SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBV* [2013] QCA 17
PARTIES:	**R** **v** **MBV** (appellant)
FILE NO/S:	CA No 253 of 2012 DC No 5614 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Dalby
DELIVERED ON:	15 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2013
JUDGES:	Margaret McMurdo P, Muir and Gotterson JJA 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 – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted after trial of one count of indecent treatment of a child under 16 and one count of attempted indecent treatment of a child under 16 – where the complainant was the appellant's step-granddaughter – where the complainant made a telephone call to the appellant which was recorded by police – where the pretext telephone call was found to be admissible at trial as demonstrating consciousness of guilt – where appellant contends that his responses do not amount to admissions – where the appellant contends that, alternatively, if the pretext telephone call was admissible as a matter of law, it should have been excluded in the exercise of the trial judge's discretion, either at common law or under s 130 *Evidence Act* 1977 (Qld) – where the trial judge was not asked to exclude the pretext telephone call on discretionary grounds – whether evidence admissible – whether miscarriage of justice occurred *Evidence Act* 1977 (Qld), s 93A, s 130

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, noted
R v Christie [1914] AC 545, considered
R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, considered
R v Doolan [1962] Qd R 449, distinguished
R v Ortega-Farfan (2011) 215 A Crim R 251; [2011] QCA 364, considered

COUNSEL: D R Kent for the appellant
B J Merrin for the respondent

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

[1] **MARGARET McMURDO P:** The appellant was convicted in the Dalby District Court on 30 August 2012 of indecent treatment of a child under 16 (count 1) and attempted indecent treatment of a child under 16 (count 2). The complainant in each count was the appellant's step-granddaughter. He has appealed against his conviction on the ground that the trial judge erred in admitting evidence of a pretext telephone call between the complainant and the appellant. He contends that the only passage upon which the prosecution relied was equivocal and did not amount to a statement against interest. If the evidence was admissible, he submits that the judge should have excluded it in the exercise of his discretion, either at common law or under s 130 *Evidence Act* 1977 (Qld).

The evidence at trial

[2] It is necessary to refer to the evidence at trial to understand the context and significance of the impugned evidence.

[3] The complainant gave evidence that the two offences occurred on different days on the family property when the appellant was visiting. Count 1, the first incident of improper conduct, took place in a bedroom in the house. The appellant had the complainant touch his penis and then touched her breast and genital area. The second count occurred when the appellant and the complainant were lying in bed under the covers in a caravan with others present. He moved his hand towards her stomach[1] and tried to pull down her pants. He continued to touch her sexually on many occasions between January 2008 and July 2009 when she was 12 or 13 years old. During this 18 month period, the appellant visited every month or two. He was charged only with the incidents particularised as counts 1 and 2.

[4] She first disclosed the alleged offending to her father's partner on 14 October 2010 when she was 15. Her father's partner gave preliminary complaint evidence. On her suggestion, the complainant made four pages of notes about the incidents. She was interviewed by police on 19 October 2010. Her video-recorded police interview (ex 1) and her notes (ex 2) were tendered under s 93A *Evidence Act*. She also gave pre-recorded evidence on 17 February 2012. In cross-examination she maintained that the appellant committed the offences.

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[1] The prosecution particulars and the trial judge in his summing up referred to the appellant's hand being "on" the complainant's stomach, but the complainant's evidence was that the appellant put his hand "towards" her stomach.

[5] The impugned evidence was as follows. A police officer arranged for her to phone the appellant on 19 November 2010 and recorded the phone call which extended over approximately 20 minutes. She spoke to the appellant, then to her "nanna" (the appellant's partner), before again speaking to the appellant in these terms:

> "[COMPLAINANT]: Are you alone there?
> [APPELLANT]: Yeah.
> [COMPLAINANT]: So nanna can't hear you?
> [APPELLANT]: Hey?
> [COMPLAINANT]: So can nanna hear what you're saying?
> [APPELLANT]: Yes.
> [COMPLAINANT]: Can I talk to you like, in private?"

