# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v DBI* [2015] QCA 83 |
| PARTIES: | **R**<br>**v**<br>**DBI**<br>(appellant) |
| FILE NO/S: | CA No 240 of 2014<br>DC No 357 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Southport – Unreported, 8 September 2014 |
| DELIVERED ON: | 15 May 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 April 2014 |
| JUDGES: | Holmes JA and Atkinson and Applegarth JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Grant the application for leave to adduce further evidence.**<br>**2. Admit into evidence the affidavit of Jakub Lodziak sworn 11 March 2015 and the affidavit of Peter Alexander Negerevich sworn 2 April 2015.**<br>**3. Grant the application to amend the grounds of appeal.**<br>**4. Allow the appeal.**<br>**5. Quash the conviction on all counts.**<br>**6. Enter verdicts of not guilty on each of the counts.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where the appellant was convicted of 10 counts of rape and one count of common assault – where the evidence against the appellant was primarily comprised of the testimony of the complainant – where the complainant recanted that testimony after the trial –where the fresh evidence comprised records of interview in which the complainant recanted evidence given at trial – where the evidence of the recantation was relevant, credible, cogent and reliable – whether the fresh evidence |

should be admitted on the appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the court observed the difficulties in setting aside a conviction solely on the basis that a recantation had occurred – where the recantation appeared credible and the reasons for the original lies appeared cogent – where the credibility of the recantation was bolstered by inconsistencies in the testimony of the complainant and other witnesses at trial – where it would not be open on the whole of the evidence, including the fresh evidence, for any jury to be satisfied beyond reasonable doubt of the guilt of the appellant – whether the verdict was unreasonable and insupportable having regard to the evidence

*Criminal Code* (Qld), s 671B(1)(c)

*Davies v The King* (1937) 57 CLR 170; [1937] HCA 27, considered
*Gallagher v The Queen* (1986) 160 CLR 392; [1986] HCA 26, followed
*Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35, followed
*R v Gale* [1970] VR 669; [1970] VicRp 86, cited
*R v Bryer* (1994) 75 A Crim R 456; [1994] QCA 547, followed
*R v K* [1984] 1 NZLR 264; (1984) 1 CRNZ 165, considered
*R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229, cited
*R v Main; ex parte Attorney-General (Qld)* (1999) 105 A Crim R 412; [1999] QCA 148, cited
*R v VI* [2013] QCA 218, followed

COUNSEL: J P Benjamin for the appellant
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Atkinson J and the orders she proposes.

[2] **ATKINSON J:** The appellant was convicted of 10 counts of rape and one count of common assault on 8 September 2014 in the District Court at Southport after a jury trial which lasted six days.

[3] At the time of his conviction, the appellant was 18 years old. He was a juvenile at the time of most of the offences. The learned trial judge therefore ordered a pre-sentence report, remanded the appellant in custody and adjourned the sentence to a date to be fixed. The appellant has not yet been sentenced.

[4] The appellant was admitted to bail on 3 October 2014 following a further interview given by the complainant to police on 30 September 2014. In that interview, the complainant retracted the evidence he had given at the trial in relation to the allegations against the appellant of sexual offences, which had formed the basis of the appellant's convictions.

[5] Leave was sought and given on the hearing of this appeal to admit evidence in the form of two affidavits. The first was made by a legal practitioner from Legal Aid Queensland and set out a brief history of what happened after conviction, annexing a copy of the disc and transcript of the complainant's interview with police on 30 September 2014. The second affidavit was made by the Legal Support Supervisor (Appeals) employed in the Office of the Director of Public Prosecutions and exhibited a copy of the transcript of a further interview conducted by the police with the complainant on 2 April 2015.

[6] The Notice of Appeal against his conviction recorded the ground of appeal as being that the verdicts of the jury, on each count, were unreasonable or could not be supported having regard to the evidence. Leave was given to add an additional ground, "that the evidence admitted by leave on the appeal demonstrates that a miscarriage of justice has occurred."

