SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBP* [2016] QCA 72
PARTIES:	**R** **v** **CBP** (appellant)
FILE NO:	CA No 53 of 2015 DC No 149 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 25 February 2015
DELIVERED ON:	30 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2015
JUDGES:	Fraser and Gotterson and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was charged with five counts of rape and three counts of indecent treatment of a child under 12 and in care – where the appellant was convicted of two counts of rape and two counts of indecent treatment of a child under 12 and in care – where the appellant appealed on the basis that the jury's verdict cannot be supported having regard to the evidence – where the complainant was a young child – where the Crown's case depended entirely upon the complainant's evidence – where the appellant alleged that the complainant's evidence was confusing, contradictory and inconsistent with other evidence – where this was made clear to the jury – whether it was open to be reasonably satisfied beyond reasonable doubt of the appellant's guilt – whether the verdict was unreasonable *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited
COUNSEL:	C W Heaton QC for the appellant D L Meredith QC for the respondent

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

[1] **FRASER JA:** The appellant was charged on indictment with eight sexual offences. After a trial in the District Court the jury found the appellant guilty of four offences and not guilty of the remaining four offences.

[2] The appellant has appealed against the convictions on the ground that the guilty verdicts are unreasonable or cannot be supported having regard to the evidence. Under that ground of appeal, the Court is obliged to independently assess the sufficiency and quality of the evidence adduced at the trial and to decide whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted.[1]

The alleged offences

[3] The appellant is the complainant's great uncle (her grandmother's brother). When the offences were allegedly committed the complainant was aged between five and seven and the appellant was aged between 44 and 46. The appellant then lived with the complainant's grandmother in a unit. The complainant frequently visited and stayed there.

[4] The charges and the verdicts are summarised in the following table:

Count	**Date of Offences**	**Nature of offences**	**Particulars**
1	On a date unknown between 31 December, 2010 and 1 January, 2012	Indecent Treatment of a child under 12 and in care	**Guilty** The appellant squeezed the complainant on her 'rude part'.
2		Rape	**Guilty** After squeezing the complainant's vagina, the appellant then inserted a finger into her vagina.
3	On a date unknown between 31 December, 2010, and 1 September, 2012	Rape	**Not Guilty** They were in the appellant's bedroom together lying on the bed watching a movie. He then put a stick into her vagina.
4		Rape	**Not Guilty** After the stick, the appellant then produced a leaf and inserted that into her vagina.

[1] *SKA v The Queen* (2011) 243 CLR 400, affirming the test stated in *M v The Queen* (1994) 181 CLR 487 and *MFA v The Queen* (2002) 213 CLR 606.

5		Indecent Treatment of a child under 12 and in care (Exposure to an indecent act)	**Not Guilty** In the complainant's aunt's room, the appellant used a computer to try to take a photo of the complainant's vagina, removed his underwear and spread his legs so that the complainant could see his erect penis.
6		Indecent Treatment of a child under 12 and in care (Exposure to an indecent photograph)	**Guilty** On that same occasion, the appellant took a photograph of his erect penis and showed the complainant the photograph on the computer as well as other photographs of him naked.
7	3 August, 2012	Rape	**Guilty** This event is alleged to have occurred on the complainant's 7th birthday. They went to see a movie during the day and that night they were in the complainant's aunt's bed. The appellant was dressed only in underwear. He inserted his finger into her vagina.
8		Rape	**Not Guilty** On that same occasion, the appellant then inserted his foot (big toe) into her vagina.

[5] The particulars of the alleged offences of which the appellant was convicted reflected recorded statements made by the complainant to police on 1 December 2012 which were admitted in evidence under s 93A of the *Evidence Act* 1977. About 21 months later, in September 2014, the complainant gave pre-recorded evidence which was admitted in evidence under s 21AK of the *Evidence Act* 1977.

[6] The complainant's mother gave evidence that the complainant disclosed the alleged offences to her shortly before the complainant underwent her police interview. The

complainant's mother's then partner gave brief evidence of disclosures of the alleged offences by the complainant. The complainant's grandmother gave evidence about the complainant's visits to her unit and that the complainant and the appellant spent a lot of time together, sometimes watching movies in the appellant's room and sometimes elsewhere in the unit. The complainant's grandmother agreed in cross-examination that she did not see anything that concerned her in the interactions between the complainant and the appellant. The complainant's aunt gave evidence about a complaint which the complainant said she had made. A police officer gave evidence of photographs seized from the appellant's computer (relating to count 6).

