SUPREME COURT OF QUEENSLAND

CITATION:	*R v Matthews* [2015] QCA 82
PARTIES:	**R** **v** **MATTHEWS, Glen Edward** (appellant)
FILE NO/S:	CA No 258 of 2013 DC No 180 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Unreported, 16 September 2013
DELIVERED ON:	12 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2015
JUDGES:	Margaret McMurdo P and Gotterson JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the conviction on Count 1 on the indictment presented against the appellant on the 7th February 2013.** **3. Enter a verdict of acquittal on the said Count 1.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of an offence under s 218A(1)(b) of the *Criminal Code* in that he, being an adult, used electronic communication with intent to expose, without legitimate reason, a person he believed was under 16 years of age, to indecent matter – where the appellant was sentenced to 18 months' imprisonment suspended after serving four months for an operational period of two years – where the appellant committed an indecent act in front of a webcam whilst in communication with a fictitious persona named Cilla Braxton – where the fictitious persona Cilla Braxton was set-up and operated by the QPS as part of Task Force Argos – where the appellant provided evidence that he held the belief that he was in communication with a person over the age of 16 years – whether there was a failure on the part of the prosecution to prove a necessary element of the charge, namely, that the appellant believed the person he was

communicating with was under 16 years of age

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where Exhibit 1 tendered at trial did not reproduce a profile page on the motherless.com website at the time of the alleged offending – where Exhibit 1 contained a number of profile comments made by third parties after the date of the alleged offending – where no objection was taken to the tender of Exhibit 1 at trial and no direction was sought by defence counsel with respect to them – whether those comments made by third parties were highly prejudicial to the appellant such that a miscarriage of justice occurred, was substantial, and was beyond the application of the proviso in s 688E(1A)

Criminal Code 1899 (Qld), s 218A(1), s 218A(1)(B), s 218A(8), s 218A(9), s 688E(1A)

R v Shetty [2005] 2 Qd R 540; [2005] QCA 225, applied

COUNSEL: J Shepley for the appellant (pro bono)
B J Power for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for allowing this appeal against conviction and with his Honour's proposed orders.

[2] **GOTTERSON JA:** On 16 September 2013, in the District Court at Brisbane, the appellant, Glen Edward Matthews was convicted on Count 1 on an indictment presented on 7 February 2013. The count alleged an offence against s 218A(1)(b) of the *Criminal Code*[1] in that on 30 March 2012 at Veresdale he, being an adult, used electronic communication with intent to expose, without legitimate reason, Cilla Braxton, a person he believed was under 16 years of age, to indecent matter.

[3] On the day of the conviction, the appellant was sentenced to 18 months' imprisonment suspended after serving four months for an operational period of two years.

[4] The appellant filed a notice of appeal against his conviction[2] on 11 October 2013. The sole ground of appeal stated in the notice of appeal is that the conviction was against the weight of the evidence. During the course of the hearing of the appeal on 25 February 2015, leave was granted to add an additional ground of appeal. The potential availability of this ground became apparent as the appeal was being argued.

---

1 At the date of the alleged offending, s 218A(1)(b) provided: "Any adult who uses electronic communication with intent to expose, without legitimate reason, a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to indecent matter, either in Queensland or elsewhere commits a crime."

2 AB517-518.

The circumstances of the alleged offending

[5] Cilla Braxton is a fictitious person. It is a name that was given to an online persona used by Detective Senior Constable Woodall.[3] During March and April 2012, DSC Woodall was attached to Task Force Argos which is tasked with the detection and prosecution of child sex offenders.[4]

[6] A profile was created for the Cilla Braxton persona on Windows Live. The profile facilitated access to Windows Live Messenger. The profile page, Exhibit 3,[5] gave a name "Cilla Braxton" and stated the following personal details:

> "Birthday – 10 September 1997 (14 years)
>
> Gender: Female
>
> Occupation: at skool"

A thumbnail photograph of a teenage girl whom DSC Woodall said in evidence was 14 years old,[6] appeared on the profile. The subject was photographed from the midriff area up. She was dressed in a school uniform with a figure-hugging blouse. A personal email address CillaBraxy14@live.com.au was displayed.

