SUPREME COURT OF QUEENSLAND

CITATION:	*R v JW* [2015] QCA 31
PARTIES:	**R** **v** **JW** (appellant)
FILE NO/S:	CA No 173 of 2014 DC No 1408 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2015
JUDGES:	Holmes, Fraser and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of three counts of indecent treatment and one count of attempted rape of his grandson – where the complainant was under 12 years and was to the appellant's knowledge his lineal descendant – where the complainant gave evidence of a remark his mother made to the appellant as to her expectation of his misconduct and of the latter's response – where the evidence was ruled admissible as capable of amounting to an implied admission – whether the evidence was wrongly admitted CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where the appellant was convicted of three counts of indecent treatment and one count of attempted rape of his grandson – where the complainant was under 12 years and was to the appellant's knowledge his lineal descendant – where evidence prejudicial to the appellant was wrongly admitted – whether there was a substantial miscarriage of justice – whether the court should

exercise its power under s 668E(1A) of the *Criminal Code* (Qld) to dismiss the appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of three counts of indecent treatment and one count of attempted rape of his grandson – where the complainant was under 12 years and was to the appellant's knowledge his lineal descendant – where the appellant argued that the complainant's evidence was unreliable and that there were inconsistencies between his account and preliminary complaint evidence – where the appellant argued that there was inconsistency in the evidence of the complainant's mother as to an uncharged act – whether the verdicts were unreasonable

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

Lee v The Queen (2014) 88 ALJR 656; (2014) 308 ALR 252; [2014] HCA 20, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied
WGC v The Queen (2007) 233 CLR 66; [2007] HCA 58, cited

COUNSEL: The appellant appeared on his own behalf
S J Farnden for the respondent

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

[1] **HOLMES JA:** The appellant, who was self-represented on this appeal, was convicted of three counts of indecent treatment of his grandson, B, with the circumstances of aggravation that the boy was under 12 years and was to the appellant's knowledge his lineal descendant, and of a further count of attempting to rape the boy. He appealed the convictions on the grounds that they were unreasonable and "contrary to the weight of the evidence". He was given leave to amend his notice of appeal to add a further ground reflecting a contention in his outline of argument: that a judge hearing a pre-trial application erred in ruling admissible B's evidence as to a comment his mother had made to the appellant.

The pre-trial ruling

[2] B was interviewed by police on 13 August 2010, just after his 13th birthday. He gave an account of an incident which occurred when he was eight years old, at the appellant's house in New South Wales. Because the allegation was of an assault in another jurisdiction, it was put before the jury as an uncharged act. B said that his grandfather had called him into his bedroom, where he was lying on his bed in his pyjamas. He took hold of the boy's arm and forced his hand onto his, the appellant's, penis under his pyjamas. B tried to pull his hand away for about half a minute before his mother entered the room and shouted at the appellant (her father).

B was asked what words his mother had used and whether his grandfather had said anything. According to B, she yelled, "I shouldn't have trusted you, I knew you'd touch one of my children", to which the appellant responded "No, I didn't". That exchange was the subject of the pre-trial ruling as to admissibility on which the second appeal ground is based.

[3] B's mother said in evidence that she recalled such an incident when she and her son were visiting the appellant. She looked into her parents' bedroom to see B on the bed with her father, who had his right arm around the boy. B's right hand was towards the opening of her father's pyjama pants. She walked a little further, realised what she had seen and returned to the bedroom, where she saw B pulling his hand back and getting himself off the bed while the appellant pushed him away. B looked upset, as if he were about to cry. She shouted repeatedly, "What is going on?", while her father said words to the effect of, "I didn't do anything" or "I haven't done anything".

[4] Defence counsel on the pre-trial application submitted that B's evidence of his mother's saying "I shouldn't have trusted you, I knew you'd touch one of my children" should be excluded as suggesting a propensity to such offending in the appellant. Puzzlingly, the judge hearing the application ruled that the evidence was admissible as capable of amounting to an implied admission; notwithstanding B's following statement, which is quite clear in the video-recording of the interview, that the appellant had denied the act. One can only conclude that his Honour must have misunderstood the effect of the evidence, perhaps thinking that the child had said the appellant did not answer, rather than that, as recorded, he said that the appellant answered "I didn't".

[5] The case then proceeded to two trials, in each of which the jury was discharged for differing reasons, before a third trial at which the appellant was convicted, resulting in the appeal here. It is difficult to understand why at no stage was the ruling revisited, given that it was so clearly based on a misapprehension of some nature. Instead, the evidence was placed before the jury without further question. It does not, however, appear to have been relied on for any purpose at the trial the subject of the appeal here, and the trial judge did not refer to it at all in the summing up.

