

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Coss* [2013] QCA 156

PARTIES: **R**  
**v**  
**COSS, Michael Joseph**  
(appellant)

FILE NO: CA No 307 of 2012  
DC No 113 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 21 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 30 April 2013

JUDGES: Margaret McMurdo P and Fraser JA and North J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –  
VERDICT UNREASONABLE OR CANNOT BE  
SUPPORTED HAVING REGARD TO THE EVIDENCE –  
APPEAL DISMISSED – where the appellant was convicted  
of two counts of rape – where there were inconsistencies  
between the complainant's evidence and the accounts given  
by the complainant to the police and to the preliminary  
complaint witnesses – where the appellant contends that the  
complainant's description of the events constituting count  
two is implausible – whether verdicts unreasonable and  
cannot be supported having regard to the evidence

*Criminal Code* 1899 (Qld), s 668E(1)  
*Evidence Act* 1977 (Qld), s 93

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited  
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53,  
cited  
*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13,  
cited

COUNSEL: J J Allen, with S Growden, for the appellant  
M Cowen for the respondent

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

- [1] **MARGARET McMURDO P:** I agree with North J's reasons for dismissing this appeal against conviction.
- [2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of North J. I agree with those reasons and with the order proposed by his Honour.
- [3] **NORTH J:** The appellant was convicted by a jury upon two counts of rape following a trial in the District Court at Cairns.<sup>1</sup> The sole ground of appeal is that the verdicts are unreasonable and cannot be supported by the evidence.<sup>2</sup> The ground of appeal requires the Court to review the whole of the evidence at trial and to make up its own mind whether a jury could reasonably convict the appellant. The respects in which it is submitted the verdicts are unreasonable are<sup>3</sup>:
1. The complainant's testimony was uncorroborated.
  2. There was a long and essentially unexplained delay in making a complaint.
  3. There were inconsistencies in the accounts given by the complainant to police and at the trial.
  4. There were discrepancies between the accounts given by the complainant to police and at trial and the terms of the preliminary complaints.
  5. The description of events constituting count two was highly implausible.

### The Evidence

- [4] Before considering the arguments advanced concerning these contentions it is necessary to mention some uncontroversial matters and to summarise the evidence of the complainant and other witnesses.
- [5] The complainant's mother and father were estranged. From 1 June 2009 to 6 November 2010 the complainant's father resided in a unit at Kewarra Beach Cairns and the complainant lived with her father. She was then aged between ten and eleven years.<sup>4</sup> The complainant gave evidence that the events constituting the counts alleged in the indictment occurred at the address at Kewarra Beach. She told police that on the occasion in question the appellant had been drinking with her father and was staying at the unit. Between 10 pm and 11 pm she dressed into her pyjamas and went to bed. She was wearing a nightie as well as underwear. In the account she gave to police when interviewed on 29 March 2011 the complainant said<sup>5</sup>:

“Complainant: Well I was like sleeping like any other night—  
 Police Officer: Mmm-hmm.

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<sup>1</sup> The first count alleged that the appellant put his penis in the mouth of the complainant and the second count alleged carnal knowledge without consent.

<sup>2</sup> *Criminal Code* 1899 (Qld), s 668E(1).

<sup>3</sup> Appellant outline [9].

<sup>4</sup> Date of birth 13 December 1998.

<sup>5</sup> AR198-200.

Complainant:-- and I woke up, 'cause I could feel something warm over me, and I woke up and he was breathing over me. Like his head was over – over mine and he was breathing heavily on me.

Police Officer: Mmm-hmm.

Complainant: And I woke up startled and then I started shaking, like my body went into like a fit sort of thing and I was like shaking and shaking and shaking. And then um, he said that if I didn't do what he said he's gonna um, he's gonna tell my dad that I was drinking and that I've wrecked the house—

Police Officer: Mmm-hmm.

Complainant:-- and everything like that. And I knew my dad wouldn't believe what I said, he would only believe what anyone else, other than me, said. He could even believe my little brother over me.

Police Officer: Mmm-hmm.

Complainant: And yeah, so I had to do what he said and then um, he said to me um, he told me to kiss him. And I said "No."

Police Officer: Mmm.

Complainant: And I told him to get away from me and I said it quietly because my dad was sleeping out on the couch.

Police Officer: Mmm-hmm.

Complainant: An um, he [indistinct] and then I was laying there and I started creeping up closest to the wall in my bed 'cause he came and lay down beside me. And um, then like I sat up and I tried to move to the end of the bed to get out of the room.

Police Officer: Yep.

