SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCM* [2012] QCA 333
PARTIES:	**R** **v** **BCM** (appellant)
FILE NO/S:	CA No 187 of 2012 DC No 103 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	4 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2012
JUDGES:	Chief Justice and Muir and White 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 – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where appellant charged with three counts of indecent treatment of a child under 12 who was in his care – where appellant convicted on counts one and two, jury was unable to reach a verdict on count three – where complaint forming basis of third count made one year after complaint forming basis of counts one and two – where complainant was unable to identify precisely when the offences were committed but identified the offences as occurring near in time to a birthday party – whether trial judge provided adequate direction to the jury regarding the need to be satisfied the alleged conduct occurred near the time of the birthday party – whether the verdicts were unsafe and unsatisfactory *R v Jacobs* [1993] 2 Qd R 541, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited
COUNSEL:	S Ryan for the appellant G Cummings for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE**: The appellant was convicted on two counts of unlawfully and indecently dealing with a child (E) who was under 12 years of age and in his care. Each charge nominated, as the time of commission of the offence, "a date unknown between 30 September 2008 and 1 December 2008". The jury could not agree on a verdict in relation to a third count, which was in similar terms. The appellant was imprisoned for 12 months suspended after six months for an operational period of two years.

[2] E was born on 6 December 2001. She was therefore six years old at the time of the offences, just short of her seventh birthday. The appellant was the stepfather of E's own father, in other words, her "step-grandfather".

[3] The evidence disclosed that the offences came to light in March 2011, when E told her mother what had happened. She told her mother that the appellant had touched and tickled her underneath her underpants. It occurred when, having experienced a nightmare, E went into her grandparents' bed, where they both were, for comfort. She awoke to experience the appellant touching her. That was the conduct involved in the first count.

[4] E then told her mother that the appellant behaved similarly the following day. That was count two. E's grandmother had gone out. E then withdrew herself from the situation by saying that she needed to go to the toilet.

[5] E said that those events occurred at a time near to the time of a surprise birthday party held for the appellant. That party was in fact held on 6 November 2008.

[6] A police officer interviewed E on 26 April 2011. E gave a similar account of the two events to the police officer. She told him that the second incident occurred near a wall. Both incidents occurred during a "sleepover": E and her brother stayed overnight at the grandparents' house.

[7] In March 2012, in anticipation of the pre-recording of her evidence, E went through her account with her mother. Then for the first time she spoke of a third incident, and that became the subject matter of count three, on which the jury could not agree. E told her mother that the appellant touched her private parts and got her to touch his. He was wearing only a shirt. He bounced E's body on top of his own. She laughed and giggled during this incident, and said to the effect that she had not earlier wanted to tell her mother about it because she was embarrassed by what she considered to be her inappropriate reaction to what was being done to her. She said that the appellant told her not to tell anyone what had occurred.

[8] It will be seen that whereas E informed her mother of the first two incidents two years and four months after they occurred, she raised this third incident a further 12 months on. E gave a similar account of the third incident when interviewed again by a police officer on 15 March 2012.

[9] E was cross-examined on two occasions, 29 March 2012 and 17 July 2012. On the first occasion, she said that she did not tell her mother about the third incident, when

she spoke to her mother for the first time about these things in March 2011, because she was scared, and that when she first spoke to the police officer she had forgotten about that incident.

[10] During each cross-examination, E was asked about whether foster children cared for by the appellant and his wife were present at the house. During the first cross-examination, E said that the foster children were not in the house when the offending occurred. During the second cross-examination, E said that she was not sure whether or not the foster children were then living with the appellant.

[11] E said that all of the offences occurred at a time near to the time of the surprise birthday party held for the appellant. As mentioned, that party occurred on 6 November 2008.

[12] The appellant gave evidence denying the charges. He said that two fostered girls came to stay at his house on 15 October 2008, and were there over the period in question. He said, relying on his wife's diary, that E and her brother slept over at his house on 14 November 2008. E slept in the same room as the fostered girls. He said that the last visit by E and her brother before the arrival of the foster children was on 11/12 October 2008 when they went to Sea World. The appellant's wife gave evidence which was consistent with the appellant's evidence.

[13] The defence placed emphasis on E's assertion that the foster children were not in the house when the events occurred, whereas, as the wife's diary confirmed, they had arrived in mid-October. The prosecutor pointed, on the other hand, to E's understandable inability to be certain about dates, and as to the presence or absence of the foster children, whereas she plainly put the offending proximately in time to that of the surprise birthday party.

[14] The grounds of appeal are that the verdicts are unsafe and unsatisfactory, and that a miscarriage of justice resulted from the Trial Judge's failure to direct the jury that before they could convict the appellant, they needed to be satisfied beyond reasonable doubt that the offences occurred either "within days of the appellant's surprise birthday party" or "within the dates span particularized in the indictment".