[6] Counsel for the respondent Crown here conceded that no admission could be implied from the exchange B recounted. She submitted, however, that it was not prejudicial because B's mother had not given evidence of making any such statement; because the jury would not have regarded it as indicating that the appellant had performed some act of the kind before; and because, in any event, it included his denial.

[7] I do not accept that submission. Firstly, it seems improbable that the jury would not have accepted B's evidence that his mother made the contentious statement. His mother said in her account of the incident that she had yelled for a few minutes "Like, what's going on, what's going on?", but she was not asked whether or not she had said the words her son attributed to her. Her evidence contained nothing to suggest that she had not in fact said them, so there was no basis on which the jury might have rejected B's evidence on the topic. Secondly, I do not consider that the statement that she had always anticipated that the appellant would touch one of her children can be regarded as other than highly prejudicial. Even if it did not lead the jury to infer that he had done something of the kind before, it must, at least, have left them with the impression that his own daughter considered him of such

reprehensible character as to be likely to do such a thing. Finally, the fact that, according to B, the appellant's response was a denial could hardly negate the damaging effect of the statement. There was no advantage to the appellant in having the passage in evidence, because the fact that he had denied touching the boy was led, without objection, from B's mother; and plainly, defence counsel recognised the danger of B's version being put into evidence, applying for its exclusion.

[8] Counsel for the respondent further submitted that if the Court were to take the view that the evidence was prejudicial, it should, in any event, exercise its power under s 668E(1A) of the *Criminal Code* (Qld) ("the proviso") to dismiss the appeal, concluding that no substantial miscarriage of justice had occurred. I will return to that submission after dealing with the ground that the verdict was unreasonable.

The Crown case

[9] B said that near Christmas, about a year after the incident which his mother witnessed, his grandparents came to visit his family at their residence near Nanango. He was in a small room under the stairs called "the kids' lounge" with the appellant when the latter grabbed his arm and pushed his hand onto his, the appellant's, penis, on top of his shorts, which he then began to pull down. That assault was the subject of count 1 on the indictment, indecent treatment. B tried to run from the room and the appellant pulled him back. B fell; the appellant picked him up and then tried to force his hand onto his penis again, but this time, B touched no more than his grandfather's stomach.

[10] About a week later, B said, he was in a shed near the house where his family were storing boxes of possessions packed in contemplation of a move to Townsville. The shed was usually used for cars, bikes and tools. Both he and the appellant were moving boxes when the appellant pulled down his trousers and his underpants to his ankles and began to masturbate. He desisted when he heard B's mother start her car nearby. B ran out of the shed, got into the car and went into town with his mother. That offence was the subject of count 2, indecent treatment, particularised as exposure of a child to an indecent act. The following day when both were again in the shed, B bent down to retrieve some Christmas decorations. While he was in that position the appellant pulled down his trousers and B's, and attempted to insert his penis into the boy's anus, holding him by the stomach in an attempt to achieve penetration. He was unsuccessful; B kicked his arthritic leg so that he fell, and ran from the shed. Those allegations gave rise to count 3, the attempted rape charge.

[11] B said that there was another incident when he was about ten years old, in which the appellant masturbated in front of him. The appellant was helping B to retrieve a small motor bike from his father's Land Cruiser, parked near a different shed, which B called the "horse shed". In the process, the appellant moved a sheet of roofing iron. He balanced it against the car and a pole, giving him a screen against passers-by, then pulled down his trousers and masturbated as B pushed the bike towards the horse shed. B said he saw this occur for a couple of seconds before running away. Count 4, a charge of indecent treatment, particularised as exposing a child to an indecent act, was based on this allegation.

[12] B said that a similar incident occurred when he was visiting his grandparents in New South Wales at the beginning of 2009. B was using a toilet in the laundry at

the back of their house when the appellant entered, locked the door, pulled down his trousers and underclothes and masturbated. That conduct was relied on as an uncharged act. B said that he had not told anyone of any of those incidents until he confided in his stepmother one afternoon about a month before his police interview; after disclosing them to her, he told his father about them as well, when the latter arrived home.

[13] In cross-examination it was put to B that the abuses he described had not happened; he disagreed. In particular, in relation to the incident in which he had said the appellant masturbated in front of him in the laundry while he was on the toilet, the proposition was put to him, and rejected, that there was no lock on the laundry door as he had claimed. He similarly rejected a suggestion that there were no moving boxes in the shed near the house. It was also put to B that his grandfather had not threatened him to deter him from telling anyone of the abuse. B replied that he had done so: it was when he was about ten years old. He could not remember precisely what was said, nor where, but it was along the lines, "Don't tell anyone or you'll be in trouble". He agreed that he had not told the police or his stepmother about threats, but he said that he had told his father. (His father was not asked whether that was so.)

