SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBH* [2013] QCA 147
PARTIES:	**R** **v** **CBH** (appellant)
FILE NO/S:	CA No 254 of 2012 DC No 71 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	14 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2013
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of three counts of rape, two counts of indecent treatment of a child under 12 and one count of procuring a child under 12 to commit an indecent act – where the complainant gave evidence that the first of the conduct occurred sometime after her sixth birthday while she was living at "the blue house" – where the appellant pointed to documentary evidence that he was in the Northern Territory at the relevant time – where the appellant contends that it was not open to the jury to accept the complainant's evidence that the incidents occurred and to conclude that she was mistaken about the timing – where a medical practitioner found no evidence of physical trauma – where the complainant gave evidence that the digital penetration caused discomfort but not pain – where the appellant contends that there was a lack of reliable evidence of digital penetration – where the appellant submits that a photograph showing the complainant smiling and leaning into the appellant gives rise to reasonable doubt that the events occurred – where the appellant alleges that the complainant's evidence was vague and expanded and

changed – whether the verdicts were unreasonable and thus unsafe and unsatisfactory

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered

COUNSEL: The appellant appeared on his own behalf
B G Campbell for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: The appellant appeals against his convictions in the District Court in Townsville on 3 September 2012 of three counts of rape (counts 2, 3 and 5), two counts of indecent treatment of a child under 12 (counts 1 and 6) and one count of procuring a child under 12 to commit an indecent act (count 4). The Notice of Appeal contains no grounds of appeal but, having regard to the written and oral arguments advanced by the appellant, it is appropriate to regard his appeal as indicating the ground that the verdicts were unreasonable and thus unsafe and unsatisfactory.

[2] Before discussing the appellant's contentions, it is desirable to outline the evidence before the jury.

The evidence in relation to counts 1 and 2

[3] The count 1 and 2 offences were said by the complainant to have been committed when she was living in Townsville in what she referred to as "the blue house" with her mother and her siblings. The appellant's sister-in-law, who is the complainant's mother, gave evidence to the following effect. The complainant was born in February 2000. She lived in the blue house with her four children, including the complainant, between 13 May 2005 and 23 May 2006. During that time, the appellant and his former wife were working on a commercial fishing vessel in the Northern Territory. The appellant's former wife and their daughter would visit from time to time and were accompanied by the appellant once or twice. She recalled only one occasion on which the appellant and his wife stayed overnight. She did not notice anything untoward in the appellant's interaction with the complainant at any relevant time.

[4] The complainant did not complain about any sexual abuse to her until 29 December 2009. She took the complainant to the police on 4 January 2010, after having had "a series of conversations with [her] older children". When the complainant was 10, she found her accessing pornography on the computer.

[5] The complainant's evidence, in relation to counts 1 and 2, was to the following effect. When she was in the lounge room of the blue house, sitting on the appellant's lap, playing a computer game, the appellant put two of his fingers "over [her] vagina but not inside like over [her] knickers". That conduct constituted count 1. Describing the count 2 incident, the complainant said, "He said … Shhh and … covered my mouth". She felt "very uncomfortable" and could feel his two fingers. The complainant, asked to show what the appellant actually did with his

fingers, gave a description of the action the appellant used when "he was inside [her] vagina". She had earlier said that "the time when he got under my knickers … and I, I gasped when he did that, ah I uhh you and than (sic) he covered my mouth over and um cause I didn't get to finish my sentence and than (sic) he said shh because um [my aunt] was um there …". She then said words to the effect that her aunt had been in the kitchen nearby.

