SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCC* [2014] QCA 253
PARTIES:	**R** **v** **MCC** (appellant)
FILE NO/S:	CA No 225 of 2013 DC No 210 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	10 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2014
JUDGES:	Margaret McMurdo P and Muir JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Verdicts of guilty set aside.** **3. Verdicts of acquittal entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where the appellant was charged with four counts of indecent treatment of a child under 12 under care – where the complainant was the then eight year old daughter of the appellant's de facto partner – where the Crown did not proceed on count 1 – where the appellant was found guilty on counts 2 and 4 and not guilty on count 3 – where the complainant's evidence was inconsistent with other evidence – where the complainant's brother gave evidence that did not support the complainant's evidence on any particular count – whether the learned trial judge erred in informing the jury that this evidence was preliminary complaint evidence – whether the appeal against conviction should be allowed CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was found guilty on counts 2 and 4 and not guilty on count 3 – where count 3 was the only alleged overtly sexual act – whether the guilty verdicts on

counts 2 and 4 were inconsistent and could not logically be reconciled with the not guilty verdict on count 3

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – where the complainant's evidence consisted of prerecorded evidence and a recorded interview with police – where the jury were granted their request to watch the complainant's evidence for a second time – where the learned trial judge, after replaying that evidence, did not direct the jury not to give the complainant's evidence undue weight by virtue of its repetition – whether there was a miscarriage of justice

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A
Evidence Act 1977 (Qld), s 93A, s 21AK

R v FAE [2014] QCA 69, cited
R v GAO [2012] QCA 54, cited
R v H [1999] 2 Qd R 283; [1998] QCA 348, cited
R v NM [2013] 1 Qd R 374; [2012] QCA 173, cited
R v Riera [2011] QCA 77, cited
R v SCG [2014] QCA 118, cited

COUNSEL: A W Collins for the appellant
J Robson 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 originally charged with four counts of indecent treatment of a child under 12 under care. The complainant in each count was the then eight year old daughter of his de facto partner. Each count was charged as occurring in Brisbane on a date unknown between 1 January 2009 and 8 April 2011. The complainant was 11 when first interviewed by police on 10 May 2012, and 12 when her evidence was prerecorded. Before the jury was empanelled on the first morning of the trial, the prosecutor endorsed the indictment that the Crown would not proceed further on count 1. The next day the appellant was found guilty on counts 2 and 4 and not guilty on count 3. He was sentenced to six months wholly suspended imprisonment on count 2 and four months wholly suspended imprisonment on count 4 with an operational period of 12 months.

[2] He has appealed against his convictions on three grounds. The first is that the verdicts of guilty on counts 2 and 4 were unreasonable and cannot be supported by the evidence. The second is that the verdicts on counts 2 and 4 were inconsistent with the verdict of not guilty on count 3. The third is that the learned primary judge erred in failing to warn the jury after the complainant's evidence was replayed during a redirection that they must not give her evidence disproportionate weight by virtue of its repetition.

[3] A consideration of these grounds of appeal requires a review of the whole of the evidence at trial.

The relevant evidence and aspects of the trial

[4] The prosecution case was particularised as follows. Count 1, on which the prosecution did not proceed, was the squeezing of the complainant's bottom whilst carrying her into her bedroom. Count 2, on which the jury convicted, was later that same night when he placed her on her bed and pulled down her pants and underwear. Count 3, on which the jury acquitted, was about three weeks later when her cousins were sleeping over. The appellant pulled off her blanket, pulled her pants down and touched her on the vagina. Count 4, on which the jury convicted, was about a month after count 2 when the complainant was sleeping in her bedroom and the appellant came in, pulled off her blanket and tried to pull down her pants.

[5] The complainant's evidence was not easy to follow. She told police the following in an interview which was admitted as evidence under s 93A *Evidence Act*. She was having problems at home because she had not seen much of her father; she could talk to him about things that she could not discuss with her mother. The appellant and her mother had been "fighting and stuff". She told police that the appellant would try to lift the blanket off her, try to pull down her pants and touch her "rude part" when he came back from the pub or from friends' houses.