[6] They then discussed a pet dog before the following critical conversation:

> "[COMPLAINANT]: Hey MBV?
> [APPELLANT]: Hmm.
> [COMPLAINANT]: How come you told me not to tell anyone about what we did?
> [APPELLANT]: What, that what did? [INDISTINCT] about?
> [COMPLAINANT]: You know.
> [APPELLANT]: No.
> [COMPLAINANT]: When you touched me and stuff.
> [APPELLANT]: Hey, for goodness sake, don't go there, for God's sake.
> [COMPLAINANT]: It's like, would you get into trouble?
> [APPELLANT]: Anybody would who done things like that. Holy hell!
> [COMPLAINANT]: Hmm.
> [APPELLANT]: That's talking silly [complainant's name]. Anyway I gotta go."

[7] I have listened to the recording.[2] The appellant's tone of voice during the impugned evidence sounded angry and defensive, not surprised or confused. It differed from his more relaxed tone of voice earlier in the recording.

[8] Defence counsel objected to the admissibility of the impugned evidence, contending that it did not amount to an admission. The trial judge rejected that submission. His Honour held that the jury were entitled to conclude that the only reasonable inference was that the appellant made those statements conscious of his guilt that he had inappropriately touched the complainant. It was a matter for the jury whether they ultimately came to that conclusion.

[9] The evidence of the complainant's father together with the prextext telephone call established that, prior to her complaint and shortly before the untimely death of her mother from cancer, there was a rift between the appellant and the complainant's father. This rift was not associated with the appellant's relationship with the complainant. The nature of and reason for the rift and the associated family tension was not further explored.

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[2] I have set out what I clearly heard on listening to the recording. This varies slightly from the prepared transcript (ex 'MFI' C).

[10] The appellant did not give or call evidence but defence counsel submitted to the jury that the rift may have provided a motive for a false complaint and that the impugned evidence recorded only the protests of a man who knew nothing of the touchings. Defence counsel submitted the jury could not accept the complainant's evidence beyond reasonable doubt.

The judge's relevant jury directions

[11] The judge gave lengthy directions concerning the impugned evidence, noting that both counsel had placed emphasis on it in their addresses. His Honour continued:

> "And of course you are also entitled to have regard to what you can gain from her voice during the conversation and the [appellant's] voice, although there might be some difficulties in relation to the [appellant], probably because he was talking through a phone that was being recorded, where it did seem to distort his voice you might think so that you perhaps didn't hear his natural voice, at least not at all times.
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> And again, of course, it's for you to determine what was said in this conversation. …"

[12] After reciting the impugned evidence and some of the preceding conversation, his Honour added:

> "… The prosecution, in effect, submits to you that the only rational or reasonable explanation for his reaction was because it was, as [the prosecutor] put it in his opening address, an implied admission. That he knows what she is talking about because he had a sexual interest in her and he had given effect to that by touching her in a sexually inappropriate way.
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> [The prosecutor] said during the course of his closing address about this - and I don't purport to do anything than attempt to summarise what he said to you after he played that pretext call to you - he submitted that you will take into account that, despite the phone call to that point involving a pleasant chat between [the complainant] and him and his wife, as soon as she put to him about touching her he wants to get off the phone. He asked you rhetorically 'If that was said to you, would you respond as he did?', and he submits the answer is 'No'. He submits there is real resignation in his voice because, as he put it, their secret is coming out against his wishes. He submits the [appellant] knew at that point exactly what she was talking about and this is why he gets off the phone. He submitted to you that he just wanted it to go away.
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> He reminds you that the [appellant] at that stage did not know the conversation was being recorded, in fact I believe it was his wife in the conversation who asked [the complainant] whether the conversation was being recorded and she said 'No'. His wife perhaps seemed to be concerned that if it was being recorded it would get back to her family because of the break down with the family.
>
> He submits that therefore the complainant's account of what happened is supported by the [appellant's] own admissions because

he had a guilty knowledge. He submitted to you the only sensible way to look at this conversation and the [appellant's] reaction is that he understood perfectly what she talked about and he was concerned about his guilty secret coming out.