[6] The complainant gave the following evidence under cross-examination. She accepted that, by the answer given to the police officer about her age at the time of the count 1 and 2 incidents, she meant that they occurred some time after her sixth birthday while she was living at the blue house. She said that, at the time of the first incident, her mother and aunt were in the kitchen and she and the appellant were in the lounge room. The count 2 incident occurred some hours after the count 1 incident. One of her siblings was in the lounge room at the time watching television. She was asked "Was it uncomfortable?" and replied "Yes". Asked "Did it hurt?", she replied, "No". She said that she continued playing the computer game. Asked if her aunt had walked into the lounge room at the time the incident happened she said, "Yes". She accepted that she did not tell anyone about the incident while living at the blue house and that she did not act differently around the appellant when he visited. Asked if she "still played with him when he visited and had a good time with him?", she said, "Yes".

The evidence in respect of counts 3, 4 and 5

[7] The complainant described an occasion on which the appellant took her into one of two tents which had been set up in her grandparents' yard to enable the children to camp out for the night. She said that the appellant put some "gooey stuff", which he called "yummy stuff", on her vagina and licked it. The substance, a lolly, had been purchased by the appellant when he went shopping with the complainant and her sisters. After putting it on the complainant's vagina, he put "his um tongue up [her] vagina hole". This evidence related to count 3.

[8] Asked "What happened next?", the complainant said, "Well um he um as I told you he asked if I could (indistinct) put his (indistinct) I can pull his um doodle and do this". She said that she did that but refused his request for her to "put it in [her] mouth". This incident constituted count 4.

[9] The count 5 offending was also alleged to have occurred in a tent on the same evening. The complainant said that she "laid down on [the appellant] on [her] belly and … he moved his um doodle in [her] vagina, like with his hands". Asked what she felt, she replied "Yukky". She said that he moved it up and down. She then put her knickers and all of her clothes back on and "went into the tent". This would seem to be a reference to the other tent in which the other children were sleeping or playing.

[10] The complainant had earlier said that, seemingly after the count 3 incident, the appellant "put some of his spit on his um like his 2 fingers and than (sic) he put it in". In cross-examination, the complainant confirmed that she had camped out on only one night.

[11] Asked to confirm that there was only one occasion on which she said that the appellant put his penis in her vagina, she said that it happened also at her aunt's

house. Cross-examined further, she accepted that she could not recall where this incident happened, how old she was at the time or any other details about it. Asked if it was painful when the appellant put his penis in her vagina when they were in the tent, she said "Yes". Asked if it caused any injury, she said "No". Asked if she was sore afterwards, she said "Yes", but could not remember for how long.

[12] The appellant's former wife gave evidence to this effect. She recalled an occasion during which the appellant stayed in the tents set up on her parents' property with the complainant, her siblings and a cousin. The appellant had earlier gone out with his daughter to collect his three nieces, including the complainant, and returned with lollies. The appellant's former wife confirmed that she took photographs of the tents and the children on 24 March 2007, the day on which the children spent the night in the tents.

The count 6 incident

[13] The complainant described an occasion on which she had a sleepover at her aunt's home in Townsville. One of her sisters was there, as was her cousin and the appellant. The appellant came into the room where she was sleeping on a mattress near the other two girls. He asked her if she wanted to watch a television program "than (sic) he took of (sic) his pants um when I was watching (indistinct) put his doodle on me and than (sic) he accidentally peed on me". The appellant was wearing denim pants at the time. Asked to describe what happened, the complainant said, "He laid down and than (sic) he put his doodle on my hip … Um he was like laying down on the side like that and than (sic) he accidentally peed on me cause I'm very **sore**" (emphasis added). The complainant said that it was dark at the time and "the pee" lasted for "probably about 15 seconds". The appellant then got a "towel oh like a wet towel and he washed it off me and than (sic) he took me to his truck".

[14] During the cross-examination, the witness was stood down so that the prosecutor could explain that, having listened to the recorded evidence, she had concluded that the appellant said "cause I'm very **small**" (emphasis added) rather than "cause I'm very sore". Then, in the presence of the complainant, the prosecutor explained what she believed she had heard on the recording. The judge asked the complainant if she could remember saying something like what the prosecutor had just read out. The complainant answered, "Yes".