[6] The first time was when he carried her to her room after she fell asleep in the car. She felt him squeezing the "rude part" of her "bum". She told him to stop but he would not listen (count 1). He put her down on the bed and tried to pull her pants down. She yelled out to stop. He "would just yell back" and then he walked away and came back, and did it again. This incident occurred about three years ago when they were driving relatives home from the airport. It was about 8 o'clock at night and she had fallen asleep. She felt someone squeezing her rude part, said, "stop, stop" and then she woke up. He kept telling her to be quiet and go back to sleep. When she went back to sleep he would do it again; start squeezing her rude part again. Another name for "rude part" was "vagina". He squeezed her rude part on top of her clothes. She was wearing long track suit pants. When he put her on her bed, he pulled down her pants and underwear. She pulled them back up and yelled. He kept telling her to be quiet and to go back to bed and he left (count 2). Her mother came in to check on her. The complainant was half asleep and could not really hear because she had bad hearing.

[7] When asked what was the very next thing that happened she responded that the appellant came in again in the middle of the night and she woke up. He walked out "like he was pretending to look for clothes or something", he picked up some dirty washing and put it in the bathroom. She walked into her brother's room, closed the door, secured it with a door stopper and went to sleep.

[8] She told her big sister, JA, and her big brother, JE, that the appellant was coming into her room and touching her. She then slept in their room at night whenever the appellant had been drinking. But one night she slept in her room again and "he just started all over again". He pulled off her blanket and tried to pull off her pants but she woke up immediately. Then she went back into her "brother's room or something and when he would come in [her] sister would, like stay awake a bit and tell him to go away and he would just tell [them] to go back to sleep and walk away and pretend he was just checking on [them]." When questioned by the police about this incident she further explained that she fell asleep but woke up when he "went to" pull off her blanket and she "grabbed" her "stuff" and went to her brother's room and fell asleep there. The appellant was pulling the top of her pants "really softly

like slightly just pulling a bit … and [then] he would try and pull it down [on] the other side". When she woke up he quickly jumped off her bed and left the room (count 4). This happened about a month after count 2 when she was sleeping at the back of a bedroom she shared with her little brother, H, and her little sister, JK.

[9] She remembered another time just before they moved from Brisbane to Townsville. The appellant had his family over and was extremely drunk, falling over and fighting with her mother. He came into her room really early in the morning. She was still awake because she was scared that something would happen to her mother. When he saw she was awake he walked back outside and did not touch her.

[10] When asked to tell about another time, she said that she could not really remember but she thought "about a week before the last, last one", she and her siblings were lying in the lounge room. Some cousins were having a sleepover with her and her brothers and sisters. She was lying on a bed near the corner of the TV area. He walked over, pulled off the blanket, pulled down her pants and touched her rude part. She felt someone touching her rude part and woke up. She pulled up her pants and asked what he was doing. He said he was just checking on everyone. She told him to go away. He left and she went back to sleep. The police officer asked her to describe how the appellant touched her rude part. She said he "just kept rubbing it" and then she woke up (count 3). She did not tell anyone.

[11] The appellant obtained a "really good job" in north Queensland and her mother decided to move there with him. She had to go to school and tell everyone she was leaving and that was really hard. She moved to Townsville with her family on 9 April 2011.

[12] The police asked her about another time when the appellant touched her. She said she could not remember another time; he "just repeated like the other times like I would of woken up and [indistinct] my brothers room or I would of started saying go away".

[13] The complainant in her prerecorded evidence on 19 July 2013 confirmed that what she told the police officer was true.

[14] In cross-examination she said she was clear that on one occasion the appellant actually touched her vagina and that she first told her older sister, JA, about this in about April 2012, a month before she spoke to the police. JA told her that JA had told their mother on a couple of occasions that the appellant had "been doing stuff".[1] JA then asked the complainant if anything had happened to her. The complainant "told her vaguely about what happened". She told JA that the appellant touched her on the vagina. Defence counsel put to the complainant that, when JA asked her if the appellant had touched her inappropriately, the complainant said that he had never tried to touch her and that she was fine. The complainant denied this. She agreed she was quite close to JA although they were not as close as they once were. She agreed there was no reason for JA to make up things about this.

[15] After she told JA about the appellant's conduct she was sure she also told her older brother, JE, that the appellant had been touching her on the vagina. Defence counsel suggested that she told JE that the appellant touched her on her legs, rubbed

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[1] It is difficult to apprehend why this was not excised from the recording and transcript as it was inadmissible hearsay. No point was taken about it in the appeal. It is possible it was not excised as defence counsel wanted it led for forensic purposes despite its highly prejudicial nature.

his hands up and down them and stood in the doorway some nights. She agreed she told him that when she was in bed the appellant just looked at her and she would pretend to be sleeping. She was unsure if she also told him that the appellant touched her on the vagina. She then said that she did tell JE that the appellant touched her on her "rude part".