He submits to you, for example, when he responded to her assertion that he had '…touched her and stuff', by saying 'For goodness sake, don't go there, for God's sake', he knew there was somewhere to go and he knows this because there was some past touching which was known to them. He submits to you that the response wasn't 'What are you talking about?' or 'What trouble?' or 'What reason would there be for me to get into trouble?', but rather he says 'Anybody would who done things like that, … . So, again it's submitted to you he knows full well what trouble he could get into because he was accepting his previous conduct with her, as she alleged.

You can only use this evidence against him if you are satisfied beyond reasonable doubt that the only rational interpretation of this reaction by the [appellant] was in fact an acknowledgment by him - or to put it another way, a consciousness by him of the truth of the allegations she was making because he did in fact know what she was talking about because he had had sexual interest in her and he had given effect to that interest by touching her sexually in inappropriate ways.

As I said, you must consider this reaction in the context of the whole conversation. You must also exclude any other rational or reasonable explanation consistent with his innocence.

There is no sworn evidence in this case of other explanations or interpretations, but because the [appellant] is not obliged to give evidence and the burden of proof is on the prosecution you are entitled to consider other reasonable explanations or interpretations consistent with his innocence. For example, whether this was purely a poor choice of words in confusion or panic, in responding to an unexpected and unjust accusation. And you would consider [defence counsel's] submissions to you where he asked you to consider his reaction in the context of the whole phone call. He submitted to you that if you think of the whole phone call and the lead-up to that, you could conclude there was a real love that the [appellant] and his wife had for [the complainant].

And this is how the conversation went along before she 'dropped this allegation out of the blue', as [defence counsel] put it. He reminds you that when she first says 'How come you told me not to tell anyone about what we did?', that his answer's 'What that - what did - what you on?' or 'What are you on about?', really was no more than a query by him about what he was talking about. And when she says 'You know'; he responds, 'No'.

He submits the only rational inferences from "… for goodness sake don't go there, for God's sake' is not what the Crown alleges. He submits that it could reasonably be taken to mean 'Don't talk like

that. Don’t talk rubbish'. He submits that what it really is is an expression of incredulity, and he argues that this is fortified by almost immediately saying to her 'That's talking silly, [complainant's name]. Anyway, I got to go'. He places emphasis on the words 'That’s talking silly'.

He submitted that his reference to, 'Anybody would who done things like that, …' has to be looked at in the context that she made an allegation and then asked him a question, 'Would you get into trouble?', and he is simply responding to that question. So, what he submits to you is that there are interpretations which give a rational and reasonable or plausible explanation for how he reacted as he did, which exist in addition to the explanations that the Crown contends for, and he submits that the prosecution cannot establish beyond reasonable doubt that the explanation it contends for is the only rational explanation or inference that can be drawn as to why he reacted in the manner that he did.

If you can't exclude this kind of explanation beyond reasonable doubt, you cannot use this pretext telephone call against the [appellant]. You can only use it against him, I emphasis, if you are satisfied his response arose out of a realisation that the truth implicates him as having a sexual interest in [the complainant] which he had given effect to in a sexually inappropriate way.

[The prosecutor] submits that even in the absence of this pretext call, you will consider her to be a credible and reliable witness about her allegations, in any event. However, if you are entitled to use this pretext call because you have come to the conclusion, which I have mentioned that [the prosecutor] contends for, it is something you're entitled to consider in determining whether you are satisfied beyond reasonable doubt when she says this other non-specific sexual activity occurred and also in considering if his conduct the subject of count 2 was accidental; in other words, whether the Crown have excluded accident. As with everything else in this case, that is a matter for you.

That's not the only way that you can use the evidence in this case if you come to the conclusion the Crown contends for, …

In this case, that evidence includes, depending on what view you take of it, the evidence of the pretext telephone call and the [appellant's] reaction in that call, which is capable of independently confirming or supporting or corroborating her evidence not only about count 1 but, indeed, in relation to count 2. This is the other use, the other independent use that you are able to make of that evidence about his reaction in the pretext call, depending on what view you take of the evidence.

