with a named person; the appellant's allegedly confronting the complainant over "the phone numbers of her drug dealers and money"; and a conspiracy between the complainant and others "to get there (sic) hands on the $120 million …".

[37] The appellant complained that he was unable to have the jury deal with his matter fairly and dispassionately after they had heard evidence of his remarkable sexual practices. The evidence was plainly relevant. It went to the appellant's sexual relationship with the complainant and was part of the conduct constituting the offence against the male complainant. The trial judge gave the usual direction to the jury concerning the need for dispassionate consideration of the evidence and told them to "dismiss all feelings of sympathy, prejudice or even disgust about the matters mentioned" in Court. Later in his summing up, the primary judge drew attention to the "strange" sexual conduct and said, "as I've indicated before the mere fact of that should not lead you to approach this other than in a cold, cool and rational way". The jury were also directed that each charge had to be considered separately and that the evidence relating to each charge had to be evaluated for the purpose of determining whether the prosecution had proved the elements of that charge beyond reasonable doubt.

[38] In his extensive typed submissions, the appellant referred to a patent that, according to him, he was negotiating to sell "to an overseas country for approx 120 million dollars". He asserted that the complainants and another person, who did not give evidence, were planning to extort money from him, seemingly in anticipation of his receipt of vast riches. The appellant considered that putting this evidence or perhaps, more accurately, these assertions before the jury would reveal a motive for the complainants to make false complaints. How the false complaints could have benefitted them financially was not explained. Defence counsel, sensibly, took the view that any attempt to persuade the jury of the $120 million windfall was unlikely to enhance his client's credibility and, of course, the appellant gave specific instructions that no witnesses were to be called on his behalf.

[39] Another matter complained of by the appellant was the delay between the offences and the trial. The trial judge gave an appropriate direction in that regard. There is no substance in any of the miscellaneous matters.

Conclusion

[40] As none of the grounds of appeal have been made out and as it has not been shown that any miscarriage of justice occurred, I would order that the appeal be dismissed.

[41] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the order proposed by his Honour.