**The evidence at trial**

[7] The evidence against the appellant was primarily the pre-recorded evidence given by the complainant, the appellant's step-brother, who is four years younger than the appellant. His evidence-in-chief consisted of two interviews with the police conducted on 5 August 2013 and 31 October 2013. In the first interview he described several occasions of sexual abuse over a period of five years. The alleged abuse was described in lurid detail, but the complainant's account contained some passages which suggest that caution should be exercised in accepting the credibility and reliability of his story. This is particularly so given his reference to having seen certain sexual offences that he was describing in movies.

[8] The first incident described involved the complainant alleging that the appellant committed anal intercourse upon him and threatened him while their parents were out of the house. The complainant then said "And then, when he was finished, my mum told me if [the appellant] tells you to do something, don't do it – even though I couldn't tell her because [the appellant] was still upstairs." He gave no explanation as to what may appear to be an inconsistency between his parents being out during the incident but his mother being home for the conversation immediately afterwards.

[9] Amongst the other incidents the complainant described was an occasion at his grandmother's house where he said his younger sister came into the room while he was being abused and the appellant told her to leave.

[10] The final allegation in the first interview was one of which the complainant said "I think I can remember…". He said that only he, the appellant, the complainant and their younger sister were at home. They were playing hide and seek. The appellant told their younger sister to count, then told the complainant to go upstairs into the bathroom with him. The appellant then proceeded to have anal intercourse with him in the bathroom. Their sister called out asking the appellant where the complainant was. The appellant answered that he, the appellant, was in the toilet and asked her to wait. Their younger sister nevertheless opened the door, which

was not locked, and saw the appellant anally penetrating the complainant. The appellant then told her to shut up about it and she left. He then continued, ejaculating inside the complainant without protection.

[11] In the second interview, the complainant spoke of more occasions of violent sexual abuse that he had subsequently recalled. This time he referred to "pain movies" he had seen when describing what he said had happened to him.

[12] At various points in his evidence he described items on which he said the appellant wiped his penis after ejaculating. All had apparently been thrown out except a body pillow. The complainant's discussion of the body pillow showed that it had been in the bed where the appellant had slept with his girlfriend. It was admitted at the trial that the appellant's spermatozoa were found on that pillow.

[13] Cross-examination of the complainant revealed some further difficulties in accepting his evidence:

- He agreed that his mother was working six days a week from home doing ironing and that he was never left at home alone with the appellant, at a time when some of the offences were alleged by him to have occurred when his parents were out of the house;
- There was long-standing animosity between the complainant and the appellant which manifested itself in mutual name-calling, threats and physical fights;
- He said he always reported to his mother whenever the appellant was being mean to him or assaulted him, which was inconsistent with his not having told her about the various incidents of violence and sexual abuse which he had described;
- He agreed that his mother had talked to him and his older sister in December 2012, telling them that they should inform her if anyone touched or hurt them, and that he had told her that nothing bad was happening to him;
- He changed his story a number of times as to whether some incidents about which he told his school counsellor were real or just dreams;
- At the time he first spoke to the police, he was angry with the appellant because the appellant had taken the complainant's game console to Cash Converters; the police retrieved it but his father had not gone to collect it from the police station and it was eventually destroyed. He was told the game console could no longer be retrieved on 1 August 2013. The complainant became very angry with the appellant and with his father and wanted to get the appellant out of the house. It was then that he went to police.

[14] The complainant's younger sister was also interviewed by the police. The interviews on 6 August 2013 and 17 April 2014 were recorded. Her evidence-in-chief at the trial consisted of the second interview with police, which was recorded on 17 April 2014. She was 10 years old by the time her cross-examination was recorded on 7 August 2014.

[15] In her first interview with police she apparently corroborated the complainant's version of the offences he said she had witnessed. She subsequently asked her mother to contact the police because she had not told the police the truth and she knew that was wrong.

