

SUPREME COURT OF QUEENSLAND

CITATION: *R v DBF (No 1)* [2013] QCA 244

PARTIES: **R**
v
DBF
(appellant)

FILE NO/S: CA No 167 of 2012
DC No 135 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 30 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2013

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

ORDER: **That the appeal be dismissed.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – RELEVANCE – GENERALLY – where appellant was found guilty of, *inter alia*, maintaining a sexual relationship with a child – where evidence of an uncharged act was led during the trial from complainant’s sister – where evidence of the uncharged act was partially inconsistent with complainant’s evidence – whether such evidence was probative – whether such evidence was admissible

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – application of test in *M v The Queen* (1994) 181 CLR 487

Criminal Code 1899 (Qld), s 668E (1)

BBH v The Queen (2012) 245 CLR 499; [2012] HCA 9, followed

M v Queen (1994) 181 CLR 487; [1994] HCA 63, considered

R v B [1989] 2 Qd R 343, followed

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered

COUNSEL: The appellant appeared on his own behalf
T A Fuller QC for the respondent

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

- [1] **MARGARET McMURDO P:** The appellant's first ground of appeal against conviction is that the convictions are unsafe and unsatisfactory, that is, in terms of s 668E(1) *Criminal Code* 1899 (Qld) they are "unreasonable or cannot be supported having regard to the evidence". This involves a consideration of whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of all counts: *M v Queen*;¹ *SKA v The Queen*.²
- [2] The complainant gave evidence that the appellant committed all the offences of which he was convicted. The complainant's evidence received compelling general support from the appellant's recorded statement in his telephone conversation with the complainant on 23 March 2011. Her evidence was also supported by the evidence of her sister, T, of sexual activity between the appellant, the complainant and T. There was no reason for the jury to conclude that the complainant and T were colluding. Douglas J's review of the evidence at trial demonstrates that it was well open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty on each count. This ground of appeal is not made out.
- [3] I also agree with his Honour's reasons for rejecting the appellant's second ground of appeal. T's evidence of an episode of sexual activity between the complainant, the appellant and T was relevant and admissible.
- [4] I agree with Douglas J that the appeal against conviction should be dismissed.
- [5] **FRASER JA:** I agree with the reasons of Douglas J and with the order his Honour proposes. As his Honour's analysis demonstrates, it was open to the jury to be satisfied beyond reasonable doubt on the whole of the evidence that the appellant was guilty of the offences of which he was convicted.
- [6] **DOUGLAS J:** The appellant was convicted of one count of maintaining a sexual relationship with his eldest daughter over a period of about six and a half years from 1 July 1997 to 21 January 2004, three counts of indecent treatment of her, she then being a child under 16 years, and two counts of raping her. He appeals against the convictions on the grounds that the learned trial judge erred in admitting the evidence of an uncharged act on a third party and because the verdict was unsafe and unsatisfactory.
- [7] I shall consider first the evidence and the summing up in considering whether the verdict was unsafe and unsatisfactory. I shall then consider the other ground of appeal relating to the admissibility of evidence of an uncharged act on a third party. The third party relevant to that issue was the complainant's younger sister. She was also the complainant in respect of similar charges where the appellant was also found guilty at a separate trial. That verdict was the subject of another appeal that was heard at the same time as this appeal.³

¹ (1994) 181 CLR 487, 493-495.

² (2011) 243 CLR 400, [11]-[12].

³ *R v DBF (No 2)* [2013] QCA 245.