The complaint evidence

[15] Mr D, who had married the complainant's mother, told of an occasion in December 2009 when the complainant, in company with two of his step-daughters, told him that "she was being touched by her Uncle [the appellant]". Responding to questioning by him, the complainant said that "he touched her on [her] vagina" and that when "they were out at their grandparent's (sic) place … [the appellant] asked her to go to another tent … she put goo on … her vagina and he licked it".

[16] The complainant's eldest sister, then aged 14, gave an interview to police on 12 January 2010 in which she revealed how the complainant's approach to her step-father had come about. After she had been told something by one of her siblings, she and another sibling spoke to the complainant. She asked the complainant "if it was true", referring to a statement by another of the complainant's sisters that the

complainant "taught me how to do sex". She said that after the complainant told her "what happened" she and her other sibling eventually persuaded the complainant to tell her step-father. The girls, including the complainant, then went and saw the complainant's step-father.

[17] In cross-examination, the complainant's eldest sister said, in effect, that she had told the police everything that the complainant had relevantly said in "multiple conversations" in the course of the week or so after the complainant had made her complaint.

[18] The complainant's mother said that after she had a conversation with the complainant about the appellant's conduct, she had her medically examined on 5 January 2010. She said that the complainant told her that the appellant "had inappropriately handled her". The complainant spoke to her of:

> "… [an] occasion where she had been camping at her nanny and granddad's house and they had bought lollies and that for the camping trip and apparently later on that night, [the appellant] had put some green gooey stuff onto her vagina area and had licked it off her and she had also told … of another time where her – she had been – she slept over her [aunt's] house and apparently, after [her cousin] had gone to sleep that night, [the appellant] went up to her and asked her if she wanted to come out and watch Family Guy with her – with him, and she did and apparently he had – he made her touch his thing, she said, and pointed down there and she said he made me do this to him and she also said he then peed on her and then after that she – he cleaned himself off and she had to clean herself off. And they're the only two instances I can really remember from that conversation."

The appellant's evidence

[19] The appellant gave evidence to the following effect. By reference to fisheries records, he swore to conducting fishing operations based in the Northern Territory from 28 February 2006 through to 31 May 2006. He spent some time at his wife's parents' place just after the birth of his daughter. He thought it was three nights. He recalled the occasion on which four girls, including the complainant, stayed the night and camped. He did not recall any lollies other than marshmallows which his mother-in-law had at her house. He did not recall purchasing lollies. He had arrived at his parents-in-law's house after travelling for 30 hours across the Gulf of Carpentaria, then across the top of Queensland and down to Townsville. He had driven from Karumba to the Atherton Tablelands and then to Townsville and was extremely tired. He said that during the night "The girls told [him] that they were scared and asked [him] to go into their tent" and that he did so. He denied the allegations against him.

Consideration of the appellant's arguments

[20] The appellant referred to the complainant's evidence in cross-examination that the first of the appellant's indecent conduct happened sometime after her sixth birthday while she was living at the blue house and her confirmation that she was sure about that. The appellant pointed to documentary evidence tendered in the trial which

supported his oral evidence that he was in the Northern Territory from before the time of the complainant's sixth birthday up until the complainant's family had left the blue house. The appellant objected to the prosecution's submission to the jury to the effect that the complainant could have been mistaken about whether the incident occurred after, rather than before, her sixth birthday. This argument was advanced at the trial by defence counsel and the trial judge repeated it in his summary of the defence case.

[21] The complainant's mother gave evidence that the appellant "visited [the blue house] occasionally when he'd come to Townsville for holidays". She said that the appellant's former wife was always with him if he stayed the night. She accepted that "on very rare occasions, perhaps once or twice during that entire period that [she] lived [in the blue house], [the appellant] accompanied" his former wife and daughter when they visited the blue house. She accepted that when she gave her statement to the police she could only recall that the appellant, his wife and daughter stayed overnight at the blue house on one occasion.

