SUPREME COURT OF QUEENSLAND

CITATION:	*R v SBW* [2012] QCA 191
PARTIES:	**R** **v** **SBW** (appellant)
FILE NO/S:	CA No 71 of 2012 DC No 508 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2012
JUDGES:	Margaret McMurdo P and Muir and Gotterson JJA 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 DIMISSED – where appellant convicted of one count of indecent dealing (count 1) – where appellant acquitted of exposing a child to an indecent object (count 2), rape (count 3) and indecent dealing (count 4) – where complainant was the appellant's granddaughter – where the complainant made a pretext telephone call to the appellant in which she discussed counts 1 and 2 – where the appellant did not directly concede touching the complainant in a sexual area during the call – where it was open to the jury to find that there was an implied admission during the call – where appellant challenged the credibility and consistency of complainant's evidence – where appellant submitted there was a lack of specificity in the complainant's evidence – where appellant submitted that because the complainant's evidence was rejected by the jury with respect to counts 2, 3 and 4 it should also be rejected with respect to count 1 in the absence of corroborating evidence – whether the conviction is unsafe, unsatisfactory, unreasonable and not supported by the evidence *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, considered

R v CX [2006] QCA 409, considered
R v D [2000] QCA 417, considered

COUNSEL: T E Mossop for the appellant
V A Loury for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for dismissing this appeal against conviction.

[2] **MUIR JA: Introduction** The appellant was convicted after a five day trial of one count of indecent dealing with his 12 year old granddaughter (count 1). He was acquitted of the other three counts on the indictment: exposing a child under 16 to an indecent object (count 2), rape (count 3) and indecent dealing with a child under 16 (count 4). All the offences were alleged to have been committed between 31 December 2006 and 1 January 2008.

[3] The appellant appeals against his conviction on the grounds that the verdict is unsafe, unsatisfactory, unreasonable and not supported by the whole of the evidence.

The evidence

[4] The complainant's evidence consisted of statements to police given on 26 April 2011 and 4 May 2011 and her evidence pre-recorded on 19 March 2012.

[5] In her statement of 26 April 2011, the complainant informed the interviewing police officer to the following effect. She was 16 years of age. She was 12 when she stayed at the home of her maternal grandparents, between September and November 2007. During that stay she felt a little unwell as she felt she was "going to get [her] period for the first time". She went into the appellant's office and sat on his lap. He was sitting on a chair in front of his computer. The appellant moved his right hand down towards the top of her pyjama shorts and put his hand inside the shorts and her underpants. He pulled her back so that she was lying against his chest, told her to relax and "massaged [her] vagina on the bare skin but did not digitally penetrate [her]". This conduct continued for about five to 10 minutes. She froze. When she came out of shock she got up, pushed him away and walked off to her room.

[6] During the same stay, the appellant approached her and said "Sorry about the other day, I didn't know what came over me and I promise it won't happen again". The complainant responded "It's OK".

[7] About two weeks later, after the visit to her grandparents had finished, the complainant was visiting her grandparents after school. She went into the appellant's office where the appellant said "Look what your website opened". She then saw an adult male and female having sex. The appellant laughed. The complainant said "That's disgusting" and closed the window of the footage. Her mother, brother and grandmother were in the lounge room when this incident (count 2) occurred.

[8] A few days after the computer incident, the complainant was in her grandfather's office doing an assignment when the appellant came into the room. He put his right hand inside her stockings and underpants "and started touching [her] vagina… for about five minutes on the bare skin with his fingers" before starting "to penetrate [her] vagina with his finger. He inserted it and out for about five to 10 minutes". She went to the bathroom for a while. When she came out her mother said that they had to go and they left. This incident constituted count 3.

[9] About two days after this incident, she told her friend, Ms BK, at school about everything the appellant had been doing to her. About a week after that, she told another friend, Ms BN, everything the appellant had been doing to her. The complainant invited Ms BN to accompany her to her grandparents' house where she was to sleep the night in the absence of her mother from home. That evening when she went to the appellant's office to obtain batteries, he put his arms around her, moved his hands down the back of her pants and touched the bare skin of her buttocks. He tried to pull her forward but she managed to disengage.

[10] The next time she went to school she told her friend, Ms BK, what had happened on that occasion. A few days later, she told her mother that the appellant had been sexually assaulting her.

[11] In her statement given 4 May 2011, the complainant elaborated on some of the incidents mentioned by her in her first statement. She said in relation to the count 1 incident that she did not tell the appellant that day that she had stomach pain and did not ask him to rub her stomach, but that her grandmother may have told the appellant that she had stomach pains.