The evidence

- [8] The complainant was 24 at the time of the trial and recalled events during a period when she was aged 12 to 13 when the appellant began to massage her back, buttocks and the area around and in her vagina a couple of days a week in her bedroom. He tried to kiss her, massaged her breasts and would rub his penis between her buttocks and ejaculate while lying on her. He also performed oral sex on her. He placed his finger in her vagina on about two occasions, which laid the basis for the charges of rape in counts 5 and 6 of the indictment. On one occasion his penis slipped into her vagina. That was not charged as rape because of a doubt whether the act was intentional.
- [9] She also gave evidence of an earlier occasion when she and a younger sister were playing while their mother was in hospital giving birth to the third daughter of the family. On that occasion, she said that her father was playing with her breasts while her younger sister performed oral sex on him. He also tried to get her and her sister to kiss him and each other. That episode was first mentioned by her to the prosecution the day before the trial began. She said a counselling session about two weeks before had triggered her memory of it. It was that evidence that was the subject of the first ground of appeal.
- [10] She told some of her friends at school that she was being molested by her father in years 7 and 8. A guidance counsellor at the school she attended in year 8 became aware of her story and called police. The complainant provided a statement to them on 23 March 2001 when she was 13.⁴ The statement referred to an event in the year 2000 between Easter and the June school holidays when the appellant sucked her breasts and rubbed his penis on her vagina. That event was the basis of count 2 on the indictment, one of the three indecent dealing counts. She said that she spoke to her mother about that occasion but her mother did not believe her.
- [11] She said in her statement that, on 16 March 2001, a Friday night, her father came to her bed and started to pull down her underwear. She blacked out and awoke to the feeling of seminal fluid above her groin. Her father was just getting off the top of her then. She told her sister and some friends at school about the event. Those events laid the basis for count 3, another count of indecent dealing.
- [12] She also recalled an event in the school holidays between 2000 and 2001 when the appellant rubbed his penis on her backside to the stage where he ejaculated on her back. That laid the basis for count 4 on the indictment, again a charge of indecent dealing.
- [13] After she made her statement to police on 23 March 2001, she noticed two holes in the wall of her bedroom. Other evidence was given to corroborate that, including evidence from her sister that she saw the appellant looking into the complainant's room through matching holes in the sister's cupboard. The mother also gave evidence of having seen those holes.
- [14] The complainant also gave her mother a handwritten statement, which she said occurred on the same day as she made her police statement. It provided details of one event only, similar to the event described in the police statement as having happened on the Friday night, one week before 23 March 2001, but which, in her handwritten statement, she said happened three weeks before on a Friday night.

⁴ See Exhibit B at AR200-204.

- [15] She said in her evidence at the trial that her father's behaviour stopped after that complaint for a brief period, maybe a month or a couple of weeks, but then resumed and later became a lot more frequent. He continued until she began to have boyfriends of her own from when she was 14 to 15. She withdrew the complaint to police on 23 March 2001 on her mother's advice, left home some years later and made another complaint to police in 2011.
- [16] After that complaint in 2011, she engaged in a pretext telephone call with her father on 21 March 2011 and spoke to him on 23 March 2011 when she was equipped with a recording device on her body. He made admissions in those conversations consistent with his having had sexual relations with her, including that he thought what he was doing to her was alright until she went to the police after which he said that he was not doing it as much and that it was not something that he was proud of. He said to her that he started behaving in that fashion to her when she was about 10.
- [17] The complainant's sister also gave evidence about an occasion when the two sisters and the father were in the complainant's room. They were all naked. She recalls the appellant asking the girls to kiss each other. They did not do that. But she remembered her father kissing her sister, the complainant, with his tongue in her mouth. When cross-examined about this episode she said that all her father did to her was to run his hand up her leg.
- [18] She could not remember any other incidents involving her sister at that house, but did remember another incident at a house the family had built at about the time the complainant was in year 7 at school. They had travelled to another town where she saw the appellant under the covers with her sister and heard a lot of heavy breathing and observed the covers moving from side to side. She said that her sister looked sad and scared. She said it was simply her father's body moving, not her sister's.
- [19] She also observed her father on one occasion in the cupboard in her room looking through the holes in the cupboard which were aligned with holes in the wall so that her sister's room could be observed. At the time, her sister was there with her boyfriend.
- [20] The appellant gave evidence and sought to explain what he said on the pretext call and the recorded conversation with his daughter by saying that she had been playing "head games" with him and that he "just went up there with the intent to basically let her say what she wanted me to say ...".⁵ In cross-examination he explained that by saying: "I told her everything that what she wanted to hear."⁶ He accepted that other statements he made in those conversations were truthful but denied the truth of any of the complainant's assertions about the conduct he had engaged in towards her.
- [21] In those conversations, however, he gave her information, including the information that his conduct commenced when she was about 10, which on any view was more information than "what she wanted him to say." His explanations for his recorded admissions to his daughter were, to say the least, unconvincing.