[16] Her evidence in the second police interview was that the complainant had told her to tell the police that the appellant had tried to touch her and that she had said no, and that she saw the appellant touch the complainant. She said he told her to say that so that the appellant would get into more trouble because the complainant and the appellant had never got along. The complainant's younger sister also said that the complainant had told her that if she found out where the appellant was, the police would come and take her away from her parents. She described a number of occasions of angry violence inflicted on her by the complainant, including punching her and threatening her with a knife. She gave evidence that, in truth, the appellant had never tried to touch her and she had never seen the appellant touching the complainant.

[17] The other witnesses called at the trial were the complainant's science teacher, to whom he had made a preliminary complaint, the youth support co-ordinator to whom he was referred by his teacher, the complainant's parents and older sister, a friend of the appellant and a friend of the complainant's family. Nothing in their evidence made the complainant's version of events any more likely. Indeed, much of that evidence served to further undermine the complainant's credibility and reliability.

**Appellant's submissions**

[18] The appellant submitted that the evidence given after the trial by the complainant, had it been available at trial, would have led the jury to entertain a significant and reasonable doubt as to the appellant's guilt of all offences. This is particularly so because the complainant has admitted to lying and there was no evidence implicating the appellant in the commission of the offences beyond the complainant's own evidence.

**Submissions of the respondent**

[19] The respondent submitted that the evidence given by the complainant after the trial was highly relevant to the central issues at trial, which were the complainant's reliability and credibility. The only evidence of the offences had come from the complainant. The respondent Crown conceded that it could not submit that there was not a significant possibility that a jury, acting reasonably on the trial evidence together with the fresh evidence, would have acquitted the appellant. The Crown conceded that, in this case, on the basis of the fresh evidence coupled with the trial evidence, it would not be open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

**Consideration**

[20] As referred to earlier in these reasons, the parties were given leave to adduce further evidence, being an interview between the complainant and the police on 30 September 2014 and a further interview on 2 April 2015. I have had the opportunity to view a recording of the first interview and a transcript of the second, which were conducted as interviews for a potential perjury offence committed by the

complainant. During the first interview after the trial, the complainant adamantly and emphatically denied ever having been sexually assaulted by the appellant.

[21] Leave to adduce the further evidence was given pursuant to s 671B(1)(c) of the *Criminal Code* (Qld), which enables an appellate court to receive the evidence, if tendered, of any witness who is a competent, but not a compellable, witness, if it thinks it necessary or expedient in the interests of justice.

[22] The principles governing the admission of such evidence were set out by the High Court in *Gallagher v The Queen*[1] and *Mickelberg v The Queen*[2] and have been followed in a number of decisions of the Court of Appeal.[3] These principles were summarised by the President, McMurdo P, in *R v VI*:[4]

> "In determining an appeal which turns on further evidence, the Court must consider two questions. The first is whether the evidence should be received. The second is, if received, whether that evidence, when evaluated with all the evidence adduced at trial, requires that the conviction be set aside to avoid a miscarriage of justice. A miscarriage of justice will arise where there is a significant possibility that, had the further evidence been adduced at trial, the jury, acting reasonably, would have acquitted the appellant. These two questions, as in this case, frequently merge." (citations omitted)

[23] The President then drew a distinction between the admissibility of "fresh" and "new" evidence. The evidence in this case is fresh evidence, that is evidence that did not exist at the time of the trial.

[24] Of such evidence, the President observed:[5]

> "If the evidence is fresh, in determining whether to allow the appeal the Court must ask whether the appellant has established that there is a significant possibility that, in the light of all the admissible evidence at trial together with the fresh evidence, a jury acting reasonably would have acquitted the appellant.
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> …
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> Before accepting even fresh evidence, this Court must also be satisfied that it is relevant, credible and cogent in light of the rest of the evidence at trial. This is where the two questions (whether to receive the evidence and whether it requires the convictions to be set aside to avoid a miscarriage of justice) merge. If the evidence lacks credibility and cogency, it is unlikely to give rise to a significant possibility that, had it been adduced at trial, a jury, acting reasonably, would have acquitted the appellant." (citations omitted)

**The fresh evidence**

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1 (1986) 160 CLR 392.
2 (1989) 167 CLR 259.
3 *R v Main; ex parte A-G (Qld)* (1999) 105 A Crim R 412, *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229.
4 [2013] QCA 218 at [64].
5 At [66] and [68].