[16] Defence counsel suggested that around January 2012 she spoke to her mother about the appellant's conduct. She initially said she did not remember this but then agreed that, when her mother asked her if the appellant had been touching her, she denied this. She knew her mother really liked the appellant and thought that if she "didn't tell her that it would go away very soon". She agreed she told her mother that she did not like the fights between her mother and the appellant and added "but there's nothing mum, nothing". She agreed she repeatedly denied to her mother that the appellant did anything improper. She agreed that she did not like the appellant. She maintained, however, that she had told JE and JA about the appellant's conduct. She accepted she told a woman in Brisbane, CB, that she did not want to return to Townsville because the appellant and her mother were abusing alcohol and fighting and she felt unsafe. She did not tell CB the appellant was touching her inappropriately.

[17] Defence counsel asked the following:

> "And correct me if I'm wrong, but did you say to the police officer effectively these incidents occurred about three years ago and you gave a time frame in relation to the last time it occurred, which was about a month after the first one, and then there was no other touches? -- Yes.
> So it started and then just stopped? -- There was no touching but he had tried to pull my pants down but the police sort of asked me if there was any touching." (errors in the original)

[18] She agreed that she often fell asleep at night in front of the TV and would wake the next morning in her bed with the TV off, not knowing how she got into her bed. She agreed that when the appellant carried her he did so with one hand on her bottom. He was a big man with big hands so that his hand covered almost her entire bottom. She remembered him squeezing her bottom and she thought he squeezed her vagina. Defence counsel suggested that the appellant never pulled her pants down and never touched her on the vagina. She responded, "He has."

[19] The complainant's mother gave evidence that the appellant moved in with her and her five children in March 2009 and they lived together in Brisbane. The appellant left for Townsville in July or August 2010. On 8 April 2011 her two older children stayed with their father in Brisbane but she and the three younger children (including the complainant) joined the appellant in Townsville. The complainant missed her father who passed away in early 2013. Her former partner and the father of her older children told her that JE told him that the appellant may have been acting inappropriately with the complainant.[2] She confronted the appellant with this allegation which he denied. She then spoke to the complainant about this in the 2012 Easter holidays but the first she learned of any allegation from the complainant of improper behaviour by the appellant was when the police became involved in May 2012. In re-examination, she said that after the appellant moved to Townsville he visited her and the children in Brisbane in September and at Christmas.

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[2] Again, there was no objection to this inadmissible, highly prejudicial evidence, apparently for forensic reasons.

[20] The complainant's older brother, JE, who was 17 years old at trial, gave evidence. In cross-examination he agreed that before the complainant went to the police on 10 May 2012, she spoke to him about the appellant. When defence counsel asked if she told him the appellant had been touching her on the vagina, JE responded "Not exact on the vagina, but inappropriately." Defence counsel suggested that she said the appellant "touches me on my legs. He rubs his hands up and down them and … stands in my doorway some nights when I'm in bed and just looks at me. I have to pretend to be sleeping." JE agreed that she said this and that he told his father. JE agreed that the complainant did not say that the appellant had been touching her vagina.

[21] The complainant's older sister, JA, who was 19 years old at trial, also gave evidence. When JE visited Brisbane for the 2012 Easter holidays, he told her that he was concerned that something had happened between the appellant and the complainant.[3] JA tried to speak to the complainant about this but she refused to discuss it. She asked the complainant if the appellant ever touched her inappropriately and the complainant replied that he had never tried to touch her and she was fine. The complainant walked away and did not seem too happy.

[22] The appellant did not call or give evidence. The defence case was that the alleged conduct was unlikely in such a busy, crowded household. If it had happened someone was likely to have seen it. Emphasis was placed on the inconsistencies in the complainant's account and her delay in making a complaint. According to her mother and JA, she told them that the appellant did not touch her at all. According to JE, her complaint was of minor, not indecent, touching. There was a lack of detail in her complaint to police. She had a motive to make false allegations in that she missed her father and did not like the appellant. Her evidence of her complaints to JE and JA was inconsistent with their evidence.