Summing up

- [22] There was no ground of appeal directed to the content of the summing up. Her Honour dealt fairly and thoroughly with the general considerations relevant to any

⁵ See AR122, ll.14-16.

⁶ AR124, l.38.

trial by jury and the particular issues this jury had to consider. Her Honour directed the jury that the prosecution case was heavily dependent on the complainant's evidence and whether they accepted her as truthful and reliable. She went on to identify clearly the elements of each offence and the evidence relied upon to establish the charges. Her Honour gave the jury the normal directions about the effect of the appellant giving evidence and how they could use the evidence of the holes in the wall and furniture, which included a CD case as leading to a rational inference, in the prosecution's submission, that the appellant had a sexual interest in his daughter.

- [23] The jury were also directed specifically about the inconsistencies in the two written statements made by the complainant and taken to the evidence relevant to the potential inconsistencies. Her Honour also directed the jury that any reasonable doubt with respect to one offence should be taken into account and considered by them in their assessment of her credibility generally. They were also directed as to the use they could make of the recorded conversations and the preliminary complaint evidence in appropriate terms.

The appellant's submissions

- [24] The appellant relied simply on his written submissions when he appeared for himself on the appeal. They were not particularly coherent and focussed on what he asserted were inconsistencies in his daughter's account, including her memory of when she left home, the circumstances around her withdrawal initially of her complaint and other matters which do not, either in themselves or collectively, throw any doubt on the jury's decision. He also attempted to refer to matters of evidence which were not led in his trial where he was represented by experienced counsel. My survey of the evidence and the summing up satisfies me that the conviction was not unsafe or unsatisfactory.

Admissibility of the evidence involving the complainant's sister in an uncharged act on a third party

- [25] The evidence to which I referred earlier of the episode involving the complainant and her sister, which was revealed by her to the Crown Prosecutor on the day before the trial, was the subject of an objection at the trial on the basis that it was highly prejudicial to place evidence before the jury of the appellant engaging in sexual activity with a second daughter. There were differences in the evidence relating to such an episode or episodes between the two sisters with the complainant recalling that her sister was performing oral sex on the appellant as he touched the complainant's chest. She said that the appellant then tried to get the girls to kiss him and then each other. The sister recalled all three of them being naked, her father kissing her sister on the lips and him asking the two girls to kiss each other as well as him touching her on the leg. She made no reference to her performing oral sex on him then. The two witnesses could have been talking about the same or separate events which was a matter for the jury to determine; see *R v B*.⁷ Her Honour had given the normal directions to the jury concerning their role in assessing the evidence and in deciding what evidence to accept.⁸

⁷ *R v B* [1989] 2 Qd R 343, 348-349.

⁸ AR152-153.

[26] Otherwise, the respondent argued that the evidence of the appellant's interaction with the complainant on either version was evidence of the offence of maintaining a relationship with her which was highly probative and direct evidence of that offence. Mr McCarthy submitted accurately that it was admissible on that basis and also as evidence of the true nature of the relationship between the appellant and the complainant and capable of corroborating the complainant's account, in accordance with the decisions in *R v B*⁹ and *BBH v The Queen*.¹⁰ In this case, also, there was nothing equivocal about the nature of the conduct observed by the complainant's sister. It was, as was submitted, direct evidence of the maintaining offence. For these reasons, the evidentiary issue raised by the notice of appeal must fail.

Conclusion and order

[27] I would order that the appeal should be dismissed.

⁹ *R v B* [1989] 2 Qd R 343.

¹⁰ *BBH v The Queen* (2012) 245 CLR 499; [2012] HCA 9, 534 at [104]-[105], 535-536 at [109]-[112] per Heydon J, 550 at [169] per Crennan and Kiefel JJ, 557-560 at [196]-[203] per Bell J.