[7] The evidence in the Crown case was completed on the second day of the trial. The appellant did not give or call evidence. Counsels' addresses to the jury were also completed and the summing up commenced on the second day. On the morning of the third day, at the jury's request, the s 93A statement was played a second time. The trial judge completed the summing up shortly before midday and the jury returned their verdicts at about 3.30 pm.

Summary of the parties' arguments

[8] The appellant argued that the complainant's evidence, upon which the Crown case depended, was confusing, contradictory, and inconsistent with other evidence (particularly the evidence of her mother, grandmother and aunt as to her complaints to them), there were other remarkable and concerning features of the complainant's evidence (including dramatic but obviously incorrect statements about the appellant's conduct), and upon an assessment of the quality of the evidence the guilty verdicts were not reasonably open. There was no material difference between the quality of the evidence on the counts upon which the appellant was acquitted and the counts upon which he was convicted and inconsistency between the convictions and acquittals supplied further support for the contention that the verdicts of guilty were unreasonable. The appellant also argued that the respondent's arguments in support of the convictions made allowances for the complainant's evidence in a way which amounted to a dilution of the criminal standard of proof.

[9] The respondent submitted that upon the whole of the evidence it was open to be satisfied beyond reasonable doubt of the appellant's guilt. Whilst the quality of the complainant's evidence was generally similar in relation to all counts, particular features of her evidence (notably including the lengthy period of time between her statements to police and when she gave her pre-recorded evidence) provided a rational explanation for the features of the evidence upon which the appellant relied and the differing verdicts. The respondent submitted that the manner in which the complainant gave her evidence also provided an explanation for why the jury was persuaded beyond reasonable doubt of the appellant's guilt on some counts but not on others.

[10] In what follows I mention what I consider were the most significant aspects of the evidence, including the evidence upon which the parties' relied in their detailed arguments.

Counts 1 and 2 (guilty), counts 3 and 4 (not guilty)

[11] In the complainant's s 93A statement the complainant said that her "uncle" (a reference to the appellant had "been actually really rude to me and me and mummy thought if I talked to a police officer maybe they might help me out a little bit". The police officer asked the complainant to start at the beginning and tell her everything about her uncle being rude to her. The complainant referred to watching a movie in a room with her

uncle and: "… **he was hurting me like he was squeezing my rude parts so hard and I didn't like it I told him to stop but he just kept ignoring me** and then when and he showed me these movie, these pictures of him and his rude part and I just kept going like that,[2] because I didn't want to look at all and he asked me why I'm going like that and I said because they are too rude and I am not a rude little girl … and then my [aunt] come up and said it's dinner time and so we went to go and get dinner and then he asked me if I'd touch his rude part and I said no that's too rude **and when he first, he also put his finger up my rude part, he put an end of a leaf up my rude part and a stick up my rude part** and the next minute I started bleeding,[3] me and Mummy said he should go to jail for a long, long time cause he is actually really mean … [a]nd then um he starting kicking me and being mean and swearing at me and yelling at me … [a]nd then he started saying would you touch my rude part and I said no … [h]e said because it's too, yeah it might be too rude but I'm a rude boy and I said I used to be a rude girl but now I'm not … [a]nd when I told my step dad I started crying because I was really upset about it and mummy and daddy and my other, and my family really are angry at him".

[12] This part of the transcript is a reasonably representative example of the way in which the complainant spoke to the police officer. She tended to run one event into another, as though they all occurred close together. Clearly enough, however, and this is confirmed by other parts of the statement, the parts I have emphasised contain the complainant's descriptions of one occasion when the appellant did the acts particularised in counts 1 and 2 and thereafter did the acts particularised in counts 3 and 4.

[13] The police officer asked the complainant to start at the beginning and tell her everything about watching the movie that time. The complainant referred to a movie about a cockroach. (That is consistent with her pre-recorded evidence in which she referred to the movie as "Men in Black"). After describing the movie, the complainant said that the appellant was lying down when "he rolled over and touched my rude part"; "he was squeezing it … [i]t was really hurting, he squeezed it really hard and he scratched it … when he squeezed it really hard I started just crying and told him to stop it and he stopped". The complainant described details about the house and the room where this occurred, and how she was lying on the bed. The complainant said "I was just watching the movie and he pulled my legs apart …". The complainant referred to her aunt and uncle being in the house and also described the clothes she was wearing and what the appellant was wearing. She said that this happened the year she was in Prep. She said that the appellant's hand "…was on my rude part and he was squeezing it very hard … he started by rubbing it and then he started squeezing it as hard as he could to make me cry". She explained what the appellant was doing with his hand by showing the police officer the movements with her hand. The complainant said that "… he squeezed and put his finger up there … I was crying because he squeezed it so hard that it really hurt me". The complainant said that she then went to the toilet and noticed the blood on her tissue. The complainant said that the appellant told her not to tell anyone and that if she told anyone he would squeeze harder.