[14] B's stepmother gave evidence. She said that she was living with B's father in July 2010. B and his siblings were together for his younger sister's birthday when, while joking with his brother, B said that he must be gay, because his grandfather had touched him. His stepmother said she discussed the matter with B's father that night and the following day asked B whether what he said was true. According to the stepmother, B outlined the following incidents: when he was eight years old, his mother had found him with his hand on the appellant's penis; at the Nanango property, when the appellant and B were in a car in the property's driveway, the appellant began to masturbate and to play with B's penis but was interrupted by the arrival of B's mother in her car; the appellant had attempted to penetrate B's anus with his penis at some horse stables on the property; on other occasions, the appellant had masturbated in front of him, usually in the laundry; and on one particular occasion, the appellant had masturbated behind a sheet of metal near an old four wheel drive vehicle.

[15] B's stepmother said that the boy had described trying to draw his grandmother's attention to what was happening by getting her to come with him to the bathroom where the appellant was having a shower. The appellant had pulled B into the bathroom and masturbated in front of him, but B's grandmother did not enter the room to see it. In cross-examination, B's stepmother agreed that B had disclosed further incidents: that the appellant had "French kissed" him; that he had forced B to give him a "head job"; and that he had punched the appellant.

[16] The complaints which B's step-mother said he had made, which were not mentioned in his police interview, were canvassed with B in cross-examination. He agreed he had told his step-mother that the appellant had twice given him "French" kisses and on one occasion had forced B to fellate him, and that there was an instance when he tried to show his grandmother what was happening, but the appellant had locked the bathroom door; he did not remember telling his stepmother that the appellant had masturbated on that occasion. He denied telling her about his grandfather's masturbating in a car in the driveway to the Nanango property, and insisted that it had not happened. He was asked whether he had told her about

getting into "a punch-up" with the appellant and said he did not remember that; in re-examination he said that no "punch-up" with his grandfather had happened.

[17] B's father recalled that on the evening of his daughter's birthday, after he had finished work, both he and his then wife were present when B told them that the appellant had been touching him. B said that it had occurred both at the appellant's house and at the house the family used to live in in Queensland, and that it occurred in the shed used as a garage and near the horse stables shed. B had also said that the appellant had "tried to fuck him in the arse". B's father confirmed that boxes were packed for a possible move to Townsville. It was suggested to him in cross-examination that the boxes were ready at Christmas in the year his daughter was born (2004); he said that it could have been so, and on being shown a statement, agreed that he had previously said that it was then. Neither B's stepmother nor his father was challenged as to their recall of what B had said to them.

[18] B's mother gave the evidence already outlined of the incident she witnessed involving her father and B. Her recall was that it had happened about 2003. She and her children returned immediately afterwards to Queensland. Under cross-examination, B's mother accepted that in previous statements she had said both that she saw B's hand inside the opening of her father's pyjamas and that although she saw B's hand move quickly, she did not see where his hands were; her recall now was that B's hand was at the pyjama opening. It was put to her, but not accepted, that her statement that she had not seen where B's hands were was the "closest to the truth."

[19] B's mother said her parents had visited the Nanango property four or five times over the period she and her former husband had owned it. She confirmed that when the family was preparing to move to Townsville, there were boxes stored in the shed near the house which served as a garage. There were also boxes stored at the horse shed, at which a Land Cruiser was parked. She became aware of her son's allegations in November 2010. In early 2011, she telephoned her father, informed him that B had revealed what had happened, and asked why he had interfered with her son. The appellant responded that he did not know why he had done it.

[20] The appellant did not give evidence.

The appellant's submissions on the 'unreasonable verdict' ground

[21] The appellant's outline consists largely of a progress through the trial transcript taking issue with evidence given and various aspects of how the trial proceeded. At some points the appellant makes denials: he says that he never needed to lock the bathroom door; that he did not wear pyjamas to bed; that he did not push B from the bed as his daughter described; that the telephone call in which, according to her, he said he did not know why he had interfered with the boy had not taken place; and that there was no incident in which B tried to demonstrate to his grandmother what was happening. Those denials were not, however, made by him at trial; so there was no evidence before the jury to contradict B and his mother.

[22] Other submissions criticise the quality of B's recollection or effectively suggest implausibility in his account. In the former category is B's inability to remember the precise words of the threat he said his grandfather had made, whether it was made in New South Wales or Queensland, and when the "French kissing" incidents had occurred. None of those matters seems particularly significant for B's credit.