[7] DSC Woodall also created a "Cilla Braxton" profile on an online adult pornographic website known as "motherless.com". To create a profile, the user needs to enter an age which is above 18 years.[7] The profile page for this site, Exhibit 1,[8] displayed the name "cilla14brisbane" with the following personal details:

> "Date joined: Mar 19th 2012
>
> Gender: Female
>
> Sexuality: Straight"

No age or date of birth was stated on this profile page. However, the same thumbnail photograph that appeared on the Windows Live profile page also appeared on the "motherless.com" profile page, as did the same email address.

[8] The appellant had joined the "motherless.com" website on 16 December 2011. His profile page, Exhibit 2,[9] displayed the name "OzNurse". The appellant had created that persona. He also operated a Hotmail account "oznurse2011@hotmail.com".

[9] It is apparent that the appellant learned of the Cilla Braxton persona by locating the cilla14brisbane profile page. DSC Woodall testified that he first came into contact with the appellant on the motherless.com website. The appellant, as OzNurse, sent an "offline" message[10] to the cilla14brisbane persona on 27 March 2012 via that website. Brief "offline" exchanges occurred on that day and on 29 March 2012. In

---

3 AB151; Tr1-13 ll4-8.
4 AB142; Tr1-4 l41 – AB143; Tr1-5 l2.
5 AB480.
6 AB153; Tr1-15 l17.
7 AB152; Tr 1-14 l7-8.
8 AB478, As is explained later in these reasons, this exhibit did not reproduce this profile page exactly as it was during the period between 27 and 30 March 2012.
9 AB479.
10 DSC Woodall explained that "offline" messaging was similar to email messaging in that it does not involve live interchanges: AB152; Tr1-14 ll20-28.

the course of the exchanges, the appellant described the profile picture of his correspondent as "very cute" and enquired of the persona's interest in chatting online.[11]

[10] It seems that the appellant located the profile page for Cilla Braxton on the Windows Live website by means of the email address common to both profile pages. He had managed to locate it by 30 March 2012.

[11] However, by that date, a person unknown to police, had already tagged a photographic image of a young woman in a bikini as "Cilla Braxton". The subject is photographed wearing sunglasses and paddling at the water's edge. This photographic image, Exhibit 18,[12] depicts an adult female who appears to be more than 16 years of age. The tagging had caused the image to be uploaded to the "Skydrive" or "Cloud storage" part of the Cilla Braxton profile on Windows Live.[13] When "Photos" on this profile page was clicked, the Exhibit 18 photographic image was displayed. Clicking on this image led to the Cloud storage of a person called "Sophie H". The "Sophie H" files contained numerous photographic images of young women in a beach or social setting. A search of the appellant's computer located a file called "Sophie H". This file contained images from a "Profile Piccys" folder within the "Sophie H" files.

[12] Evidently, the appellant saw the photographic image of the young woman in the bikini on the Windows Live profile page and, via it, had accessed the "Sophie H" files. However, it was not until 19 April 2012 that DSC Woodall learned that the particular photographic image had been tagged to the Cilla Braxton profile page.[14] These circumstances account for the apparent confusion in messages exchanged between 10 am and 10.30 am on 30 March 2012 as follows:

> OzNurse (appellant): "hi Cilla u are very sexy love the photo of u in ur togs. like to chat online ok got ur message i am also just going out back at 12ish."
>
> Cilla Braxton (Woodall): "where did u c me in my togs"
>
> OzNurse (appellant): "in ur photos try join messenger live computer was going crazy and ur photos [popped] up."[15]

[13] The appellant engaged in online chatting with the Cilla Braxton persona from about 12.15 pm that day, for about two hours. A transcript of the chat log was tendered as Exhibit 6.[16] Early in the chat session, the Cilla Braxton persona twice intimated that she was 14 years old[17] to which the appellant replied that she looked older than she said she was.[18] The appellant again mentioned the "tog pix" but the persona responded that she did not know what "pic" he was talking about.[19] Discussion about exchange of photographs of each other ensued[20] and the conversation took on a sexualised tone.