[25] When the complainant was interviewed by the police on 30 September 2014, three weeks after the trial, he had a support person present and was given the usual warnings about his rights. He was told that he was being interviewed with regard to a complaint of perjury.

[26] He told the police that he had not been sexually assaulted by his brother the appellant. He said that the story he told the court was all false. He was mad at his brother for being "the number one son" and for stealing his Nintendo game console, which he could not get back, and that he wanted his brother out of the house. He said that all of the information he had given the police about being sexually assaulted by his brother was false. He described how the members of his family were upset when the appellant was arrested and that he had not seen the appellant since then. When asked about his own feelings, he said that he had mixed emotions because he was angry with the appellant but he was also upset because the appellant was not there to protect him from bullying by other people at school.

[27] During the interview the police became concerned about the independence of the complainant's support person and suspended the interview while she was replaced. When the interview was resumed, the complainant gave a rather bizarre explanation of why he had decided to tell the truth. He then said that he did not tell anybody the truth after he was first interviewed by the police and that what he had told them was lies, because he still wanted the appellant out of the house and he was afraid by then that he might be assaulted by one of the appellant's friends. He referred to occasions when he had been assaulted, sworn at and threatened by the appellant so he said that he told a lie about him to get him out of the house. The complainant was adamant, in spite of intensive questioning by the police, that he had not been sexually abused in reality.

[28] This court must consider whether the fresh evidence given by the complainant is relevant, credible and cogent. The particular difficulty faced in this case is that it is recantation evidence. Such evidence after a trial should be approached with caution. As the High Court observed in *Davies v The King*,[6] allowing an admission that a witness has committed perjury as the sole ground for setting aside the result of a trial in which that witness has given evidence would tend to undermine the administration of criminal justice.

[29] The Court of Appeal in New Zealand pointed to the same dangers in *R v K*.[7] In that case, K was convicted of six counts of incest and one count of indecent assault. Evidence was given by his 18 year old daughter, who said that sexual offences were committed against her by K from when she was aged 10. Her evidence as to one of the offences of incest was corroborated by her stepbrother, who woke during the night when the three of them were staying together in a hotel room and observed K having sexual intercourse with the complainant.

[30] The day after the trial, the complainant had discussions with her mother and sister in which her mother described to the complainant how her father looked in prison and how her grandmother (K's mother) was very sick in Perth and wanted to see K. Two days later, the complainant made an affidavit at a solicitor's office in the presence of her mother saying that her evidence at the trial was not true and that her

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6 (1937) 57 CLR 170 at 183.
7 [1984] 1 NZLR 264.

father definitely had never had sexual intercourse with her. About a month later, the complainant made a further and fuller affidavit before another solicitor. In that affidavit, she said that she regretted having to say that her previous affidavit was false. She said that she had made it because of her close attachment to and love for her mother and other members of the family and because her mother wanted her to sign a paper to get her father out of prison. The complainant said that she had now had completely independent advice. She reaffirmed as being true and correct the evidence she had given at the trial. Upon her solicitor's advice, before swearing the second affidavit, she had taken a copy of it home to read for herself, together with a copy of her first affidavit which her solicitor had obtained for her.

[31] The New Zealand Court of Appeal observed that, as the matter stood on the affidavits, the vital evidence given at the trial had at one stage been retracted but then reaffirmed and the complainant's explanation of these changes was, on its face, frank and credible.

[32] The court therefore decided to hear oral evidence from the complainant. Early in her examination by counsel for the Crown, the complainant said:

> "Before I go on I would like to make a statement. The first affidavit I made was true and the second affidavit I made was false and I don't wish to give any more evidence before this Court."

She was thereafter unwilling to answer any more questions.

[33] The judgment of the court was delivered by Cooke J, who concluded that nothing that the complainant had said in oral evidence before the Court of Appeal caused the court to doubt the correctness of her second affidavit, including what was said in that affidavit about her making it after having been able to think about the matter "more calmly and clearly on my own". The court concluded:[8]

> "In so far as any recantation emerges from the conflicting statements by the girl since the trial, we have no doubt that her attitude reflects the very human, family pressures of the situation. To grant either an acquittal on appeal or a new trial here would be to allow the criminal justice system to be manipulated because a key witness has come to regret the consequences of giving truthful evidence."