In the latter category, the appellant asserts that he could not have helped B take a bike out of the Land Cruiser while at the same time holding a sheet of tin. There is nothing in that: B made it clear in his evidence that he and the appellant had taken the bike out of the Land Cruiser and that the latter had moved the iron and commenced to masturbate while he, B, was wheeling the bike away from the car. A second point that the appellant makes is that if he had committed the assault the subject of count 1 in the "kids' lounge", anyone using the stairs would have seen it. That, of course, would depend entirely on who else was in the house at the time and what their activities were, as to which there was no evidence; and in any event, risk does not generally preclude the commission of sexual offences.

[23] The appellant also points to inconsistency between the evidence of B's stepmother as to preliminary complaint and B's evidence: as to whether there was a "punch-up" between B and the appellant and whether the attempted rape occurred in the shed near the house or the horse shed. He did not mention, but might have added, a third matter: the stepmother's evidence of B saying that the appellant had masturbated and fondled him in a car in the property driveway, something which B denied he had either experienced or disclosed.

[24] It is not entirely clear that the first of those apparent discrepancies does reflect a conflict in the evidence. B's stepmother's recollection was that B said he had punched his grandfather. It is conceivable that she was recalling B's use of violence to escape the attempted rape as a punch, rather than the kick B described to the police. At any rate, there is a lack of correspondence between what she remembered and what B denied; a punch is a rather different thing from a "punch-up", which connotes an exchange of blows. The remaining matters, as to where the attempted rape occurred and whether there was an incident of masturbation and fondling in a car seem to me within the usual "Chinese whispers" effect which occurs when a witness attempts to recall what a complainant has said about a series of events shocking to the listener: there will inevitably be some level of miscommunication, misunderstanding and inaccuracy of recollection on the part of the recipient of the information.

[25] Finally, the appellant raised the inconsistency in his daughter's evidence as to whether she had or had not seen B's hand in the front of his pyjamas. There is no doubt that there was some uncertainty in her recall of the precise position of the boy's hands in relation to her father's pyjamas, but she was not challenged as to her recollection of the position of B and his grandfather on the bed; their immediate reaction, with the boy quickly pulling his hands away and moving off the bed while the appellant pushed him; and B's upset state. Those details alone provided important support for B's account.

[26] There is nothing in the identified matters which should have caused the jury pause in acting on B's evidence. On the whole of the evidence, I am satisfied that the jury was entitled to accept B's account of the commission of the offences and to be satisfied beyond reasonable doubt of the appellant's guilt. The contention that the verdicts were unreasonable must be rejected.

Other matters raised

[27] The appellant's outline raises many other matters which have no bearing on whether the verdicts were reasonable. I will deal with two, relating respectively to new evidence and the particularisation of the dates of the offences. The appellant said that he had asked his lawyers to call his wife to give evidence, but they did not do

so. Although there was no application to adduce evidence, he asked the court to look at a letter. That letter, apparently from his wife, says that the truth was not told at the trial and her husband is innocent, but provides no further detail. Quite apart from the fact that any evidence which might come from the appellant's wife was available at trial, nothing in the letter nor in the circumstances B described indicates that she could have contributed anything useful to the defence. B did not suggest that his grandmother was present for any of the offending. At the highest, he said that on one occasion he had tried to persuade her to come into bathroom with him and she had not done so. There is no reason, therefore, to suppose that her evidence would have assisted the defence or affected the verdict in any way.

[28] The appellant also sought to have the Court have regard to a statutory declaration by a Mr Scott, who says that he visited the appellant's premises in December 2010 and noticed that there was no lock on the laundry door. Assuming that to be so, it was at a time well after the incident B described as occurring in early 2009 (and indeed after B had been interviewed by police); the appellant, plainly enough, could have given evidence at trial about the existence or otherwise of the lock if he had chosen to do so; and there is no reason to suppose that even had the jury concluded that B was wrong in this detail it would not have accepted his account generally.

[29] The appellant made a number of complaints relating to the dates on the indictment; essentially that the periods within which the offences were particularised were too broadly stated to allow him an alibi and that the trial judge had wrongly directed the jury that the dates were not material particulars, subject to their having to be satisfied that B was under 12 years of age.

