SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAU* [2015] QCA 217
PARTIES:	**R** **v** **RAU** (appellant)
FILE NO/S:	CA No 305 of 2014 DC No 30 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Dalby – Unreported, 28 October 2014
DELIVERED ON:	6 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2015
JUDGES:	Gotterson and Philippides JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**That the appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after a trial of one count of exposing a child under 12 years to an indecent act and one count of indecent treatment of a child under 12 years – where the complainant child and her mother were the only two witnesses – where there were some alleged inconsistencies in the complainant's evidence – where the trial judge gave directions as to the need to scrutinise the complainant's evidence carefully – where the jury were aware of the substantial matters relevant to the complainant's credit and reliability – whether the verdicts were unreasonable or insupportable having regard to the evidence *Criminal Code* (Qld), s 210(1)(a), s 210(1)(d), s 210(3), s 668E(1) *Evidence Act* 1977 (Qld), s 21AK, s 93A *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *Morris v The Queen* (1987) 163 CLR 454; [1987] HCA 50, cited *R v SCH* [2015] QCA 38, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

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

[1] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.

[2] **PHILIPPIDES JA: Background** The appellant was convicted after a trial on 27 and 28 October 2014 of one count of exposing a child under 12 years to an indecent act (s 210(1)(d) and s 210(3) of the *Criminal Code*) and one count of indecent treatment of a child under 12 years (s 210(1)(a) and s 210(3) of the *Criminal Code*).

[3] Count 1 was particularised as "the [appellant] having placed money on, as [the complainant] put it, his 'rude part' and asked her to remove the money from it". This was alleged to have occurred in the complainant's bedroom when she was in her top bunk. Count 2 was particularised as "the [appellant] rubb[ing] his rude parts against [the complainant's] rude parts, that is … [the appellant] had removed his pants … [the complainant] still had [her] underpants on … [the appellant] lay on top of [the complainant], and he was rubbing his crotch against her crotch". This offence was also alleged to have occurred in the complainant's bedroom. Both offences were alleged to have been committed sometime between 10 November 2011 and 1 September 2012.

[4] The complainant child, R, was born 8 May 2006. She was five to six years old at the time of the alleged offences.

Ground of appeal

[5] The ground of appeal against conviction is to be regarded as a contention pursuant to s 668E(1) of the *Criminal Code* that the jury's verdicts were "unreasonable, or cannot be supported having regard to the evidence". It is, therefore, necessary for this Court to review the appeal record and determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt. In *MFA v The Queen*,[1] McHugh, Gummow and Kirby JJ noted that a review of this kind:

> "… involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials."

[6] In *R v SCH*,[2] the relevant principles were summarised as follows:

> "In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty.[3] In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such

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1 (2002) 213 CLR 606 at 624.
2 [2015] QCA 38 at [7]-[8].
3 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.

> a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred.[4] However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even 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.[5]
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> This Court must, therefore, undertake "an independent assessment of the evidence, both as to its sufficiency and its quality"[6] in accordance with the principles to which I have referred."

Evidence at trial

[7] Two witnesses were called at trial, the complainant and her mother. The appellant did not give evidence.

[8] The complainant's evidence was in the form of two recorded police interviews with the complainant on 9 September 2012 and 24 September 2012. Those recordings (made when the complainant was six) were admitted into evidence pursuant to s 93A of the *Evidence Act* 1977 (Qld). A recording of the complainant's evidence taken at the District Court at Toowoomba on 21 July 2014 (when she was eight) was admitted pursuant to s 21AK of the *Evidence Act*.

The evidence of the complainant

First interview

[9] In the first s 93A interview, the complainant initially appeared reluctant to speak about anything of a sexual nature that the appellant had done to her. She did not make any complaint of a sexual nature until the police officer said that he had heard from the complainant's mother that the appellant had done something that upset her on her top bunk.[7] Even then, the first complaint made was that "when [the appellant] went [indistinct] off my top bed, my top bunk … he accidentally put his knee in my rude part and my rude part was all red". The complainant stated that her "rude part" was the part of her body she used for "weeing" and elaborated on the occasion when the appellant put his knee in her rude part.

[10] The complainant only made a complaint about the allegation that became count 1 after the police officer said to her that her mother had told him that "something happened when [the complainant was] on the top bunk with [the appellant] and that [the appellant] put money somewhere … that [the appellant] put money on his rude part and told [the complainant] to take it off". The complainant then gave an account of the event that was charged as count 1, although it is to be noted that, even then the police officer had to prompt the complainant by indicating what he had been told the complainant had told her mother:

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4 *MFA v The Queen* (2002) 213 CLR 606 at 623.
5 *M v The Queen* (1994) 181 CLR 487 at 494-495; *MFA v The Queen* (2002) 213 CLR 606 at 623.
6 See *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at 406.
7 R says "Nothing did" when asked what happened in her bunk bed that upset her.

