SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBA* [2015] QCA 21
PARTIES:	**R** **v** **WBA** (appellant)
FILE NO:	CA No 159 of 2014 DC No 209 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	Orders delivered ex tempore 5 February 2015 Reasons delivered 27 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2015
JUDGES:	Fraser and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 5 February 2015:** **1. The appeal be allowed.** **2. The verdicts of guilty be set aside and verdicts of acquittal entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of one count of attempted rape and two counts of procuring a child under 16 years to commit an indecent act – where there were contradictions in the evidence of the complainant ere the evidence of the complainant was contradicted by other witnesses – whether the convictions were unsafe and unsatisfactory *Criminal Code* (Qld), s 668E(1) *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, considered *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *R v BAT* [2005] QCA 82, considered *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL:	T Ryan for the appellant D L Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was found guilty by a jury on one count of attempted rape (as an alternative to the charge of rape in the indictment) and two counts of procuring a child under 16 years to commit an indecent act with the circumstances of aggravation that the child was under 12 years, that the child was, to the knowledge of the appellant, his lineal descendant and that the appellant had the child under his care for the time being. The appellant has appealed against his convictions on two grounds. The first ground was that the convictions were unsafe and unsatisfactory. The second ground was that a miscarriage of justice resulted from the trial judge's failure to give the jury a warning which was said to be required by the High Court's decision in *Robinson v The Queen*.[1] The appellant also applied for leave to appeal against his sentence on the ground that the sentence was manifestly excessive.

[2] At the hearing of the appeal the Court ordered that the appeal against conviction be allowed, the convictions be set aside, and that acquittals be entered upon the three counts in the indictment. What follows are my reasons for joining in those orders.

The first ground of appeal

[3] The first ground of appeal, that the convictions were unsafe and unsatisfactory, invoked the ground in s 668E(1) of the *Criminal Code* that "the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence…". This ground of appeal requires the Court to make an independent assessment of the sufficiency and quality of the evidence and to decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted;[2] if, after "making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted then the court is bound to act and to set aside a verdict based upon that evidence."[3]

Outline of the evidence at trial

[4] The Crown case depended upon the evidence of the complainant, who is the appellant's daughter. Her evidence was contained in a recorded police interview made in November 2012 when she was 11 years old (about a year after the alleged offences), and in her oral testimony at a pre-recorded hearing in May 2014 when she was nearly 13 years old. In the police interview the complainant said that the offences occurred on three separate occasions towards or after the end of the school year in 2011, when she was 10 years old. The complainant often slept in her parents' bed. Her mother was regularly required to leave for work very early in the morning.

[5] The complainant told police that on the first of the three occasions she woke up in her parents' bed and saw the appellant using a sex toy. The complainant said that

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1 (1999) 197 CLR 162.

2 *MFA v The Queen* (2002) 213 CLR 606 at 614-615; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14], 408 [21].

3 *M v The Queen* (1994) 181 CLR 487 at 525, quoted in *MFA v The Queen* at 623-624.

she complied with the appellant's request to rub the sex toy up and down his penis. After the appellant ejaculated the complainant had a shower and got ready for school. The complainant said that a day or two later the appellant was in the shower with the complainant in the morning and he asked her to masturbate him. She did so but refused his request to fellate him.

[6] The third and most serious offence was alleged to have been committed a day or two after the second occasion. The complainant told police that one morning she woke up lying on her back on her parents' bed with the naked appellant on top of her. The complainant pretended she was still asleep. She said that she could see that the appellant was raping her and she felt his penis inside her vagina, hurting her. The complainant said that the appellant was holding her legs below her knees and moving her up and down, her underwear and pyjama pants had been pulled down to her knees, the appellant was kneeling, her legs were on either side of the appellant's stomach, and her feet were behind the appellant. Later in the interview the complainant said that her pyjama pants were on the ground but she repeated that her underpants were around her knees. The interviewing police officer, who conducted this difficult interview in a calm, compassionate, and skilful way, told the complainant that it was difficult to understand how the complainant's underpants could have been around her knees whilst her legs were on either side of the appellant during the events she described. The complainant maintained the version she had given. The complainant said that after the appellant left the bed she pretended that nothing had happened. When she showered she noticed that her vagina hurt.

[7] The complainant told the police officer that on the day before the police interview she had argued with her mother about wanting to leave home as soon as she turned 16. When her mother asked her why, the complainant said she would not understand because it was hard to say. The complainant's mother asked the complainant whether someone had touched her. The complainant then said that the appellant had touched her legs and shoulders. On the following day the complainant rang 000 and told the operator that the appellant had raped her.