[30] The first question was explored to some extent before trial when the Crown sought leave to amend the indictment to expand the periods during which the events were alleged to have occurred. The jury at the second trial was discharged after they pointed out that the dates on the indictment in its unamended form did not correspond with B's evidence, and the appellant's counsel maintained that any amendment at that late stage would preclude exploration of a possible alibi in respect of the altered dates. The result was the Crown prosecutor's successful application, prior to the trial resulting in verdicts, to amend the indictment to allege that the offences in Counts 1, 2 and 3 occurred between 2 August 2005 (the day before B's eighth birthday) and 5 March 2009 (the date on which B's family left the Nanango property), while Count 4 was alleged as occurring between 2 August 2006 (the day after B's ninth birthday) and 5 March 2009. The appellant's counsel opposed the amendment application, arguing, as the appellant does now, that the change made the giving of a notice of alibi impossible.

[31] The reason for the Crown's concern to set the dates so widely is not apparent from the transcript of the trial. B had set the events underlying the counts in a considerably more limited period: round Christmas 2006 for counts 1-3, with the incident of masturbation concerned in count 4 occurring when he was ten years old, i.e. in 2007 or 2008. The only evidence at odds with his timing was his father's recollection that the boxes had been placed in the shed in the year his daughter was born, which was 2004, and his mother's evidence that the incident she witnessed (from which B dated the earliest of the offences as occurring about a year later) was "around 2003"; but the amended dates did not cater for the possibility that the events occurred earlier than B recalled.

[32] However, I do not consider that any miscarriage of justice resulted. Neither the appellant nor his former counsel has suggested what alibi might be available. Certainly, the appellant was not precluded from leading evidence that he had not visited the Nanango property at the times B identified. The trial judge's direction was correct: there was nothing in the conduct of the trial which made proof of the dates essential, apart from the need to establish that B was under 12.[1] And, importantly, the trial judge gave the jury a *Longman*[2] direction, pointing out, among other things, the difficulty for the appellant of establishing any alibi over the long charge periods.

Application of the proviso

[33] Counsel for the respondent submitted that the Court should apply the proviso because the appellant had had the benefit of the jury's hearing the denial contained in the exchange to which B testified; because the matter was not given any prominence in the summing up; and because of the strength of the Crown case. The first two propositions are directed to the effect of the evidence on the jury. But the question of whether the proviso should be applied is not to be resolved by reference to whether the jury might have reached a different view of the evidence absent the prejudicial statement:

> "… the possibility that the trial jury *might* have used wrongfully received evidence against the accused cannot be treated as conclusive of the question presented by the proviso".[3]

This Court's task is to make its own assessment of the evidence and, allowing for the limitations of proceeding on the record in respect of some of the evidence, to determine whether the appellant's guilt was established beyond reasonable doubt.[4] The fact that the jury returned a guilty verdict may be relevant;[5] but in the present case there is a real risk that the jury's verdict was influenced by the damaging evidence from B's mother, so that it must be viewed in that light.

[34] However, this Court is in as good a position as the jury to consider B's evidence, both in the police interview and the hearing, all of which was recorded. It was consistent, coherent, and credible. There was some difference between his timing of the events and his parents' recall, with no great certainty, of when the boxes were in the shed and when the incident the subject of the uncharged act occurred, and there was the variation already discussed in the preliminary complaint evidence. Otherwise, there was no evidence to contradict any detail of B's account of the offences, and nothing emerged in cross-examination of him or any other witness to cast any serious doubt over his veracity and reliability. On the whole, the preliminary complaint evidence from both B's father and his stepmother served to bolster his credibility. More importantly, B's account was supported by what was properly regarded as an admission, in the form of the appellant's response to B's mother that he did not know why he had interfered with the boy. In addition, her evidence of the incident in the New South Wales house, largely unchallenged as to detail, corroborated B's account of it; that evidence went to establishing the appellant's sexual interest in the boy.

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1 *WGC v The Queen* (2007) 233 CLR 66.
2 *Longman v The Queen* (1989) 168 CLR 79.
3 *Weiss v The Queen* (2005) 224 CLR 300 at [36].
4 *Weiss* at [41].
5 *Weiss* at [43].

[35] This is not an instance where the error in admitting the prejudicial statement attributed to B's mother was of such a fundamental nature, "such a serious breach of the presuppositions of the trial", as to preclude the proviso's application.[6] On a review of the whole of the trial record, I am satisfied that the evidence proved the appellant's guilt of the offences beyond reasonable doubt and, accordingly, that no substantial miscarriage of justice has occurred in this case.

Order

[36] I would dismiss the appeal against conviction.

[37] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the order proposed by her Honour.

[38] **PHILIPPIDES JA:** I agree, for the reasons given by Holmes JA, that the appeal should be dismissed.

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6 *Weiss* at [46]; *Lee v The Queen* (2014) 308 ALR 252 at [48].