[22] The appellant's former wife recalled that she and the appellant stayed at the blue house overnight on at least one occasion. She observed that the appellant and the complainant appeared to have a "close and loving uncle and niece relationship".

[23] The complainant was almost 12 at the time of the pre-trial pre-recorded evidence and, if her evidence is to be accepted, she was about six at the time of the offending the subject of counts 1 and 2. It is not particularly surprising that such a young person might be mistaken as to the precise timing of an incident, or incidents, if they were not linked to a particular memorable event. The count 1 and 2 incidents were linked to a time when the appellant visited and slept at the blue house. There was at least one occasion on which the incidents could have occurred. It was open to the jury to accept the complainant's evidence that the incidents occurred and to conclude that she was mistaken about the timing.

[24] The appellant referred to the allegation of digital rape in count 2 and complained that if he had digitally penetrated the complainant, his "large roughworking (sic) man fingers … would have ripped and torn [the complainant]". In this regard, he referred to the evidence of a medical practitioner who examined the complainant on 5 January 2010. The doctor found no evidence of physical trauma of any kind. He submitted also that it was improbable that, if such an incident had occurred, the complainant would not have suffered pain. He pointed to the complainant's evidence that the digital penetration did not hurt. From those matters, he sought to draw the conclusion that either the complainant did not know what digital penetration was or that she was lying.

[25] The submission about the lack of reliable evidence of digital penetration is contrary to the evidence. This exchange occurred in the first interview:

> Officer: Just, just tell me about what happened to you when he put his fingers inside your vagina. What did you feel?
>
> Complainant: (indistinct) felt very uncomfortable.
>
> …

Officer: What else could you feel?

Complainant: Oh I could feel his 2 fingers (indistinct)

Officer: Tell me about that.

Complainant: Um (indistinct) like his, his um his pointer was probably (indistinct) um and his rude finger was probably (indistinct)

Officer: And what, describe to me or show what he actually did with his fingers, without demonstrating on your body what action did he do?

Complainant: He went um like (indistinct) he was like this, sometimes he only put (indistinct) those 2."

The complainant proceeded to give a demonstration of what had occurred.

[26] The submission about the likelihood of pain, if not injury, being caused by digital penetration has greater merit. However, it was open to the jury to conclude that the penetration had been cautious and limited in its extent thus causing discomfort (as the complainant said) but not pain. As the medical practitioner observed, whether an injury could be caused by sexual abuse would depend on "whether penetration occurs or how far penetration occurs" and the size of the penetrating object.

[27] In respect of counts 3, 4 and 5, the appellant relies on a photograph taken on 25 March 2007 which shows a happy smiling complainant clustered with her cousin and two sisters around the seated appellant who is nursing his baby daughter. The complainant appears to be leaning against the appellant. The appellant submits that the photograph gives rise to a reasonable doubt that the events, which according to the complainant occurred the night before the photograph was taken, could have occurred. I accept the respondent's contention that the complainant's behaviour in this regard was not remarkable for a child of her age who had been subjected to sexual misconduct. The appellant was her uncle. She was happy to be with him and her cousins. She enjoyed a good relationship with him and her evidence was that her behaviour in relation to him did not change. It was open to the jury to conclude that, given the complainant's age, she may have failed to realise the inappropriateness of the alleged conduct, she may have been confused and she may have wished to remain on good terms with her uncle. The complainant may also have been apprehensive about the consequences of reporting the appellant's behaviour. There is, however, no need to speculate. The complainant was not cross-examined about the lateness of her complaint or the reasons for her unchanged attitude to the appellant whom she saw only infrequently.

[28] The next argument the appellant advanced in respect of count 5 was to the effect that, not only was the complainant's allegation vague but, her evidence expanded and changed. He submitted that the dates covered by the charge, between 21 March 2007 and 26 March 2007, are inconsistent with the complainant's evidence in cross-examination.

[29] The appellant argued that, in respect of the licking incident (count 3), no penetration was proved. He submitted that the evidence did not show that the complainant understood the meaning of the word "penetration".