Adequacy of direction

[15] The directions given by the learned Judge included these passages concerning the time of commission of the offences:

> "Now in relation to the things that need to be so established to your satisfaction beyond reasonable doubt, the first thing to note is that… the allegation here is premised on the particulars that the offences occurred on a date unknown between the 30th day of September 2008 and the 1st day of December 2008. So that particularises what the allegation is as to when it occurred.
>
> Secondly, as to place, it was at B, in the State of Queensland and you of course have evidence that that is where the defendant and his wife lived at that relevant time and therefore if E was at that house in that period of time, she was at that place.
>
> … it can be said that although you must necessarily be satisfied beyond reasonable doubt of all of these elements before finding the

> defendant guilty, you might conclude, in the circumstances of this trial, that the only element you need to focus on is whether it is proved beyond reasonable doubt that the alleged dealings occurred.
>
> When I say 'alleged dealings' I mean occurred as alleged. That is between the dates, the 30th of September 2008 and the 1st day of December 2008."

[16] Counsel for the appellant submitted that the direction failed adequately to convey the need for the jury to be satisfied beyond reasonable doubt that the offences occurred proximately to the birthday party, or within the timeframe particularised in the charges. Submitting that the alleged timing of the offences was in this case material or vital, she referred to *R v Jacobs* [1993] 2 Qd R 541.

[17] The prosecution evidence tied the commission of the offences proximately to the birthday party which occurred on 6 November 2008. In a responsive way, the defence sought to raise doubt by establishing, partly by reference to the diary, a lack of opportunity because of the complication of the presence of the foster children. While the particularised dates were not strictly speaking elements of these offences, that the offences occurred within the timeframe alleged, and particularly in proximity to the party, was central to the way the case was conducted by both parties, and so it was incumbent on the Judge to instruct the jury they should not convict unless they accepted E's evidence as to when the offences occurred. He did.

[18] The instruction given by the Judge, extracted above, adequately dealt with the issue. Those instructions included His Honour's express direction to the jury that to convict, they must be satisfied beyond reasonable doubt that the respective offences occurred during the period particularised in the charge. The appellant's submission essentially went to the degree of emphasis with which the Judge should have delivered that direction. I do not consider the absence of further direction on this issue rendered the summing-up defective.

Reasonableness of verdicts of guilty

[19] Counsel for the appellant submitted that the circumstances in which E first complained to her mother of the third incident were unusual, probably explaining the jury's inability to agree on count three, and that they "gave rise to doubts about her credibility and reliability overall", such that the verdicts of guilty and the inability to agree in respect of count three were "inconsistent and irreconcilable".

[20] There is however a rational explanation why the jury were unable to reach unanimity on count three notwithstanding the verdicts of guilty on the other counts. That is the fact that E delayed for a further year before raising the allegations involved in the third count with her mother, where on E's account, all three incidents had occurred within the same comparatively short time period. One or more jurors may have considered that circumstance rendered E's evidence on count three unreliable. Yet she gave an explanation for that delay – that she was scared, and that she was embarrassed about responding inappropriately during the incident – which jurors may have accepted as believable, especially with this very young girl, so that although they found her evidence on count three unreliable, that may not have caused them to doubt her credibility overall.

[21] Counsel for the appellant submitted that the documentary support for the arrival of the foster children, as to the date of the sleepover, and as to the visit to Sea World, was compelling evidence which substantially eroded E's claims. In her address to the jury, the prosecutor submitted that the wife's diary was not a complete and accurate record of the comings and goings to and from the appellant's house, and that the diary had "holes". The jury were entitled to approach reliance on the diary, and the conclusions said to be drawn from it, with circumspection.

[22] In the course of her submissions to the jury, the prosecutor said this:

> "So, is E's evidence so inconsistent with the diary that you simply have to conclude she's unreliable? Again, I suggest it's not. E said that she – the offences happened before the birthday party. The accused man and his wife say that E did not visit until after the birthday party. But when E was cross-examined about the precise timing of the sleepovers and the presence and absence of foster children in the court last week, she really couldn't remember those things. It's not the case that she was adamant about them and now has been proven dead wrong."

[23] Counsel for the appellant submitted this implied an onus on the defence to prove the complainant wrong. I do not accept that submission, and it is significant in this case that no further direction was sought from the Judge. Needless to say he gave orthodox directions as to the onus of proof. All the prosecutor was saying, on my reading of that passage, was that the complainant's credibility survived the examination and cross-examination to which she had been subjected.

[24] In the end, the issue for the jury was whether, in the context of the defence evidence, they were nevertheless satisfied beyond reasonable doubt that the respective offences occurred as related by E, including within the nominated timeframe (as to which see *SKA v The Queen* (2011) 243 CLR 400, 409). Especially having regard to the consistency of E's accounts, from when she first spoke to her mother in relation to counts one and two, the jury, acting reasonably, was entitled to take that view. Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict.

[25] I would dismiss the appeal.

[26] **MUIR JA**: I agree that the appeal should be dismissed for the reasons given by the Chief Justice.

[27] **WHITE JA**: I have read the reasons for judgment of the Chief Justice and agree with his Honour's reasons and the order he proposes dismissing the appeal.