[8] When the complainant was asked whether she had told anyone else apart from her mother, she referred to an occasion in the second term in 2011 when she told a friend, MC, that she woke up and the appellant was on top of her. The complainant also told the police officer that not long after the appellant raped her, when the complainant was staying at her cousins' house for two weeks, her cousin FE asked her why she hated the appellant. The complainant replied that the appellant had raped her. FE started laughing as though it was a joke.

[9] In the complainant's evidence in chief she affirmed the truth of what she had said during the police interview. The complainant also referred to a fourth incident, which she said occurred before the first of the occasions she had described in her police interview, when she saw the appellant using a sex toy to masturbate in the bed. The complainant said that she pretended to be asleep and that the appellant did not notice that she was awake. The complainant maintained her account of the indecent dealings she had alleged in her recorded police interview. She also maintained her account that the appellant had raped her. The cross-examination exposed inconsistencies and contradictions in her evidence and between her evidence and the evidence of other witnesses. The significant issues will be obvious from the following summary of the evidence given by other witnesses.

[10] The complainant's mother gave evidence, which was consistent with the complainant's evidence, that she regularly left the house early in the morning during the relevant period. She also gave evidence that the appellant used a sex aid at times to stimulate himself, that during 2011 and 2012 the complainant would often get into her parents' bed, and that the appellant disliked this and would shout at the complainant to get out. The complainant's mother gave evidence that on the day before the police interview she had tried to get the complainant to clean up her bedroom. The complainant didn't like that and "had a little bit of a hissy fit." The complainant said she wanted to move out when she was sixteen. When the complainant's mother asked why she wanted to move out the complainant said that something had happened between her and the appellant. The complainant did not tell her mother what it was. On the following day the complainant's mother came home from work to find that the police had arrived. In cross-examination the complainant's mother said that the complainant did not say that she was raped.

[11] In a police record of interview in January 2013, MC (who was then 11 years old) said that a couple of weeks before the end of term 2 the complainant was crying and told her that that the appellant had hit her. In MC's pre-recorded evidence in March 2014 she affirmed the truth of what she had told the police officer. In cross-examination she said that the complainant had never at any time said anything along the lines that the appellant had woken her up and was on top of her.

[12] The complainant's cousin FE was interviewed by police in September 2013, but the record of that interview was not tendered in evidence. In cross-examination during her pre-recorded evidence in May 2014 (when she was 13 years old) she said that she had refreshed her memory by looking at the record of her police interview. FE gave evidence that she did not have a conversation with the complainant in which she asked the complainant why she hated the appellant and the complainant said that it was because the appellant had raped her. FE said that the complainant told her that she was lying about the appellant touching her, and that she lied in order to get the appellant away from the family and the house. In re-examination FE said the complainant did not talk about the appellant touching her at all.

[13] Another cousin of the complainant, FE's sister CA, was interviewed by police in September 2013. Again, the record of that interview was not tendered in evidence. CA gave pre-recorded evidence in May 2014 when she was 16 years old. In cross-examination she agreed that she had refreshed her memory by listening to the recorded police interview. She said that in the mid-year school holidays in 2013 the complainant told her that the appellant had not raped her vaginally but that he had raped her anally. The complainant gestured to her backside as she said that.

[14] The appellant did not give or call evidence. His detailed version was contained in a recorded police interview which was tendered in the Crown case. In the course of that interview the complainant's allegations were put to him. He repeatedly denied those allegations. When he was confronted with the allegation that he had raped the complainant, he forcefully denied it and expressed puzzlement, concern, and shock that this complainant had made such an allegation against him.

[15] There was other evidence in the Crown case, including testimony by the complainant's brother and two half-sisters, but this evidence did not have a significant bearing upon the reasonableness of the verdicts.

Consideration

[16] Counsel for the appellant argued that various weaknesses, inconsistencies and contradictions in the evidence within the Crown case rendered the guilty verdicts unreasonable. Counsel for the respondent acknowledged the accuracy of the matters identified by the appellant's counsel and that they raised relevant issues, but submitted that all of those issues were drawn to the attention of the jury in the summing up and that the jury was entitled to find as it did.

[17] In *R v BAT*[4] Keane JA (with whose reasons MacPherson JA and Douglas J agreed) observed that:

> "Since *M v The Queen*, it has been consistently held by this Court that inconsistencies and deficiencies in a complainant's evidence may reasonably be regarded as of little moment by the jury who has seen the complainant and enjoyed the advantage of observing her reactions and responses when tested with these inconsistencies and discrepancies."