[30] The evidence does not support this complaint. In the first interview the complainant said, "Um, well than (sic) um cause like he put it on my vagina and he puts his um tongue up my vagina hole". The complainant was asked, "how do you know that?" She responded, "Because I can (sic) feel it". A little later she was asked, "Tell me about how he put his tongue in your vagina hole". She responded:

> "Oh um he opened (indistinct) my vagina with his fingers there and put it um he was like that and than he lic (sic), started licking it … Um he was um here but than (sic) he was like cause we (indistinct) laying down on his back and I laid down on my belly (indistinct) and he was, my um my legs were going down there and his, he would (indistinct) like that."

[31] The complainant was asked again how she knew the appellant's "tongue was in [her] vagina hole". She replied, "Um I felt it".

[32] This evidence described the way in which the tongue was used and the only reasonable inference that can be drawn from it was that vaginal penetration occurred.

[33] The appellant argued that the complainant admitted in cross-examination that the complainant conceded that penile vaginal penetration did not occur when the complainant camped out. That argument is based on a mistaken construction of what was said. The complainant confirmed that penile penetration had occurred twice, "[o]nce in the tents and once at [her aunt's] house". The questioning which followed this confirmation related only to penile penetration on an occasion other than the camping.

[34] It is clear enough from the complainant's second interview that the complainant was asserting that the appellant inserted his penis in her vagina in one of the tents. That was accepted by counsel, whose cross-examination was based on the understanding that the complainant had said that penile penetration occurred on the camping evening.

[35] In the second interview, the interviewer said to the complainant:

> "… there was one thing that you told me about but you didn't tell me a lot about it, so you said to me initially, you said 'which house I can't remember' but you said 'he was in the room with me and than (sic) he put his doodle into my vagina' and than (sic) you said 'he asked me to hold his doodle as well'. So what I want you to do is, I want you to tell me everything about what you meant about him put (sic) his doodle in my vagina. I want you to tell me everything you can remember about that."

[36] The complainant responded:

> "Um, can't remember that much but I tell you what I remember, a little bit. Um – well – don't remember (indistinct) we were camping

> at (indistinct) … Um like you know, like he bought the (indistinct) and stuff, yeh (indistinct) put it on my vagina and licked it off – than (sic) he started putting um his um doodle in his vagina, in my vagina than (sic) he was licking my vagina and than (sic) I, he asked me if I could hold his (indistinct) um his doodle but um and than (sic) he asked me if I, if I could put it in my mouth but I said 'no'."

[37] There was further questioning and the complainant explained:

> Um well he was (indistinct) I laid down on him on my belly and um like (indistinct) um his, he moved his um doodle in my vagina, like with his hands … He's holding onto his doodle … And moving it into my vagina."

[38] The complainant was asked, "[W]hat did you feel with that?" and she replied, "Yukky".

[39] In the course of the complainant's cross-examination about what happened in the tents, this exchange occurred in relation to the camping occasion:

> "And is that the only time you say [the appellant] put his penis in your vagina? -- Yes.
>
> That didn't happen on any other occasions? -- Well it happened once at [my aunt's] house.
>
> In your vagina? -- Yes.
>
> So you're saying it happened twice? -- Yes.
>
> Once in the tents and once at [your aunt's] house? -- Yes.
>
> The occasion at [your aunt's] house, is that the one you talked to [the interviewing officer] about, where you say [the appellant] peed on you? -- Yes.
>
> Are you saying that, on that occasion, he in fact put his penis into your vagina? -- Yes.
>
> You didn't seem to tell [the interviewing officer] that he put his penis into your vagina on that occasion, rather that he just put it on your hip. Do you remember that? -- Yes.
>
> Is what's – you're right, go on? -- But I'm not positive that it was at [my aunt's] house, but I remember it was another time. Like one of the other times.
>
> So are you now saying that it's not the time that you've talked to [the interviewing officer] about, where [the appellant] peed on you? -- I'm pretty sure the other time was when – not the time when we were camping, and not the time that we were at [my aunt's] house, the – the other time.