Complainant: Like um, then he – he grabbed my arm and he pushed me back down on the bed.

Police Officer: Mmm-hmm.

Complainant: And um, then he told me to open my mouth and I kept my mouth shut and then he pinched my nose so I couldn't breathe so I had to open my mouth, otherwise I wouldn't have been able to breathe, and he shoved his penis in my mouth.

Police Officer: Mmm-hmm.

Complainant: And then I tried to push him away but then he put – he pushed it in harder like put it down my throat and then I started coughing and spluttering. And then he um, he stepped away for a second and then he picked me up and turned me over and put his penis in me. And – then like I kicked him – I kicked him in the back.

Police Officer: Mmm-Hmm.

Complainant: And then after I kicked him he stood up and um, got away from me then and then I was like started to slowly creep to the door 'cause he'd shut the door earlier.

Police Officer: Mmm-hmm.

Complainant: And I started to creep and open the door up but then he – he shut it back again and locked it and I was there and then I tried to run to the other side of the room so he couldn't get me and then he just grabbed me again and put me back on the bed and told me to kiss him. And I kept saying, "No," and "No, no," and he just wouldn't listen and then I don't really remember much but all

I remember is that I pushed him out – like once I’d – ‘cause I was like crying and everything because I was so scared and – and that and then um, I remember finally being able to unlock the door and push him out of the room and then shut the door behind him and then lock it again.

Police Officer: Mmm-hmm.

Complainant: And um, then I just – when I locked the door then I went back to sleep and I think I stayed awake for like an hour or two and then yeah, I went back to sleep.”

- [6] The appellant did not give evidence nor call evidence at the trial. There were no witnesses to the event described by the complainant. The complainant’s father was called. He gave evidence of his friendship with the appellant, that they drank together and that the appellant sometimes slept at the unit.
- [7] Six witnesses were called who gave evidence of preliminary complaint. One witness, TS, gave evidence that she was a school friend of the complainant and that they were close friends. She said that on an occasion when she was about 11 or 12 years of age,<sup>6</sup> she and the complainant were together at the home of TS in a bedroom listening to music when the complainant said she had something to say and then said “that when she was nine/10 years old that um one of her dad’s friends raped her when she was staying with her dad one time.”<sup>7</sup> Another school friend, NH, gave evidence that on an occasion when on a bus after school the complainant told him she wasn’t a virgin and when he asked her what happened she said “when I was little I got raped by one of the dad’s friends.”<sup>8</sup> When he asked the complainant about “anything else” she said she could not remember anything else.<sup>9</sup> Another child, TO gave evidence that on an occasion on his lunch break at school he noticed the complainant was crying and when asked what happened the complainant “told us that she got forced to have sex but she told her mum” and her mum called the police.<sup>10</sup>
- [8] The complainant’s mother gave evidence that on the evening before the complainant was interviewed<sup>11</sup> by police the complainant told her that she was not a virgin, and that two or three years earlier she had sex with the appellant.<sup>12</sup> The following morning, before the police interview, the complainant and her mother spoke further. Her mother’s evidence was<sup>13</sup>

“Okay, And what did she say?-- She said that it started when she was lying in her bed and she saw [the appellant] standing beside her bed and he told her to take her clothes off.

Did she tell you whether she did take her clothes off?-- She was apprehensive at first, but she did.

Okay. Did she say whether this person said anything to her at this stage?-- She did. She said that he said she was pretty or sexy and

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<sup>6</sup> AR13 L9-12.

<sup>7</sup> AR173 L20.

<sup>8</sup> AR181 L30.

<sup>9</sup> AR183 L19&50.

<sup>10</sup> AR189 L30.

<sup>11</sup> 28 March 2011, complainant was interviewed on 29 March 2011.

<sup>12</sup> AR65 L66—66 L3.

<sup>13</sup> AR66 L34-67 L20.

that he – that she should let him have sex with her. She did say he was very drunk. He – she said that he got into the bed with her, beside her – I’ve got a mind blank, I’m sorry.

That’s okay. Did she say what he physically did to her?-- I’ve just got a gap in time, I can’t – no, I’m fine, thank you. Sorry, I’m just trying to remember exactly what she said.

That’s okay?-- Okay. She said that he rolled on top of her and she told him to stop or don’t, and he told her to shush, so as not to wake her dad up, who was asleep on the couch at the time in the lounge room, and, so, obviously, she quietened down pretty quickly. He----

Just in what she told you?-- Yes, sorry, yep, what - this is what she told me. They moved to the floor or he assisted her to the floor beside her bed. She said that, her words, she – he was pushing his dick, excuse my language, towards her mouth and she was turning her head and closing her mouth and – and she said that he grabbed her nose, so she couldn’t breath, so she would open her mouth, and he then put his penis in her mouth. She said that she could feel it down the back of her throat and that it was choking her and he said, again, that she needed to be quiet because her dad was going to be angry if – if she woke him up. And – excuse me, and then she said that he rolled her over on to her stomach and – her words, and then she – then he did it.