"He had my five dollars

Mm .. Tell me about [the appellant] having your five dollars and start at the beginning

That I asked if I could have it and he said you have to pull it off and I didn't

He said what sorry, [R]

He told .. he had my [indistinct] five dollars and I wanted it and he .. I said nicely can I please have it and he said you have to pull it off when I didn't want to

Mm and where did he put it

Down.. he put it on tighter

You put it on tighter

No he did

He did.. and you said to mummy that he put it.. where did he put it tighter.. you told mummy that it was on his rude part.. is that right.. and where is his rude part.. and what does.. what does.. what do boys do with their rude part.. do you know another name for a boys rude part.. and where were you when this happened

On my top bunk"

[11] The complainant said that this event had occurred when her mother was in bed. She was asked if she had told anyone about it and she said that she had only told her mother.

Second interview

[12] Just over two weeks after the first interview, the complainant was interviewed again by the same police officer. The police officer commenced the questioning in the interview by saying that he had heard that something had upset her on Friday night. The complainant said that she had told her mother that "[the appellant] was doing rude stuff". She then described the event which was charged as count 1, but used the words "my 5 cents" rather than "my five dollars" as she had in the previous interview.

[13] The description given of count 1 by the complainant was "he told me that he had my 5 cents on his rude part told me to grab it off if I wanted it… And when I didn't want to grab it off his rude part so he he he went to bed". (This constituted count 1.)

[14] The complainant then said that this event occurred at the old house that she had lived at, when she was on the top bunk in her bedroom. After giving a description of the layout of the house and her bedroom, the complainant said that the appellant "always does rude stuff":

"… You said that he always does rude stuff on the (sic) with you on the top bunk tell me more about the rude stuff

[Indistinct]

That he does

Every single night he tells me to put my arms around his neck

…

And he always every night he always pulls my pants down

Mm mm and tell me more about that and what happens next

And he always hops out of my bedroom cause mum goes past

…

Mm mm well tell me about him pulling your pants down.. tell me more about that

And when my pants were down he always pulls his pants down

Mm mm and then what happened

And then he never does it again"

[15] The complainant then described that the appellant pulled her pants down as well as his pants and "was going up and down" and that when he did that, the appellant's "rude part" was on the complainant's "rude part" which was what she used to "wee". (This constituted count 2.)

[16] It may be accepted that there are portions of the second police interview that are confusing. It appears that the interviewing police officer thought that there was more than one occasion when simulated intercourse occurred. The officer repeatedly asks about the "last time" that this has occurred. The resulting exchange was confusing and it appears that the participants may have been at cross purposes.

Pre-recorded evidence

[17] Nearly two years after the second police interview, the complainant was called to give pre-recorded evidence. In her evidence in chief, the complainant explained that the money placed on the appellant's rude part "had a shape of the Queen's head" and was purple in colour.

[18] The complainant also explained that when the appellant took his and her pants off, she still had underpants on, but the appellant did not have any underwear on. The complainant said that there was only one occasion when the appellant had come into her bed and taken down her pants and his pants. She also said that he had not taken her pants off before or after that occasion.

[19] The complainant was cross-examined. In relation to count 1, she said that this event had occurred at night prior to her going to sleep but at a time past her usual bed time of 8.30 pm which was probably 9.00 pm. The complainant said that there was a clock in her bedroom and she was asked to draw a diagram of her bedroom which was ultimately tendered as an exhibit in the trial.

[20] The complainant was cross-examined in relation to count 2. The complainant accepted that she could have called out to her mother when the appellant lay on top of her but that she did not do so.

The evidence of the complainant's mother

[21] The complainant's mother gave evidence consistent with that of the complainant. She had two children. She had been in a domestic relationship with the appellant from April 2011 until August 2012.

[22] Each of her children were in separate bedrooms, with bunk beds.

[23] The appellant worked night-shift and usually left for work at about 8.30 pm. However, that changed a few months prior to August 2012 when the appellant began leaving for work after 10.00 or 11.00 pm.

[24] The complainant's mother remembered an occasion when the complainant was home sick from school and she and the appellant were also home. The complainant's mother went out to the shops. On her return she saw the appellant come out of the complainant's room "quite fast". He told her that he had been playing with Barbie dolls with the complainant. The complainant's mother looked in the room and did not see any dolls. The complainant was on the bed when her mother went into the bedroom. That night, the complainant's mother had a conversation with the complainant in which the complainant made a preliminary complaint to her that the appellant "was putting money on his rude parts and making her take it off".

[25] In August 2012, the complainant's mother moved her family out of the house that they had shared with the appellant. In September 2012, she took the complainant to the police.

[26] The complainant's mother said that, a couple of days after the complainant's first interview with the police, when she was putting the complainant to bed, the complainant had told her that what the appellant had done to her had included "rubbing his rude bits onto hers".

Grounds of appeal

[27] The appellant's case on appeal centred on various inconsistencies which it was argued were such as to render the verdicts unreasonable in all circumstances. The respondent argued that the jury were aware of the substantial matters relevant to the complainant's credit and reliability. The trial judge gave directions as to the need to scrutinise the complainant's evidence carefully. The complainant's evidence was contradicted. The question was whether her evidence was of such quality as to sustain convictions beyond reasonable doubt. That is whether because of confusion of inconsistencies in the evidence, it was not open to the jury to accept it beyond reasonable doubt. This was a case where this Court, making an independent assessment of the quality and sufficiency of the evidence, would not set aside the verdicts.