---

11 Exhibit 5; AB481.
12 AB511.
13 AB233; Tr3-27 l5 – AB237; Tr3-31 l24.
14 AB237; Tr3-31 ll13-16.
15 Exhibit 21; AB497-498.
16 AB482-494.
17 AB482, 483.
18 AB482.
19 AB483, 484.
20 Exhibits 7 to 13 and 15 were photographic images exchanged between them during the chat session. The images of "Cilla Braxton" sent to the appellant were found in a file on his computer. Four of

[14] The appellant activated his webcam so that the Cilla Braxton persona could see him.[21] The persona initially resisted the appellant's invitation to reciprocate out of "shyness".[22] At this point, the following exchange occurred:

> Cilla Braxton (Woodall): "kinda but normally with my friends from skool an they r onli 14 like me lol"
>
> OzNurse (appellant): "don't tell me ur 14 i don't [believe] u ur more like 18+"
>
> Cilla Braxton (Woodall): "n ur still silly lol"
>
> OzNurse (appellant): "can u get online without ur parents knowing."[23]

[15] Later, the Cilla Braxton persona's webcam was activated and focused on a "prop" female person in silhouette. The picture seen by the appellant was blurry and did not display a face. The conversation progressed to a highly sexualised state and to a point where the alleged offending occurred.

[16] The particulars of the count were that the appellant "fondled his penis" and masturbated in front of an operating webcam during a chat with the Cilla Braxton persona. On the third day of the trial, the appellant made formal admissions to that effect. He also formally admitted that his conduct recorded on the webcam was such that it would amount to indecent matter if shown to a person under the age of 16 years.[24] In light of these admissions, the principal issue for the jury's consideration was whether the appellant believed the Cilla Braxton persona to be under 16 years of age.

[17] The appellant was interviewed by DSC Woodall on 19 April 2012. The interview was recorded. The recorded interview was viewed by the jury and the recording was tendered.[25] During the interview the appellant consistently said that he believed that the persona was not 14 years, but older.[26]

Statutory provisions

[18] Subsections (8) and (9) of s 218A of the *Criminal Code* were enacted in the following terms at the time of the alleged offending:

> "(8) Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.
>
> (9) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years, or 12 years, as the case may be."

---

them, Exhibits 9, 11, 13 and 15 appear to depict the same teenage girl dressed in casual or beach attire. Exhibit 8 depicts a young teenage girl in a school sports uniform.

21 AB488-489.

22 AB488-489.

23 AB488.

24 Exhibit 24; AB500, admitted at AB260; Tr3-54 l28.

25 Exhibit 20 tendered at AB241; Tr 3 – 35 116. Transcript at AB 336 – 400.

26 AB 345 – 349; 394.

[19] The respective roles of these two subsections were considered and explained by this Court in *R v Shetty*.[27] Keane JA (with whom McPherson JA and McMurdo J agreed) said of s 218A(8):

> "[21] … The interpretation of s 218A(8) to be preferred, in light of the authorities concerning the proper approach to the interpretation of penal statutes, is that if the accused does advance some explanation as to what belief was actually held then it is for the jury to assess the credibility of that explanation. If that explanation is accepted, or, more precisely, if it is not excluded by the prosecution beyond reasonable doubt, the charge will fail because the Crown will have failed to prove a necessary element of the charge.
>
> …
>
> [26] To summarise, in my opinion, s 218A(8) does not alter the position that the jury must be satisfied that the accused had the belief essential to establish a contravention of s 218A(1). The legislature has determined that the jury must be so satisfied if they conclude that it was represented to the adult that a person was under a certain age and the adult does not adduce evidence that the representation did not induce in him the belief which that representation was apt to induce. If the adult does adduce evidence as to what he or she actually believed, then it is a matter for the jury whether or not this evidence should be accepted."