[12] The complainant gave a more detailed account of the alleged digital rape, explaining:

> "He has then penetrated my vagina with his finger and it felt like it was only up to the first bone on his finger… I could feel it was inside my vagina and it was hurting me. He was moving his finger slowly in and out of my vagina, the pain felt like pressure on the immediate area where his finger was as well a ripping sensation in the exact same area of the vagina."

[13] The complainant said that when she told Ms BK what the appellant had done, she merely said that he was acting inappropriately and touching her.

[14] In respect of the second computer incident, she said that when Ms BN got out of the shower, she told her that the appellant had put his hands down the back of her pants and touched her buttocks on the bare skin.

[15] In the course of her pre-recorded evidence, it was put to the complainant that she had sat on the appellant's knee at his computer desk, told him that she had "a really sore stomach" and that he massaged her stomach "just below [her] belly button".

[16] In response to it being suggested to her that in the car on the way to the appellant's house, the complainant had said that "maybe the pain in [her] stomach might be a sign that [she was] getting [her] first period". She responded "I had no idea what it was, or even what a period was". She said that her mother was a doctor but had

never spoken to her about periods. She accepted that at around the same time she had had a discussion with her grandmother about her first period and about stopping at "the shops". She accepted that the car did stop at a shop and that this was in connection with her first period.

[17] She also accepted that she "actually went and sought [the appellant] out around lunchtime complaining about the pains in [her] stomach" and that she sat on his lap in the computer room and that he rubbed her stomach. It was put to her that as she stood up the appellant's hand touched the top of her pubic bone and that the appellant immediately apologised saying "Look, it won't happen again. You can do the massage and pressure points yourself. You've been shown twice now". She denied that.

The pretext telephone call

[18] The following conversation occurred in the course of a pretext telephone call made by the complainant to the appellant on 26 April 2011:

"Complainant Yeah, why did you touch me?

Appellant Um, well ah, wh-, what we were doing was, I was, or this is how I look at it, I was um, I was trying to help you with your pain

Complainant What pain, and how does like touching me in private sexual areas help that

Appellant Well I didn't think I touched you in a sexual area, I was rubbing your tummy because you got, you got pains in your tummy

Complainant But you went lower

Appellant Well only when I stood up and it was by an accident, very much by accident and I, i regret even rubbing your tummy

Complainant But it wasn't just one occasion

Appellant Beg your pardon?

Complainant It wasn't just one occasion

Appellant That was twice but no I didn't touch you sexually the first time, the second time as far as I can remember my hand slipped, I had no intention what-so-ever.

Complainant But you did touch me down there

Appellant I didn't go right down no, not that I remember anyhow, why are you bringing this up now

…

Complainant You made everyone te-, call me a liar about touching me and

Appellant No I didn't, no I didn't, no I never, never called you a liar. I never -

Complainant You may not have but you let them believe that

Appellant No, no I didn't

Complainant I didn't get any support

Appellant Well when CMD, when your mum confronted me I said yes I, I, I did do something like that but i had not intentions, I said that I, I um, I don't know why I did it, if, if I, I just don't remember the whole thing

Complainant But

Appellant It's like I was fazed out

Complainant Did you tell her that you've, you touched me or

Appellant Yeah

Complainant In private places

Appellant I, I told her that um I was rub, I remember, I remember the first instance when I was rubbing your tummy

…

Appellant Yeah, no, no I'm so regretful of what, what happened and I shouldn't have been rubbing your tummy in the first place

Complainant Mmhmm

Appellant And, so that's how I look at it, I was using that um, acupuncture, pressure points and ah yeah, I was getting a little bit ah too personal

Complainant Mmhmm

Appellant And I didn't know, I didn't think anymore of it but yeah I, after, after that sort of thing happened I thought crikey ya know what am I doing ya know, in the olden days I'd have my hand cut off you know

Complainant Yeah

Appellant But I never, ever intentionally wanted to touch you sexually

Complainant Yeah"

The appellant's arguments

[19] Counsel for the appellant advanced the following arguments in support of the grounds of appeal.

[20] Although telling the interviewing police officer in May 2011 that she did not tell the appellant that she had stomach pain, the complainant later conceded in cross-examination that she had told Ms BN that she told the appellant that she had stomach ache. She rejected telling Ms BN that when she realised what the appellant was doing she just jumped off his lap and walked away. Nothing in Ms BN's evidence of what she was told is sufficient to prove indecency beyond doubt.