Denomination of currency

[28] The appellant argued that the complainant gave inconsistent evidence in relation to the money she said was used in the commission of count 1. The appellant pointed out in particular that:

- at the initial police interview, the complainant's first reference to money was to a ten dollar note, however, later in the same interview she referred to a five dollar note but only after being prompted by the leading questions of the interviewing officer;
- at the second police interview, 15 days later, the complainant spoke instead of five cents; and
- in pre-recorded evidence in chief on 21 July 2014, the complainant made no mention of any denomination of currency but stated that the note was purple and had a depiction of the Queen's head.

[29] I accept the respondent's submission that the inconsistency in the complainant's evidence on this matter was of no great moment, given the age of the child and the passage of time. The description the money being purple in colour was consistent with a five dollar note. As the respondent submitted it was open to the jury to find that, in referring to five cents, the complainant was simply misspeaking during the interview with police.

Inconsistency as to the time that the alleged offending the subject of count 1 occurred

[30] The appellant submitted, both in his oral and written argument, there was inconsistent evidence as to the time at which count 1 occurred. The appellant pointed out that the complainant's evidence was that the offence occurred after her bed time, between 8.30 pm and 9.00 pm. This was allegedly contradicted by the complainant's mother, who testified that the complainant was home sick from school and the offending occurred when the complainant's mother was at the shops.

[31] It appears that the appellant was mistaken in thinking that the complainant's mother identified count 1 as having occurred on the occasion when the appellant was seen by her rapidly leaving the complainant's bedroom during the day. As the trial judge made clear in the summing-up at trial, there was no direct relationship between the two events. It was open to the jury to consider that the sighting of the appellant leaving the complainant's room was merely the prompt that led the complainant's mother to have the conversation with the complainant in which the preliminary complaint about count 1 was made. Further, there was no evidence to contradict that of the complainant as to the timing of the conduct the subject of count 1 or for that matter count 2.

Inconsistency as to the frequency of the conduct involved in count 2

[32] In relation to count 2, which concerned the description of simulated intercourse, the appellant submitted there were inconsistencies as to how many times the conduct charged in count 2 occurred. In that regard, the appellant submitted that, in the second police interview, the complainant alleged that appellant would come into her room every night and pull down her pants and do rude things to her. However, in the pre-recorded evidence, the complainant said that the conduct only occurred once. The appellant also referred to the evidence of the complainant's mother that the complainant had told her that the conduct occurred on a few occasions.

[33] The respondent acknowledged that there was some confusion in the second police interview about how many other uncharged occasions of sexual misconduct by the appellant had occurred. However, the jury were entitled to find the complainant honest and reliable about the charged counts. In that respect, it was open to the jury to conclude that the complainant's evidence was that, while there was more than one occasion when her pants were pulled down, she only gave evidence of one occasion when there was rubbing of the genital area. Further, the trial judge was careful to give correct directions as to how the uncharged conduct could be used. I do not consider that this aspect of the evidence is insufficient to render the verdict on count 2 unreasonable.

Inconsistency as to the complainant's clothing

[34] The appellant also argued in his written outline that there were inconsistencies in the complainant's evidence in relation to what she was wearing at the alleged time of count 2. In her second police interview, the complainant gave different accounts as

to what she was wearing. Initially, she recalled wearing purple pyjama pants with stripes and dots. She later stated that her pyjamas were blue with white winged ponies, which were the only ones she had. As to this aspect of the complainant's evidence, I consider that the colour of the complainant's clothes at the time of count 2, as the respondent submitted, is of no great relevance in determining her honesty and reliability.

Inconsistencies as to whether the complainant's mother was present with Department of Children Services (DoCS)

[35] The appellant further contended that there were inconsistencies in the evidence as to whether the complainant's mother was with her when she spoke to the DoCS workers. In her pre-recorded evidence, the complainant gave evidence that she spoke with workers from DoCS with her mother present. The complainant's mother, on the other hand said that, on at least one occasion between 9 September 2012 and 24 September 2012, she and the complainant spoke to the DoCS workers separately. As the respondent submitted, the number of times the complainant spoke with DoCS workers was not a matter of any significance in the trial.

[36] The appellant also sought to argue in oral submissions that, for the duration of his relationship with the complainant's mother, workers from DoCS visited their residence every four to six weeks and no complaint against him had ever been made. The appellant conceded that no such evidence was adduced at trial and claimed that that was because his solicitors advised against it. There may well have been forensic reasons for any such advice. However, in any event, it is difficult to see the cogency of such evidence if it had been adduced.

Disposition of the appeal

[37] In my view there is no substance in the appellant's submission that the verdicts were unreasonable. I would dismiss the appeal.

[38] **MARTIN J:** I agree with Philippides JA.