[14] After a break in the police interview, the police officer reminded the complainant of her statement about the stick and leaf and asked her to tell her everything about that time. The complainant said that this was the same time that they watched the cockroach movie, and it was before the movie. In response to a series of questions the complainant said that the appellant got the stick and leaf from the garden, that the complainant and

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2 At this point the complainant turned away.

3 There is a long pause at this point.

her aunt saw the appellant get it and told the complainant's grandmother but the appellant sneaked it into his pocket, and that the complainant's grandmother didn't want sticks or leaves in her house. When the complainant was asked how the appellant put the stick in, she spoke about other matters before eventually saying that the appellant put it up her rude part. When asked how far he put it the complainant said "just up to there only little bit like that was sticking out…" The complainant said "Ow" and the appellant pulled it out. The appellant then got the leaf out of his pocket and "put it up there half way there and only that much was sticking out…" The complainant did not tell her parents because she was scared she might have been yelled at. The complainant said she could feel it inside her.

[15] The appellant submitted that a weakness in the complainant's pre-recorded evidence in relation to count 2 was that, although the complainant referred to the appellant having squeezed her vagina, she only referred to the appellant having inserted his finger in response to a leading question. The jury nevertheless could accept that the complainant's evidence of that event was credible and reliable.

[16] As to the differing verdicts, the complainant gave largely unprompted and detailed evidence which supported counts 1 and 2 and, as the respondent submitted, those matters appeared to concern the complainant more, and she spoke more about them, than counts 3 and 4; the complainant initially mentioned counts 3 and 4 only once and in the general terms set out in the second emphasised part in [11] of these reasons. The more detailed references to the stick and leaf in the second part of the interview were not initially volunteered and were given in response to a series of questions by the police officer. The accumulation of those considerations could reasonably be regarded as justifying a conclusion that the quality of the complainant's evidence upon counts 1 and 2 was better than the quality of her evidence on counts 3 and 4. Adopting a cautious approach, the jury, whilst not doubting the complainant's credibility and the general reliability of her evidence, might have found that the Crown had not excluded a reasonable doubt about penetration for counts 3 and 4.

[17] In her s 93A statement the complainant said that after the events particularised in counts 1 and 2 she was crying and went downstairs, saw her grandmother, "and he told me not to tell anyone". (It became clear that this was a reference to the appellant telling her not to tell anyone.) The complainant went on to say that when she went downstairs she asked her grandmother whether she could go to the park with her aunt and she did so. When asked whether she told anybody then what had happened the complainant said that: she told her aunt "a little bit", she asked her aunt, "would you tell anyone this if I tell you", her aunt said "no", and the complainant then said that the appellant had "been really rude to me lately, he's been squeezing my [vagina]". The complainant went on to say, however, that she told her "last week when I was at grandmas". Consistently with the complainant's evidence, the complainant's aunt gave evidence that the complainant had told her that the appellant had squeezed her vagina. In cross-examination the complainant's aunt agreed that she had given a police statement in which she said she didn't remember this and that the complainant might have told her about it but that her (the aunt's) memory was not always the best. The complainant's aunt subsequently agreed in cross-examination that she did not remember whether or not the complainant told her this or not. In light of the aunt's initial evidence and her later equivocal evidence, the jury might reasonably have accepted the complainant's evidence that she told her aunt upon the basis that her aunt would not tell anybody.

[18] The appellant referred to the complainant's statements in her s 93A statement and in pre-recorded evidence that on the night of the offences she had complained to her grandmother, her grandmother had taken her to her mother, and her mother had taken her to the doctors and the police the following day. In the complainant's pre-recorded evidence she unequivocally agreed that she told her grandmother about the appellant squeezing her vagina on the night it occurred, her grandmother took her straight home to her mother, and her mother took her to the doctors the next day and then to the police officer. The appellant emphasised the inconsistency between that evidence and the evidence given by the complainant's mother and grandmother; the complainant's grandmother said that the complainant had not told her that the appellant had squeezed her vagina and she had not taken the complainant to the complainant's mother. The complainant's mother's evidence was that it was not until 1 December 2012 that the complainant made disclosures. The appellant argued that the complainant's incorrect statements about her complaints could not reasonably be divorced from her account of the alleged offences.