[18] Some of the numerous matters upon which the appellant relied were inconsistencies or deficiencies of that kind. Of themselves they would not have justified the strong step of setting aside a jury verdict. Those matters included the following: according to the evidence of the complainant and her mother, the complainant continued to sneak into her parents' bed through into 2012, well after the time of the alleged sexual assaults by the appellant, even though the complainant's mother regularly left for work early in the morning, leaving the complainant alone in the bed with the appellant; in the period of about one year after the alleged offences the complainant did not complain about them to her mother, her maternal grandmother, or any other person, although she acknowledged in evidence that she could say anything to Salvation Army staff at a place she regularly attended; the complainant's account in the police interview that the offences occurred towards the end of 2011 was inconsistent with evidence she gave in the pre-recorded hearing that they occurred before the September school holidays in 2011; the complainant's evidence that the incident in the shower happened after the alleged rape was inconsistent with the order of the events she described in the recorded police interview; and some intimate details of the alleged offences given by the complainant in her testimony contradicted statements about the same matters in her police interview.

[19] A concerning aspect of the complainant's evidence was her description of the most serious alleged offence in her recorded police interview (see [(6)] of these reasons). That description understandably puzzled the interviewing police officer. It is difficult to understand how the alleged offence could have occurred in the way the complainant described. However, this case did not involve only inconsistencies, deficiencies and discrepancies in the evidence of the complainant. There were also contradictions of critical aspects of the complainant's account. The following contradictions were of particular significance:

(a) The complainant stated and repeated in her police interview and early in her pre-recorded evidence that vaginal penetration had occurred and caused her vaginal pain which persisted in her subsequent shower, but CA was not shaken in her evidence that the complainant denied vaginal penetration and stated that

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4 [2005] QCA 82 at [28].

anal penetration occurred. CA's account was on its face apparently credible and reliable. The complainant did not refer the police officer to any conversation with CA.

(b) In cross-examination of the complainant about the conversation described by CA, the complainant ultimately gave evidence that penetration may have occurred vaginally or anally and that she did not know which had occurred. That explanation contradicted many unequivocal statements in her police interview and in her evidence that her vagina had been penetrated.

(c) The complainant's mother's evidence of the limited complaint to her did not match the complainant's evidence about the same conversation, and the complainant's mother apparently did not take any action about the complaint but went to work as usual on the following day. More significantly, the two other people whom the complainant identified as persons to whom she had complained dramatically contradicted her account of those complaints:

    (i) FE gave evidence that the complainant said that she had lied about the appellant touching her in order to get the appellant away from the family and the house.

    (ii) MC contradicted the complainant's accounts that she complained of sexual misconduct by the appellant and gave evidence that the complainant instead said that the appellant had hit her.

[20] That the jury had a doubt about the credibility or reliability of a critically important part of the complainant's evidence is suggested by the jury's verdict that the appellant was not guilty of rape. The jury found the appellant guilty of attempted rape, revealing a doubt whether penetration had occurred. If the doubt was based upon the marked change in the complainant's evidence about penetration, the verdict emphasised the significance of that change. If the doubt arose from statements in the appellant's police interview (which was consistent with evidence given by the complainant's mother) that he had difficulty in maintaining an erection, the jury must have harboured a doubt about evidence given by the complainant that the appellant's erect and hard penis entered her vagina and caused her pain which persisted whilst she showered afterwards. In summing up to the jury, the trial judge also referred to the absence of supporting medical evidence of vaginal or anal intercourse. Again, if that influenced the jury's verdict of not guilty on the rape charge it suggests a doubt upon the complainant's quite emphatic evidence that penetration had occurred.

[21] Any one of the contradictions in the evidence might not necessarily have justified interference in the verdicts, but the cumulative effect of those contradictions in the context of other inconsistencies and weaknesses in the Crown case compelled the conclusion that there was a reasonable doubt that the appellant was guilty of any of the offences of which he was convicted. This was not a case in which the doubt could be resolved by reference to any advantage the jury possessed in seeing and hearing the evidence. Having played the recordings I found nothing capable of satisfactorily explaining the contradictions in the evidence.

[22] There was in this case no scope for applying the proviso in s 668E(1A) that the court "may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it

considers that no substantial miscarriage of justice has actually occurred." Accordingly, I considered that the Court was obliged to set the verdicts aside and enter verdicts of acquittal.

[23] **GOTTERSON JA:** I agree with the reasons of Fraser JA for the orders made at the hearing of the appeal.

[24] **JACKSON J:** I agree with the reasons and orders of Fraser JA.