[23] The judge gave the following direction about the complainant's allegations to JA and JE about the appellant's conduct:

> "You have heard some evidence about things said by the complainant to others, to her brother and her sister in particular. She says that she made complaints to them about these events. That evidence can only be used so far as it goes to assist you to assess the complainant's credibility. Consistency between the accounts of her brother and sister with her evidence before her is something that you take into account as possibly enhancing the likelihood that her testimony is true, but you cannot regard those things that she said that she says out of court as proof of what actually happened. In other words, the evidence of what was said on those occasions may, depending on the view you take of it, bolster the complainant's credibility because of its consistency but it doesn't by itself prove anything.
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> Likewise, inconsistencies between the accounts of the brother and the sister and the complainant's evidence may cause you to have doubts about her credibility or reliability."[4]

[24] The jury retired to consider their verdicts at 3.19 pm on the first day of the trial. The court resumed at 3.59 pm as the jury requested to see the DVD of the complainant's police interview. They also wanted the judge to give them a review

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3 Again, there was no objection to this inadmissible evidence, apparently for forensic reasons.

4 AB 36-AB 37.

of the details of the counts and to remind them of JE's evidence. As the transcript of JE's evidence was not then available, the court adjourned to the following day.

[25] At 10.04 am the next day the judge repeated the particulars of the charges. The complainant's full evidence, including her cross-examination, was played. The judge summarised the key aspects of JE's evidence. His Honour reminded the jury of the onus of proof; that the appellant's not giving evidence added nothing to the case; and that the delay meant that it was dangerous to convict on the complainant's evidence alone unless, after scrutinising it with great care, they were satisfied of its truth and accuracy. The jury retired again at 11.05 am. At 12.19 pm the court resumed in the absence of the jury. The judge noted that the jury had said they were presently unable to reach a decision on counts 2 and 4 and they would like more direction about reasonable doubt. Defence counsel asked the judge to reinforce to the jury the direction he gave earlier that, if they had a reasonable doubt on one count, that may affect their consideration on the other counts as it was relevant to their view of the complainant's credibility. The judge did not accede to that request.[5] The judge again explained to the jury the elements of the offences and gave an uncontroversial direction about reasonable doubt. The jury retired at 12.29 pm and returned with their verdicts at 2.26 pm.

Are the verdicts unreasonable and inconsistent?

The appellant's contentions

[26] The appellant sensibly contended that the first two grounds of appeal, that the guilty verdicts on counts 2 and 4 were unreasonable (ground 1) and inconsistent (ground 2) should be considered together. The complainant's evidence as to what she told JA and JE about the alleged offending was inconsistent with their evidence. The only independent evidence of any complaint at all came from JE who said that she told him the appellant had touched her on the legs. This allegation did not correspond with any particularised count. The appellant contended that JE's evidence of this complaint was not admissible as a preliminary complaint, relying on this Court's statements in *R v NM*[6] and *R v Riera*.[7] It followed that there was no evidence from JE supporting the complainant's credibility. Although not alleged as a ground of appeal, the appellant contended that the judge should not have told the jury that JE's evidence was preliminary complaint evidence and should have warned them against propensity reasoning in respect of it.

[27] The appellant also contended that in light of the jury's acquittal on count 3 which was an alleged overtly sexual act of touching the complainant's vagina, there was a risk that the jury convicted the appellant on the basis of JE's inadmissible evidence of inappropriate touching unrelated to any charge, rather than because the prosecution had established beyond reasonable doubt its particularised case on counts 2 and 4.

[28] For these reasons the appellant contended that the guilty verdicts on count 2 and 4 were unreasonable and could not be logically reconciled with the not guilty verdict on count 3.

The respondent's contentions

[29] The respondent contended that the verdicts can be reconciled as logical and reasonable and are not an affront to common sense. The complainant's evidence on

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5 AB 45.
6 [2013] 1 Qd R 374.
7 [2011] QCA 77, [6].

count 3 that the appellant touched her on the vagina was inconsistent with her complaint to JE. He was adamant that she did not say he touched her on the vagina. This provided a rational and logical explanation for the differing verdicts.

[30] The jury, the respondent contended, clearly considered the complainant was an honest witness but took a cautious approach in acquitting on count 3 as she did not tell JE that the appellant touched her on the vagina. This did not require the jury to conclude that she was not a credible witness. The jury could accept her evidence on counts 2 and 4 beyond reasonable doubt. The guilty verdicts were neither unreasonable nor inconsistent with the not guilty verdict on count 3.

Conclusion on these grounds of appeal

[31] It is true the complainant did not depart from her evidence that the appellant committed counts 2 and 4. And there is some initial attraction in the respondent's simple explanation for the differing verdicts. The difficulty, however, with that contention is that while JE's evidence did not support count 3, nor did it support counts 2 or 4.