> Is it the case that you can't recall where that happened? -- I can't – no, I can't.
>
> You can't recall how old you were? -- No.
>
> You can't remember any other details about that? -- No."

[40] There was an allegation of penile/vaginal penetration in an unidentified house. Early in the first interview, after the complainant had referred to the incidents the subject of counts 1, 2, 3 and 6, she was asked, "What happened next?". She responded:

> "Um (indistinct) hard to remember. I (indistinct) one time I don't think I can remember this house, the house (indistinct) in but um he went um in a room with me and and than (sic), and than (sic) like he put his doodle (indistinct) vagina and than (sic) he asked me um hold his doodle and go, go um go like that (indistinct) than, than (sic) he asked if I could um put it in (indistinct) mouth but I said no and I don't think I can remember anymore."

[41] The interviewer then moved onto another topic.

[42] It may be seen from both the cross-examination and the above quotation from the first record of interview that the complainant was uncertain about when and where the other act of penile penetration occurred. That alleged act was not the subject of any charge. It commonly occurs in cases such as this that a young complainant will recall some acts of sexual misconduct and the circumstances surrounding them with greater clarity than others. The complainant's vagueness in this regard was not such as to require the jury to conclude that her evidence was not generally reliable.

[43] The appellant was concerned that the placing of a line through a sentence in the transcript of the pre-recorded cross-examination of the complainant instead of removing the sentence may have been "an attempt by the prosecution to highlight a statement that could contaminate the court case". The appellant's concerns are groundless. The sentence, which was ordered by Baulch DCJ to be excluded from the complainant's evidence, was not in the recording played to the jury and the jury were not given a transcript.

[44] The appellant sought to derive assistance from the evidence that the complainant was caught by her mother accessing pornographic material on the internet. Her mother's evidence was that the complainant was 10 at the time. The complainant was nine when first interviewed by police and the complaint to her elder sister was made a little before that. It does not follow, of course, that the complainant had not accessed such material before the occasion on which she was caught but there is no evidence about that. Nor is there anything about the complaint evidence which might suggest that it was derived from or inspired by pornographic materials.

[45] The complainant's account was generally internally consistent. It showed no obvious signs of exaggeration, invention or embellishment. Her credibility was not weakened by her cross-examination. Some aspects of the complainant's evidence give cause for concern. I refer particularly to the absence of evidence of pain resulting from digital and penile penetration, the obvious risk of discovery attendant

on the count 2 behaviour and the limited descriptions of the offending conduct given when complaints were made to the complainant's step-father and then to her mother.

[46] As for the last of these matters, the complaint was made reluctantly and it was open to the jury to conclude that the complainant had not attempted to give a full, detailed and precise account to her step-father and mother. It was also open to the jury to accept that the step-father and mother may not have retained a complete recollection of what they had been told.

[47] The other concerns have already been discussed.

[48] Having considered the whole of the evidence, I have concluded that it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt.

[49] As McHugh, Gummow and Kirby JJ remarked in *MFA v The Queen*,[1] it was "not uncommon in most trials" for "some aspects of the evidence [to be] less than wholly satisfactory". Their Honours said in that regard: [2]

> "There are, it is true, some aspects of the evidence that are less than wholly satisfactory. But that is not uncommon in most trials. Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention." (citations omitted)

[50] Their Honours observed earlier in their reasons that determination by an appellate court as to the reasonableness of a jury's verdict:[3]

> "… involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials."

[51] The verdicts were not unreasonable and I would order that the appeal be dismissed.

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

[53] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the order which his Honour proposes.

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1 (2002) 213 CLR 606 at 634.
2 *MFA v The Queen* (2002) 213 CLR 606 at 634.
3 *MFA v The Queen* (2002) 213 CLR 606 at 624.