Again I tell you it would only be capable of independently, from his own words, his own reaction, confirming or supporting her evidence by way of corroboration, if the only rational explanation of it was he reacted as he did because, as it has been put, this was an implied

> admission that he knew what she was talking about because he had a sexual interest in her which he had given effect to by touching her in sexually inappropriate ways; that is, a realisation that the truth would implicate him in this way. This acknowledgment of the truth of the allegation must, as I have said, be the only rational inference in the context of the whole conversation. You must be able to exclude other rational explanations consistent with his innocence, for example, of the nature that [defence counsel] referred to and which I've just reminded you of.
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> If, for this reason, based on what he said in the telephone conversation, you're satisfied beyond reasonable doubt that he has demonstrated a sexual interest in the complainant, and that he had been willing to give effect to it by touching her in a sexually inappropriate way, it shows the nature of the relationship between them and this is capable of corroborating her when she says he acted towards her as she alleges he did on the two occasions that are the subject of the charges.
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> This is in view of what you might think are commonsense human considerations, because as I have said, if you're persuaded of this on the basis of how he reacted, it is more likely that the [appellant] acted towards her on these two occasions in the way that she alleges. Whether this is the view you come to is a matter entirely for you" (errors as in original).

[13] In summarising the competing prosecution and defence cases, the judge again referred to counsel's competing submissions as to the view the jury should take of the impugned evidence.

[14] The jury retired to consider their verdict at 2.13 pm on the third day of the trial. The court reconvened soon after to deal with two jury requests, the second of which was to have the impugned evidence replayed. The judge determined to replay the recording of the whole telephone call so that the jury could listen to the tone of voice. The jury retired at 3.56 pm and at about 5.35 pm indicated they were unable to reach a unanimous verdict on either charge. The judge gave them the usual directions in accordance with *Black v The Queen*[3] and they retired again at 5.48 pm. At 7.03 pm, they delivered their guilty verdicts.

The appellant's submissions

[15] No complaint is made about the trial judge's directions to the jury. Rather, the appellant contends that the impugned evidence was not an admission. It was simply a refusal by the appellant to engage in conversation with the complainant on the topic. To regard the fact that the appellant did not immediately and unequivocally reject the allegation as an admission was to reverse the onus of proof. To draw as the only rational inference from the impugned evidence that the appellant was admitting his guilt was to invite the jury to improperly speculate. The appellant's words were intractably neutral and did not constitute an admission. The evidence took on great significance at the trial. The judge wrongly treated it as a potential or

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[3] (1993) 179 CLR 44; [1993] HCA 71, [15] (Mason CJ, Brennan, Dawson, McHugh JJ, Deane J agreeing).

implied admission capable of corroborating the complainant's account. It was analogous to the evidence wrongly admitted in *R v Doolan*[4] where Townley J stated that:

> "even if an accusation followed by a denial or a statement not admitting the accusation is strictly admissible, nevertheless the statement, when denied or not admitted by words or conduct, is not evidence of the truth of facts alleged in it."

[16] If the evidence was admissible as a matter of law, the appellant contends the judge should have excluded it in the exercise of his discretion, either at common law or under s 130 *Evidence Act*.

[17] The wrongful admission of the impugned evidence has resulted in the trial miscarrying. The appeal should be allowed, the verdict set aside and a retrial ordered.

Conclusion

[18] An accused person's demeanour when confronted with an allegation that they have committed an offence may be admissible: see *R v Christie*.[5] So, too, an accused person's post-offence conduct or statements may be admissible where they give rise to an inference that they display a consciousness of guilt. Whether this is so will always turn on the nature of the evidence in question and its relevance to the issues in dispute. Where the trial judge is satisfied that such conduct or statements in light of all other relevant evidence are capable of demonstrating a consciousness of guilt, the evidence should be left to the jury to determine whether it has that effect. See *R v Ciantar*[6] and *R v Ortega-Farfan*.[7]

[19] The appellant contends that *Doolan* is analogous to the present case. The police gave Doolan, an Aboriginal man who was self-represented at trial, a written statement from another person implicating him in a robbery. He responded that he thought the other person had more sense than to give a police statement, adding: "He has dubbed us all in".[8] The other evidence implicating Doolan in the robbery was of poor quality. Townley J's observations upon which the appellant here relies[9] plainly turned on the evidence in that case which was quite different to that in the present case. *Doolan* does not assist the appellant.