[21] The complainant conceded in cross-examination that there were two instances in which the appellant had massaged her stomach for pain. The concession was consistent with the appellant's version of events in the pretext telephone conversation. The complainant's evidence about not knowing what a period was and not having spoken to anyone about periods is inconsistent with her statement to police that she thought she was getting her first period. In cross-examination the complainant agreed that she had not pushed the appellant away, contrary to what she had told police on 26 April 2011.

[22] None of the complaint evidence supports the complainant's evidence of a five to 10 minute external massaging of the vaginal area during the count 1 incident. As the complainant's evidence was rejected by the jury on the other three counts, there is nothing in the whole of the evidence that can explain why a jury would believe the complainant beyond reasonable doubt as to her version of the count 1 incident in the absence of corroborating evidence.

[23] Other evidence that should have affected the jury's assessment of the complainant's credibility and reliability include:

(a) the complainant's admission of having falsely accused her father of putting his hands down the back of her pants and touching her buttocks;

(b) although the complainant accepted in cross-examination that she did not use the words "digitally penetrate" when making her statement to police on 26 April 2011, the interviewing police officer swore that the words were definitely used by the complainant;

(c) although the complainant said in cross-examination that she was scared when making the pretext telephone call, her questions of the police officer and laugh at the end of the recording suggest otherwise, as does the fact that she was in a police station at the time;

(d) differences between what the complainant said she had told Ms BK and what Ms BK said she had been told by the complainant;

(e) the character flaws revealed by the complainant's last minute refusal to attend her uncle's wedding and play the flute as arranged because she felt ill and had homework and study to do. She was 14 at the time; and

(f) Ms SH, to whom a complaint was made, recalls the complaint to her as having been made in April/May 2007.

[24] Counsel for the appellant compared the circumstances of this case with those in *R v D*,[1] in which an acquittal on seven out of eight counts on the indictment was found irreconcilable with a guilty verdict on the one count. It was submitted that like *R v D* where there was an acknowledged possibility that the jury had started out with a favourable impression of the complainant's truthfulness, they were left with reasonable doubt in each instance in which the appellant's denial was confirmed by evidence of some other witness.

[25] Reliance was placed on the following passage from the reasons in *R v D*:[2]

> "It is true that trial juries are regularly directed that they may properly accept and act on part only of the testimony of witnesses while rejecting other parts of it. In the process of doing that, however, a point may be reached where so little reliable evidence survives as to make it unsafe to act on what remains. In *Jones v The Queen* (1997) 191 CLR 439, 453, Gaudron, McHugh and Gummow JJ had this to say about the complainant's evidence in that case:
>
> > 'The jury's finding of not guilty on the second count damaged the credibility of the complainant with respect to all counts in the indictment. Implicit in the appellant's acquittal on the second count was a rejection of the complainant's account of events which were said to give rise to that count.
> >
> > Whatever the explanation may be, however, the jury's rejection of the complainant's account on the second count diminished her overall credibility.
> >
> > It is difficult then to see how it was open to the jury to be convinced beyond a reasonable doubt of the guilt of the appellant with respect to the first and third counts. There is nothing in the complainant's evidence or the surrounding circumstances which give any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count.'"

[26] It was said that the above remarks applied with equal or with greater force to "the evidence, the circumstances and the result in the present case".

Consideration

[27] In *MacKenzie v The Queen*,[3] Gaudron, Gummow and Kirby JJ said:[4]

> "…if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be

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1 [2000] QCA 417.
2 At [11].
3 (1996) 190 CLR 348.
4 At 367 (citations omitted).

> accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."

[28] In *R v CX*,[5] Jerrard JA summarised the principles applicable to inconsistent verdicts as follows:[6]

> "A number of matters of principle have been settled …
>
> 1. …[T]he onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. …
>
> 2. Whether… verdicts are inconsistent… is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury… could have arrived at the various verdicts?
>
> 3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent… and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted."

[29] The principal obstacle in the way of acceptance of the appellant's contentions that the different verdicts represent "…an affront to logic and commonsense which is unacceptable"[7] is the admissions implicit in the pretext telephone conversation.

[30] The cross-examination of the complainant was conducted on the basis that two incidents had occurred in which the appellant had massaged the complainant's stomach for the ostensible reason of alleviating pains associated with her period. It was put that on the first such occasion, the massaging was "just below [her] belly button" and that as the complainant stood up, the appellant's hand touched the top of her pubic bone, because the appellant was still massaging. It was also put that the appellant immediately apologised, saying "Look, it won't happen again".

[31] The difference between the complainant's account and that put to her was essentially that the complainant contended that the massaging was of the vaginal region and lasted five to 10 minutes whereas it was put that any touching that occurred was the result of an accidental slip. Although her account on 26 April did not include reference to the massage being for the stated or ostensible purpose of relief of stomach pain, the complainant accepted in her interview of 4 May that the

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5 [2006] QCA 409.