[32] As the judge identified in his summing-up to the jury, the quality of the complainant's evidence was poor. She was an 11 and 12 year old recalling events which occurred when she was eight about incidents when she was falling in and out of sleep. She made no complaint for over three years and according to her mother and her older sister, JA, she did not complain, even when specifically questioned about the appellant's conduct. The allegations to JE and ultimately the police seem to have come only after a degree of importuning and her evidence as to each count was undetailed and confusing. Also of concern was that she had a motive to make false allegations in that she did not like the appellant and did not want to move to Townsville to live with him.

[33] It was clear from the evidence of the complainant's mother, JA and JE that they each carefully questioned her about the appellant's conduct. She denied any wrongdoing on the appellant's part until her statement to JE. That evidence was adduced in cross-examination for the obvious forensic reason to show an important inconsistency with the complainant's evidence on this point. In the circumstances of this case the jury could easily have placed undue weight on this aspect of JE's evidence. It seems from the first request for redirections, that they placed some reliance on her statement to JE. As it was a complaint about an uncharged act or acts and did not relate to a particularised count, it was not evidence of preliminary complaint under s 4A *Criminal Law (Sexual Offences) Act* 1978 (Qld). See *R v NM*[8] and *R v Riera*.[9] It is regrettable that the judge told the jury this aspect of JE's evidence was preliminary complaint evidence which could support the complainant's credibility. In fact, it was admissible only as a prior inconsistent statement tending to undermine her credibility. The effect of this misdirection snowballed when the judge paraphrased JE's evidence in the redirection.

[34] It is also regrettable that the judge did not clearly direct the jury that JE's evidence of the complaint did not support the complainant's evidence on any particular count. It would also have been prudent for the judge to warn the jury that, if they accepted JE's evidence on this point, they should not reason that because the complainant told JE the appellant did this, the appellant was guilty on any count.

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8 [2013] 1 Qd R 374.

9 [2011] QCA 77, [6].

[35] In the absence of such judicial warnings as to how to use this aspect of JE's evidence, there was a real danger that the jury reasoned that, on some occasion or occasions, the appellant had touched the complainant inappropriately on the legs and accordingly convicted on counts 2 and 4 without being satisfied beyond reasonable doubt that the touching occurred as particularised by the prosecution on each count.

[36] I consider that, in the circumstances of this case, the jury's doubt about the complainant's evidence on count 3 should have also led them to have a doubt about her reliability on counts 2 and 4. Having rejected her evidence on count 3, her evidence on counts 2 and 4 was too tenuous to establish the appellant's guilt beyond reasonable doubt. In light of the not guilty verdict on count 3, I consider the guilty verdicts on counts 2 and 4 are unreasonable in the sense that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *SKA v The Queen*.[10] For these reasons I would allow the appeal against conviction, quash the verdicts of guilty on counts 2 and 4 and enter verdicts of acquittal.

The failure to warn the jury when the complainant's evidence was replayed during a redirection that they must not give disproportionate weight to her evidence

[37] The orders I propose mean that it is unnecessary for me to deal with the remaining ground of appeal but I will make some observations. The appellant contended that the judge should have included in the redirections all the evidence which was favourable to the appellant and highlighted the evidence which did not support the complainant's account of each particularised count. It is true that the appellant did not give or call evidence to contradict the complainant's version but he had denied the allegations when confronted by the complainant's mother and there were many weaknesses in the complainant's account which were emphasised in the defence case. When a child complainant's evidence is replayed during the jury's deliberations, there is almost always a real risk that the jury might give the evidence greater weight because the jury have seen and heard it for a second time, without fully considering the defence submissions about it. There is an impressive body of jurisprudence developed over many years that explains the need for a warning of the kind sought by the appellant in this appeal. See *R v H*;[11] *R v FAE*;[12] *R v GAO*[13] and *R v SCG*.[14]

ORDER:

1. Appeal against conviction allowed.
2. Verdicts of guilty set aside.
3. Verdicts of acquittal entered.

[38] **MUIR JA:** I agree with the reasons and orders proposed by McMurdo P.

[39] **NORTH J:** I have read the reasons for judgment of McMurdo P and agree with her Honour. I also agree with the orders proposed.

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10 (2011) 243 CLR 400; [2011] HCA 13; [12].
11 [1999] 2 Qd R 283, 291.
12 [2014] QCA 69, [23].
13 [2012] QCA 54, [20]-[24].
14 [2014] QCA 118.