Okay. Did she say what he did, did she expand on what he did?-- I asked if he put his penis inside her and she said yes.

Okay. Did she say whether he said anything further to her after this?-- She did say that if – if she told anyone, that he would come back for her.”

- [9] The partner of the complainant’s father, CP, gave evidence of a conversation with the complainant at an IGA supermarket in a suburb of Cairns<sup>14</sup>:

“Can you tell me about that conversation?-- Yes, basically she just said that I do remember [MC].

Well, when you were having this conversation, where were you?-- Down at Woree, at the IGA on the corner.

And were you living at Woree at that stage?-- Yes, I was.

Okay. And you were at the IGA and what was the conversation about?-- About what [MC] had done to [the complainant].

Okay. And how did it start?-- [The complainant] came to me and she said, “Do you remember Dad’s friend, [MC]?” Which he only had one friend called [MC] at that time, so I knew-----

Okay?--- -----who she was on about.

And what did you say?-- And I’m like, “Yes, I do remember.” Andy then she’s like, “Well, he did stuff to me.”

<sup>14</sup> AR88 L59-89 L58.

And did she tell you what stuff he did?-- Yes.

And can you tell the Court what she told you he did?-- [The complainant] said to me that [MC] had crept into her room, woke her up, started fingering her and started sucking her nipples and then placed his penis inside of her.

HIS HONOUR: Did she say where he -----?-- Like, she didn't -----fingering her?-- Her vagina.

Yes.

MR CRANE: Did she say that?--Yes. She said that she – he said – she said that he fingered her in her vagina, but-----

Yes?-- -----as for the – when she was saying that – she didn't actually say the words that he put his penis inside of her.

Okay?-- She pointed to her vagina and said, “He put his penis in there.”

Did she say whether he said anything at all during this incident?-- He said to her could he play with her.”

- [10] The evidence from the partner of the complainant's mother, TR, was that on the evening before the police interview the complainant said to him that she was not a virgin and that when asked “who to?” the complainant said “one of dad’s friends.”<sup>15</sup>

### **The appellant’s contentions**

- [11] On behalf of the appellant it was noted that the complainant’s evidence was uncorroborated, that there were no witnesses to the alleged event and that there was no other evidence to corroborate the allegations of rape.<sup>16</sup>
- [12] In support of the second of the contentions, counsel on behalf of the appellant submitted that the explanations given for the delay in complaining were inconsistent and unconvincing. The complainant told police that she did not tell her father what had happened because she was scared and that he would not believe her, and that she did not tell her mother because she thought she would get into trouble for it.<sup>17</sup> In her evidence at trial the complainant said she did not make an earlier complaint because she thought she would get into trouble<sup>18</sup> and when pressed as to what sort of trouble she replied, “I don’t know. I thought he was going to come for me and get me.”<sup>19</sup> Counsel submitted that it was of significance that the delay by the complainant concerned an allegation against a perpetrator who was neither a family member with whom she had continued contact nor one in a position of power over her. Further, the complainant’s mother’s evidence demonstrated that the first complaint made to her mother was following a delay of some months after the complainant had ceased living with her father and had moved to live with her mother.

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<sup>15</sup> AR74 L50.

<sup>16</sup> It was admitted during the trial that the complainant was examined by a Paediatrician on 15 April 2011. A genital examination was conducted. There was no assessment made as to whether the vagina of the complainant had been penetrated or not (see EX 13 AR168).

<sup>17</sup> AR216 L10-20.

<sup>18</sup> AR39 L29.

<sup>19</sup> AR39 L42.