[19] There was an inconsistency between the complainant's evidence of her complaints about counts 1 and 2 and the evidence of her grandmother, mother and aunt. The jury presumably accepted that the complainant was mistaken about the time when she first complained; upon the apparently reliable evidence of the complainant's mother and grandmother the complainant did not complain to anyone (with the possible exception of her aunt) until very shortly before she made the s 93A statement. In deciding whether or not the mistake affected her credibility or the general reliability of her account of the offences alleged in counts 1 and 2 the jury could reasonably take into account that the mistake was about the times when events occurred, that the complainant's recollection of times might have been affected by her tender age, and, in relation to the mistake in her pre-recorded evidence, that she gave that evidence 14 months after she made her s 93A statement. In light of those matters, the jury could reasonably conclude that, despite the mistake, the complainant's account of the offences was honest and reliable; and that by that evidence the Crown had proved the appellant's guilt of counts 1 and 2 beyond reasonable doubt. That approach involves a conventional assessment of the quality of the evidence. Contrary to one of the appellant's arguments, it does not amount to a watering down of the standard of proof.

Count 5 (not guilty) and count 6 (guilty)

[20] The appellant argued that there was an inconsistency between the acquittal on count 5 and the conviction on count 6 in circumstances in which the two offences were alleged to have occurred on the same occasion. Apart from the evidence of photographs found on the appellant's computer, the appellant submitted there was no difference in the quality of the evidence about the two events, and the complainant's evidence was contradicted by the evidence of her grandmother in relation to the making of a complaint.

[21] In the complainant's s 93A statement, she volunteered at the commencement of her statement that the appellant showed "pictures of him and his rude part and I just kept going like that … [she turned away]". When the police officer returned to the topic, the complainant again said that the appellant "showed me pictures of his rude part"; she said that the appellant's underpants were off, "his legs were wide open and his rude part was up and then I, then he showed me em and I kept looking away cause they were too rude for me …" When the complainant was asked where she was when the appellant showed her the picture, she responded that she was in her aunt's room, "cause he put them on Aunty […'s] um computer it has a camera on it". Subsequently

the complainant referred to the computer that was in her aunt's room and said, "when she didn't have a TV she had a computer then she got rid of her computer to a TV …" The complainant said that the appellant kicked the complainant's legs open so that he could take a picture of her vagina (count 5), at that time the appellant was lying down on the bed taking photos with a camera on the complainant's aunt's computer, and the appellant showed her pictures on the computer of the appellant's erect penis (count 6). When the police officer asked the complainant whether the appellant was lying on the complainant's aunt's bed or whether it was a picture on the computer, the complainant replied that he lay on her aunt's bed "but he took a picture of himself" and showed it to her. When asked whether the appellant said anything when he took the pictures the complainant said, "No he just said 'look at that' and I said 'eww' and looked away … [a]nd that's probably all I can remember". This evidence was confusing in relation to the question whether the complainant saw the appellant's erect penis (as alleged in the particulars of count 5) or whether she saw only a photograph of that and other photographs of the appellant naked (count 6).

[22] When the complainant gave pre-recorded evidence she agreed that she saw photographs of the appellant naked (count 6) and the only time she had seen him naked was in those photographs. Since the complainant's evidence did not accord with the particular of count 5, that she saw the appellant naked, it is unsurprising that the jury acquitted the appellant on that count.

[23] As to the photographs found on the appellant's computer, the appellant relied upon differences between the complainant's description of the computer on which she saw the photographs and the evidence of the computer upon which the photographs were found by police. As I understood the respondent to concede, the descriptions were very different. I accept the respondent's submission that the photographs found on the appellant's computer of the appellant naked with an erect penis nevertheless supplied support for the complainant's account that the appellant showed her such a photograph on a computer. The jury might reasonably have considered that the circumstance that when the photographs were seized by police they were on a different computer from the one upon which they were taken was of no moment.

[24] There was no inconsistency between the acquittal on count 5 (the particular of which that the complainant saw the appellant naked was not supported by the complainant's pre-recorded evidence) and the conviction on count 6 (which was supported by the complainant's evidence and the evidence of the photographs found on the appellant's computer).

[25] The appellant referred to the complainant's evidence in cross-examination that, after the appellant kicked her legs open and took a photograph of her, which made her cry, she complained to her grandmother about the appellant, showing pictures of himself, kicking her legs open, and taking a photograph of her with her legs spread. The complainant said that this occurred after she had spoken to the police about what the appellant had done to her the first time. The complainant said that her grandmother kicked the appellant out of the house and he bought his own apartment. The complainant also gave evidence in cross-examination that she had told her mother what had happened. That evidence was inconsistent with the evidence of the complainant's mother and grandmother as to the timing of her complaint.