[20] His Honour's reference in the first of these two paragraphs to the advancing by the accused of some explanation of what belief was actually held is apt to include both an explanation given by the accused's own testimony at trial and an explanation inherent in the accused's conduct, evidence of which is properly admitted in the prosecution case.

[21] McMurdo J made the following observations as to these as possible sources of evidence as to the accused's actual belief:

> "Subsection (8) facilitates the proof of that element. It does not require the defendant to disprove it. Absent "evidence to the contrary", the element of belief is established if the jury accepts that the person was represented to the defendant as being under 16. Where there is evidence to the contrary, ie evidence that the defendant did not have the alleged belief, the prosecution proves the defendant's belief by the proof of the representation if it persuades the jury to reject that evidence as evidence to the contrary. And, of course, the evidence to the contrary need not be evidence adduced by the defendant: it may be evidence in the prosecution case."[28]

I respectfully agree with these observations. I do not read the second of the paragraphs from the judgment of Keane JA set out above as necessarily requiring that the

---

27 [2005] QCA 225. Both subsections were in the form set out above at the time of this decision.

28 At [31].

evidence to the contrary be sourced in the accused's testimony or testimony called in the accused's case.

[22] These observations have particular significance for this case. The appellant did not give or call evidence at trial. However, in a number of respects, evidence led in the prosecution case was at least consistent with his not having a belief that the Cilla Braxton persona was under 16 years of age. That evidence is considered later in these reasons.

Grounds of appeal

[23] The ground of appeal allowed by leave at the hearing of the appeal is that a miscarriage of justice occurred because Exhibit 1 did not reflect the profile page of cilla14brisbane on the motherless.com website at the time of the offending. Both that ground and the weight of evidence ground were addressed by counsel during the hearing.

Miscarriage of justice ground of appeal

[24] It is uncontroversial that Exhibit 1 tendered at trial did not reproduce the cilla14brisbane profile page on the motherless.com website at the time of the alleged offending. Most significantly, Exhibit 1 contained a number of profile comments made by third parties after 30 March 2012. One of the correspondents made the following comment on three different dates in April 2012:

> "If you are 14 and horny, cum and chat with me".

The same correspondent made another comment on a fourth date in April 2012 as follows:

> "Just had a birthday and want a horny young teen to help me celebrate".

[25] These comments were highly prejudicial to the appellant. They were apt to strengthen substantially in the jury's mind the impression that the cilla14brisbane persona was presented as a 14 year old and, as a consequence, lead them to be dismissive of the appellant's expressed scepticism towards the persona's statements that she was only 14 years old. I reject the respondent's submission that the jury would have noted the April dates in the comments for themselves and of their own accord disregarded the latter. The dates are in smaller print than the comments and the terms "14", "horny" and "cum" in the latter distract attention from the former.

[26] Notwithstanding these comments, no objection was taken to the tender of Exhibit 1 at trial and no direction was sought by defence counsel with respect to them. I am unable to accept a submission for the respondent that the comments might have been seen as assisting the appellant's case on the footing that they could bolster a theory that there were other males who, like the appellant, in truth believed that the persona was over 16 years old, but who gained a thrill from pretending that she was only 14 years old. It is, I think, most unlikely that defence counsel would have expected the jury to reason that way. To my mind, there was no apparent forensic advantage or benefit which might have been sought in failing to object to the tender, or to seek a direction with respect to the post-dated comments.