6 At [33].

7 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

appellant was probably told by the complainant's grandmother that the complainant had stomach pain. In cross-examination the complainant accepted that stomach massage took place in relation to pain although it was not at her request.

[32] In the pretext telephone call the appellant did not directly concede that he had touched the complainant "in a sexual area". However, his protestations of innocence, apologies and excuses for his conduct could readily have been taken by the jury to be much more consistent with guilt than innocence. The appellant conceded that he was getting "a little… bit too personal". He said he did not know "why [he] did it" and professed memory loss. The observation that "… in the olden days I'd have my hand cut off, you know" is strongly suggestive of an acceptance that his handling had been unambiguously sexual. The observation, prefaced by the statement that the appellant did not think he had touched the complainant "in sexual area", was in response to the query "…how does like touching me in private sexual areas help that?"

[33] The content of the pretext telephone call provides a clear explanation for the jury's failure to acquit on count 1, while acquitting on counts 2 and 3. Not only was there acceptance by the appellant that there was an occasion on which he had massaged the complainant's lower stomach when she was seated on his lap but he acknowledged, implicitly, that his conduct had been inappropriate. The acquittal on count 2 is explicable on the basis that the jury could have concluded on the complainant's own account that the incident was the result of an accident or was trivial in nature.

[34] Contrary to the appellant's contentions, the complainant's credibility was supported by her complaints to her mother, Ms BK, Ms BN, and Ms CN (her father's wife).

[35] Ms BK recalled the complainant telling her that she had been sexually abused by her grandfather, "that they were at a computer and he asked her to sit on his lap and he put… his hand down her pants."

[36] Ms BN recalled that the complainant told her about her grandfather offering to rub her stomach when she had a stomach ache; rubbing her stomach as she sat on his lap; rubbing lower and lower and lower until "it got to a point where it was not normal for him to be rubbing that low."

[37] The complainant's mother, in a statement given prior to her death, stated that she was told by the complainant that she had been "abused and touched in the private area" by the appellant the previous week. She told her mother that the appellant had "put his hands down the front of [her] pants," when she was sitting on his lap. Asked if the appellant had gone "inside or outside [her] private area" she responded "the outside". The appellant's mother also recalled this exchange with the appellant shortly after her conversation with her daughter:

> "I have rung the doorbell and my father has answered.
>
> I stood on the front door step and didn't walk in.
>
> I said to dad '[the complainant] has told me something disturbing that has happened last week.'
>
> Dad said 'Oh, I know how that can be misconstrued.'

> Dad said 'She had a pain in her stomach, and so I just rubbed her tummy for her and as she got up my hand might have slipped to the wrong place.'
>
> I said 'I don't want to hear it, don't go near her again.'"

[38] That evidence also corroborated the complainant's allegations in respect of count 1.

[39] The criticism of the complainant's evidence based on the lack of specificity in her complaints is not persuasive. It is understandable that a young female may not wish to explain in graphic detail how she was indecently handled, particularly by her grandfather. Also, minor discrepancies in the respective recollections of the persons to whom complaints were made and the complainant's evidence are not particularly damaging to the complainant's credibility. The persons to whom the complaints were made were asked some years after the event to recall words spoken to them. The complainant was providing her account of events which she had experienced. It is only to be expected that the respective persons to whom the complaints were made, or some of them, may have forgotten or may have been mistaken about aspects of what they were told.

[40] I am unable to accept that it was unlikely that the complainant was stressed during the pretext telephone conversation. She may have been physically secure in a police station but she was engaged in a process of entrapment; taxing her grandfather with indecent conduct which, if proved, might lead to his prosecution and imprisonment. Even most adults, I suspect, would feel stress in these circumstances. The content of the conversation was not scripted in advance and it would be unremarkable to conclude that it should have proceeded like a well ordered cross-examination, covering all allegations in sequence with the complainant taking issue with all matters with which she disagreed. It is also not remarkable that the complainant may have chosen the count 1 and count 2 incidents to discuss rather than the more confronting count 3 incident. It will be recalled that, according to the complainant, the appellant had apologised to her about the count 1 incident.

[41] In the circumstances I have outlined, this was not a case in which the jury's failure to find guilt beyond reasonable doubt in respect of counts 2, 3 and 4 so damaged the complainant's credibility that her evidence on count one had to be rejected. As I have explained, her evidence in relation to count 1 had substantial corroboration.

[42] For the above reasons I would order that the appeal against conviction be dismissed.

[43] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.