- [13] With respect to the third of the contentions, of inconsistencies between the accounts given by the complainant to police and the evidence at trial, counsel pointed to the account the complainant gave to police of kicking the appellant using the heel of her right foot, and that she thought she kicked him in the back, around the mid-back region.<sup>20</sup> In examination in chief at the trial, the complainant confirmed that she kicked the appellant but was unsure which foot she kicked him with or where she kicked him,<sup>21</sup> however during cross examination she stated that she did not kick the appellant in the back.<sup>22</sup> Counsel for the appellant pointed to other aspects which he contended demonstrated inconsistencies between the account given to police and that given at trial, particularly relating to variations in the accounts as to the time during the night that the events occurred, the extent or nature of the light and lighting source that allowed her to see the appellant and whether she was able to see the appellant completely naked.
- [14] In oral argument counsel placed more emphasis upon the fourth and fifth grounds. I have referred to the evidence given by the complainant's mother.<sup>23</sup> In her evidence she stated that the complainant told her that she was lying in her bed and saw the appellant standing beside it, that he told her to take her clothes off and that although she was apprehensive she did so.<sup>24</sup> According to her mother, the complainant said that the appellant had said she was "pretty sexy" and that she should let him have sex with her, and that appellant then got into bed beside her and rolled on top of her.<sup>25</sup> Counsel for the appellant noted that no such detail was provided by the complainant to police or in her evidence in chief. When the complainant was cross examined the evidence given by her mother was put to her and the complainant stated she did not remember telling her mother that the appellant was naked or that he asked her to take her clothes off.<sup>26</sup> The complainant did not remember whether she had to take her clothes off or not.<sup>27</sup> Under cross examination the complainant agreed that the appellant never told her that he really liked her and that she should have sex with him.<sup>28</sup> The complainant's mother said that the complainant told her that she and the appellant ended up on the floor beside the complainant's bed, but this detail was not provided by the complainant in her account given to the police or at trial. When questioned as to this under cross examination the complainant stated that she did not tell her mother that the appellant had scooped her off the bed and laid her on the floor and denied that the appellant did such a thing.<sup>29</sup>
- [15] Counsel submitted that there were important differences between the complainant's evidence and the terms of the complaint CP said was made to her. Counsel noted that while the complainant acknowledged she had a conversation with CP about the incident, the complainant stated that it took place at her father's house, not at the IGA store.<sup>30</sup> Importantly, according to CP the complainant told her that the appellant had crept into her room, woken her up, fingered her in the vagina, started

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<sup>20</sup> AR199 L38-40; AR209 L6; AR210 L23; AR213 L22-31; AR214 L10-20.

<sup>21</sup> AR27 L21-34.

<sup>22</sup> AR38 L33.

<sup>23</sup> See, [6] above.

<sup>24</sup> AR66 L33-38.

<sup>25</sup> AR66 L40-52.

<sup>26</sup> AR33 L33-38.

<sup>27</sup> AR33 L38-49.

<sup>28</sup> AR34 L13-60.

<sup>29</sup> AR33 L50-AR34 L11.

<sup>30</sup> AR36 L8-15.

sucking on her nipples and “put his penis in there” (pointing to her vagina).<sup>31</sup> According to CP the complainant told her that the appellant had asked her whether he could play with her and she said no. At trial the complainant denied telling CP that the appellant whispered “I love you. Can I play with you,” and denied that she told CP that the appellant put his fingers down her pants and started to finger her or that he sucked on her nipples. Counsel for the appellant submitted that these discrepancies were not related merely to peripheral issues, but that they went to the substance of the allegations; whether or not there was an episode of oral rape which constituted count one and to the significant details surrounding the commission of count two.

- [16] Turning to the suggested implausibility of the description of events constituting count two, counsel for the appellant submitted that the complainant, when pressed for more detail about the event, gave an account that when the appellant penetrated her vagina he covered her mouth with both of his hands<sup>32</sup> and that whilst so doing she described the appellant placing both knees either side of her to hold her arms beside her body.<sup>33</sup> Counsel submitted that this account was highly implausible when considered in light of the complainant's initial account that the appellant had rolled the complainant onto her stomach and that he pulled her knickers half way off to her knees.<sup>34</sup>
- [17] Counsel submitted that when all of the contentions were considered together as a whole there was a significant possibility that an innocent person had been convicted and that the verdicts should be set aside.<sup>35</sup>

## Discussion

- [18] The complainant's testimony was uncorroborated and there was delay between the alleged events and the making of the complaints, but these matters were the subject of careful directions by the learned trial Judge. He warned the jury of the danger of convicting on uncorroborated testimony and he directed the jury to scrutinise closely the evidence of the complainant warning the jury that they could only act on the evidence if, after considering the evidence and the warning, they were convinced of the truth and accuracy of that evidence.<sup>36</sup> The learned trial Judge gave the jury a lengthy direction warning them of the risks of the consequences that follow because of the delay in making a complaint, thus depriving the appellant of the opportunity to test or investigate the allegations.<sup>37</sup> His Honour's direction included an observation that in the circumstance of delay involving young children, there was a likelihood of error in recollection because of distortion over time.
- [19] Concerning the discrepancies between the accounts given by the complainant, his Honour referred to some of the areas of consistency and also to the major areas of inconsistency between the account of events described by the complainant to the police and in her evidence compared to the account allegedly given to her mother<sup>38</sup>

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<sup>31</sup> AR89 L21-43.