[34] On the other hand, to allow a conviction to stand when there was an honest and truthful recantation of perjured evidence that had formed a part of the prosecution case would also serve to undermine confidence in the administration of criminal justice. In *R v Bryer*,[9] Fitzgerald P observed:[10]

> "A recantation, after trial, by a witness who gave evidence against a person convicted, is a species of fresh evidence. Logically, if the recantation is true, the jury at trial ought not have had the recanting witness's evidence implicating the accused; there should have been either no evidence from the recanting witness, or evidence from the recanting witness exculpatory of the accused, either directly or because inconsistent with the accused's guilt. Consideration of what

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8 At 270.

9 (1994) 75 A Crim R 456.

10 At 458.

> the jury's verdict might have been on that basis would often lead to a conclusion that a conviction was unsafe, eg, because the available evidence would not sustain a conviction. However, the ordinary application of the 'fresh evidence' test would require the appellate court to consider what the jury might have done if it had had contradictory evidence from the recanting witness, demonstrating that the recanting witness was, at best, unreliable and probably a perjurer."

[35] The first task required of an appellate court in dealing with a recanting witness is to determine the credibility and cogency of the fresh evidence, including considering whether there is a credible and cogent explanation as to why the witness gave false evidence at the trial.[11]

[36] I have already referred in some detail to the interview given by the complainant to the police after the trial, which I have had the advantage of viewing. He gave cogent reasons as to why he lied at the trial. He perceived that the appellant was his parents' favourite son and was jealous of that position. He was also furious that the appellant had, as he saw it, been responsible for the loss of his gaming console. He often fought with the appellant and wanted him out of the house. Having lied about the appellant's sexually offending against him, it was only after the appellant's conviction that he realised the enormity of what he had done. His recantation appears credible and his reasons for having lied in the first place appear cogent.

[37] The complainant's recantation in the police interview on 30 September 2014 is given further credibility by an examination of his evidence and that of other witnesses at the trial. As mentioned earlier, the complainant's evidence at trial provides some support for doubting its reliability. The evidence given by his mother made the commission of some of the offences at the times and places nominated by the complainant less likely and the evidence given by his younger sister undermined the credibility of the account told by the complainant at trial. Further, the complainant was reinterviewed by the police on 2 April 2015, not long before the hearing of the appeal. In that interview, he affirmed his recantation in clear and simple terms, further eliminating any suspicion that his recantation was not truthful. Without the complainant's evidence at trial, the appellant could not have been convicted.

**Conclusion**

[38] In the complainant's fresh evidence, he maintains that at no time did his stepbrother, the appellant, sexually assault him. That evidence is credible and relevant, and there are cogent reasons given for his having lied at the trial. Given all of these factors, the fresh evidence should be accepted as being reliable. On any retrial, if the fresh evidence were led as it would have to be, there would inevitably be at least a reasonable doubt as to the appellant's guilt. It would not be open on the whole of the evidence for any jury to be satisfied beyond reasonable doubt of the guilt of the appellant. Accordingly, I would allow the appeal.

**Orders**

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11 See *R v Bryer* (1994) 75 A Crim R 456 at 460 per Pincus JA referring to *R v Gale* [1970] VR 669 at 672.

[39] The orders of the court are:

1 Grant the application for leave to adduce further evidence.

2 Admit into evidence the affidavit of Jakub Lodziak sworn 11 March 2015 and the affidavit of Peter Alexander Negerevich sworn 2 April 2015.

3 Grant the application to amend the grounds of appeal.

4 Allow the appeal.

5 Quash the conviction on all counts.

6 Enter verdicts of not guilty on each of the counts.

[40] **APPLEGARTH J:** I have had the advantage of reading the reasons of Atkinson J. I agree with them and with the orders proposed by her Honour.