[27] In my view, a miscarriage of justice did occur because of the tender of Exhibit 1. The miscarriage of justice was substantial. It is beyond the application of the proviso in s 668E(1A). For these reasons, this ground of appeal must succeed.

The weight of evidence ground of appeal

[28] As developed in oral argument, this ground of appeal contends that there was a failure on the part of the prosecution to prove a necessary element of the charge, namely, that the accused believed that the Cilla Braxton persona was under 16 years of age. To adapt the test formulated by Keane JA in *Shetty*, the prosecution had not excluded beyond reasonable doubt evidence tendered in its own case of a belief on the appellant's part that the persona was at least 16 years of age.

[29] An assessment of whether the prosecution discharged that onus requires a comparison of the evidence relevant to the topic. The evidence supporting the existence of a belief on the appellant's part that the persona was at least 16 years old consisted of the following. He had located the cilla14brisbane page on an adult pornographic website where some adults may pretend to be teenagers as part of a virtual sexual fantasy; those using that site must enter an age over 18 years; the Exhibit 18 photographic image of "Cilla Braxton" which he accessed via the Windows Live website, depicted a female adult in a bikini apparently over 16 years of age; the messages authored by him on 30 March 2012 clearly indicate that he thought that the person with whom he was corresponding was the person depicted in the Exhibit 18 photographic image; and, during the live chat which ensued that day, he referred again to the "tog pics" and expressed disbelief that his correspondent was 14 years old, saying that she was "more like 18+". In addition, the appellant consistently told police in the interview that he did not believe that the persona was 14 years old.

[30] That the appellant in truth believed that the Cilla Braxton persona was under 16 years of age or, if not that, that he had reason to question his belief that she was at least 16 years of age, is suggested by other aspects of the evidence. The Windows Live profile page accessed by the appellant stated an age of 14 years and a birth date consistent with that age; the persona with whom he was corresponding twice professed no knowledge of a picture of herself in togs; on three occasions during the live chat, the persona said she was 14 years old; the photographic images, Exhibits 9, 11, 13 and 15 which appear to be of the same person and were sent by the persona to the appellant during the live chat, depicted a teenage girl who could have been under 16 years of age; and the appellant asked about the persona's parents not knowing that she was online. To that may be added, if the sexual fantasy hypothesis is rejected, puzzlement that one might expect the appellant to have experienced over why it would be that someone whom he thought was 18 years old or older would insist that she was only 14 years old.

[31] There was, therefore, credible evidence before the jury that the appellant believed that the Cilla Braxton persona was 16 years of age or older. There was also credible evidence giving rise to justifiable doubt whether the appellant had ever held that belief or if he initially had held it, whether that belief had endured until the time he committed the acts the subject of his admissions at trial. To my mind, the latter body of evidence went no more than giving rise to such doubt. It was not so persuasive as to overwhelm the former body of evidence to a point that one might reasonably conclude that the prosecution did exclude beyond reasonable doubt a belief at the relevant time on the appellant's part that the persona was at least 16

years old. That left unproved an essential element of the offence. Accordingly, this ground of appeal must also succeed.

Disposition

[32] Success on either ground of appeal has the consequence that the appeal must be allowed and the appellant's conviction on Count 1 be set aside. Had the appellant succeeded only on the miscarriage of justice ground of appeal, an order for a retrial would have been appropriate. However, evaluation of the other ground of appeal has revealed an evidential setting in which the prosecution would face the same difficulty on a retrial with respect to the requisite exclusion beyond reasonable doubt of a belief on the appellant's part that the persona was at least 16 years old. In the circumstances, the appropriate order is for the entry of a verdict of acquittal on the count.

Orders

[33] I would propose the following orders:-

1. Allow the appeal.

2. Set aside the conviction on Count 1 on the indictment presented against the appellant on the 7th February 2013.

3. Enter a verdict of acquittal on the said Count 1.

[34] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Gotterson JA, with which I agree. I also agree with the orders proposed by his Honour.