<sup>32</sup> AR210 L16-17; AR211 L40; AR212 L1; AR213 L40; AR214 L31.

<sup>33</sup> AR212 L46-60; AR214 L4-6.

<sup>34</sup> AR211 L33-34.

<sup>35</sup> *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63; *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53.

<sup>36</sup> AR127 L1-18: See, also AR125 L49-55; AR133 L50.

<sup>37</sup> AR123 L42-AR125 L43.

<sup>38</sup> AR121 L59-122 L25.

and the account given to CP.<sup>39</sup> His Honours directions to the jury were careful and emphasised that the jury should consider the question of the inconsistencies when deliberating on the reliability of the complainant's evidence.<sup>40</sup> It is nevertheless important to recall that the jury had the benefit of seeing and hearing the complainant, her mother, CP and the other witnesses give evidence.<sup>41</sup> The police officer who interviewed the complainant was careful and methodical, taking time to revisit issues and seeking as much information and details as the complainant could give. The conversations of the preliminary complaints sworn to by the complainant's mother and CP (and the others) were not of that nature. Further, it was open to the jury to prefer the evidence of the complainant to that of her mother and importantly CP both as to the place or occasion of the conversation and as to its detail or substance. Having considered the submissions and the evidence, it was open to the jury to be persuaded beyond reasonable doubt of the reliability of the complainant's evidence.

- [20] The fifth contention, that the description of count two was highly implausible, is not sustained. A close reading of the evidence of the complainant does not demonstrate that it is plain that at the time the appellant penetrated the complainant's vagina he had both hands over her mouth. As counsel for the respondent pointed out in addresses, the account given by the complainant is consistent with the appellant placing both hands over the complainant's mouth once he had achieved penetration and that at other times there was but one hand over her mouth.<sup>42</sup> The consideration of this issue was for the jury. It should not be overlooked that his Honour's comment upon this issue and his direction to the jury was very favourable to the appellant.<sup>43</sup>
- [21] The third of the contentions, the suggested inconsistency in the accounts given to the police with the evidence given at trial, was not at the forefront of the appellant's submissions in argument. The learned trial Judge referred to some of those suggested inconsistencies when he recounted the competing contentions of counsel during his summing up.<sup>44</sup> It is to be recalled that his Honour gave the jury warnings with respect to the risk of distortions of recollections of events over time particularly involving witnesses who are young.<sup>45</sup> The matters pointed to in submissions were properly for the jury to consider. It was open to the jury to be persuaded of the reliability of the complainant's evidence notwithstanding these inconsistencies.
- [22] In the forgoing discussion of the contentions I have not overlooked that counsel for the appellant submitted that a consideration of the appeal necessarily involved a consideration of all of the matters complained of in combination.<sup>46</sup> I am not persuaded that upon any of the grounds contended nor in combination that there has been a miscarriage of justice. It was not submitted that there was anything in the way which the complainant conducted herself when interviewed by the police

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<sup>39</sup> AR122 L29-60.

<sup>40</sup> AR120 L52-AR123 L13.

<sup>41</sup> *M v The Queen* (1994) 181 CLR 487 at 493; *SKA v The Queen* (2011) 243 CLR 400 at [13].

<sup>42</sup> See, AR37 L57, AR212 L2. And further in context AR210 L17.

<sup>43</sup> Consider AR126 L19-49.

<sup>44</sup> AR127 L21-133 L39.

<sup>45</sup> AR125 L40.

<sup>46</sup> This necessarily follows from the requirement of the court to consider whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of guilt: *M v The Queen* (1994) 181 CLR 487 at 493; see further *SKA v The Queen* (2011) 243 CLR 400 at [11 - 14].

officer or when she gave her evidence for the purposes of the trial that materially detracted from her reliability as a witness. The directions to the jury by the trial judge were thorough and very careful. There is nothing unremarkable in the circumstance that the complainant's evidence is uncorroborated in the circumstances of the events she describes. Her explanation for the delay in complaining to her mother and in not complaining to her father that she thought she might get into some form of trouble is also unremarkable. The contentions relating to inconsistencies, discrepancies and that of implausibility relating to count two are all matters that were properly for the jury and upon which the jury was entitled to conclude did not prevent them from finding the appellant guilty beyond reasonable doubt. The verdict of the jury was not unreasonable. The appeal should be dismissed.