[20] Here, the complainant gave clear evidence that the appellant committed the offences charged in counts 1 and 2. She maintained that account in cross-examination. There was no contrary evidence. The jury were entitled to find that the only rational inference from the impugned evidence was that the appellant did not wish to talk about how he had touched the complainant because he knew it amounted to morally reprehensible conduct which would cause him serious trouble. His plea to the

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4 [1962] Qd R 449, 456.

5 [1914] AC 545, 554 (Lord Atkinson, Lord Parker agreeing), 560 (Lord Moulton), 565-566 (Lord Reading, Lord Dunedin agreeing), 550 (Viscount Haldane LC agreeing with Lords Atkinson, Moulton and Reading).

6 (2006) 16 VR 26, 48 [69]-[72] (Warren CJ, Chernov, Nettle, Neave and Redlich JJA).

7 [2011] QCA 364, [53] (Fraser JA, Chesterman JA and Mullins J agreeing).

8 [1962] Qd R 449, 455 (Townley J).

9 Set out at [15] of these reasons.

complainant, "don't go there for God's sake", indicated that he knew about the touching to which she referred. His response to her query as to whether he would get into trouble for this touching was "Anybody would who done things like that. Holy hell!" His tone of voice changed during this part of the conversation; he became angry and defensive. Had he known nothing of the touching to which the complainant referred, he could be expected to have expressed surprise, disbelief, shock, or even horror. In conformity with *Christie*, such a reaction would have been admissible exculpatory evidence. By contrast, when the impugned evidence is considered in context, the jury were well entitled to find beyond reasonable doubt that it demonstrated a consciousness of guilt on the part of the appellant.

[21] It follows that the impugned evidence was relevant and admissible: it was capable of satisfying the jury beyond reasonable doubt of the appellant's consciousness of guilt. As the trial judge explained to the jury, it was a matter for them as to whether they accepted the inference advanced by the prosecution (that the appellant was effectively admitting the conduct alleged by the complainant) and rejected beyond reasonable doubt the defence contention (that the appellant was shocked and denying any touching). If the jury accepted the prosecution contention, the impugned evidence supported the complainant's account.

[22] The appellant contends that, even if admissible, the impugned evidence should have been excluded in the exercise of the judge's discretion, either at common law or under s 130 *Evidence Act*.

[23] The trial judge was not asked to exclude the evidence on any discretionary basis so there has been no error in law in this respect. The complainant was not in a position of authority or dominance over the appellant at the time of the relevant conversation. I can see nothing inherently unfair about the circumstances surrounding it or anything rendering it potentially unreliable so as to warrant its exclusion, either at common law or under s 130. The potential prejudice to the appellant if the jury misused the impugned evidence was curtailed by the judge's thorough directions concerning it.[10] Had the judge been asked to exclude the impugned evidence on a discretionary basis, it would have been well within a sound exercise of discretion to refuse the application. I certainly would not have excluded the evidence. I am unpersuaded that the admission of the impugned evidence has resulted in a miscarriage of justice.

[24] It follows that this ground of appeal is not made out. The appeal against conviction should be dismissed.

Order

Appeal against conviction dismissed.

[25] **MUIR JA:** Not having listened to the recording of the pretext telephone conversation, I am unable to endorse the President's observations on it so far as they are derived from her listening to it. I otherwise agree that the appeal should be dismissed for the reasons given by the President.

[26] **GOTTERSON JA:** I agree with the order proposed by the President and with the reasons given by her Honour.

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[10] Set out at [12] of these reasons.