[26] My analysis in [19] of these reasons explains why I consider that this inconsistency did not require the jury to harbour a reasonable doubt that the appellant was guilty of count 6.

Counts 7 (guilty) and 8 (not guilty)

[27] Counts 7 and 8 were alleged to have occurred on the complainant's seventh birthday, which was about four months before she made her s 93A statement. In that statement, when the complainant was asked for her "next best time" she remembered the appellant touching her rude part, the complainant answered that she remembered it happening "when he put the his finger up my rude part … on my birthday". The complainant identified a movie that she had watched that day in her grandmother's house and then said that the appellant "kind of put his finger up there", "[a]nd his foot". The complainant referred to the appellant having hurt her with his finger and having told her to tell no-one. The complainant subsequently said that the appellant "put his foot up and it … really really hurt and he got … blood on [his foot]." She said that the blood was on his toenail. When the complainant was asked what happened after the appellant put his foot in, she answered, "I went home and that's probably all the questions I can answer now". The complainant said that she did not "tell anything about the foot time".

[28] In the complainant's pre-recorded evidence when she was asked when the appellant put his foot in her vagina she responded, "well, it was sort of like a magic trick but it wasn't. He would grab his foot, rub it against me and then put it up there … it was – before he put the rude – his finger up me…well, he put his foot and that and as soon as he did that, he put his finger …". The complainant agreed in cross-examination that when the appellant did this she was wearing underwear and the appellant put his foot beneath her underwear; that he slid his foot in between her undies and his skin and put his foot up her vagina, using only his foot. When asked how much of the appellant's foot went into her vagina, the complainant said that it was just the tip of his big toe.

[29] The appellant argued that if the jury considered that the complainant's allegation about the insertion of the appellant's big toe was implausible then the jury also should have doubted that the complainant's evidence was reliable or that she was a credible witness. I do not accept that argument. Having regard to the complainant's evidence that it was "just the tip" of the appellant's toe that was inserted and that at the time the complainant was wearing underwear, I accept the submission for the respondent that the jury, adopting a cautious approach, might not have been satisfied beyond reasonable doubt as to penetration having occurred in relation to count 8 whilst having no similar doubt in relation to the digital penetration charged in count 7. It is true that in one of the complainant's statements about count 7 she referred to the appellant having "kinda" put his finger in her vagina and that she had earlier told the police that "it was the just the cockroach movie time" when the appellant had put his finger up her rude part, but the jury could regard the complainant's statement that "he put the his finger up my rude part … on my birthday" as being compelling evidence of the offence charged in count 7.

[30] The complainant gave evidence in cross-examination upon count 8 that immediately after the event she had complained to her grandmother, her grandmother took her home, and the next day her mother took her to the doctor. The complainant agreed that this had happened after she had been to the police the first time about the appellant squeezing her vagina. The appellant argued that this feature of the complainant's evidence logically impacted also upon the allegation of digital penetration alleged in count 7. The jury's verdicts suggest that the jury did not regard the complainant's apparently mistaken evidence about the timing of her complaints to her grandmother and about

when she first was taken to the police as impacting adversely upon her evidence of the offence in count 7. For the reasons already given in relation to the other guilty verdicts that approach was reasonably open to the jury.

Conclusions

[31] The Crown case depended entirely upon the complainant's evidence (otherwise than in relation to count 6, in relation to which the photographs found on the appellant's computer supported the complainant's account). That was made clear to the jury. The trial judge directed the jury that as a matter of law it was necessary for the jury to examine the complainant's evidence with great care before arriving at any conclusion of guilt. The trial judge referred the jury to the reasons for that direction upon which defence counsel relied, which included differences between the complainant's evidence and the account which she gave to police and particularly the complainant's statements in cross-examination concerning the timing of the intervention of the complainant's grandmother and mother, who said those events did not occur. The trial judge warned the jury that it would be dangerous to convict upon the complainant's testimony alone unless, having scrutinised her testimony with great care, considered the circumstances relevant to the evaluation of her testimony, and paid heed to the trial judge's warning, the jury was satisfied beyond reasonable as to the truth and accuracy of that testimony.

[32] There is no reason to think that the jury did not pay heed to those directions and scrutinise the evidence as they were directed to do. There were some inconsistencies and discrepancies in the evidence, but I am not persuaded that, either individually or in combination, those matters required this properly directed jury to harbour a reasonable doubt upon the appellant's guilt of any of the offences of which he was convicted. In my view, upon the whole of the evidence in the Crown case it was reasonably open to be satisfied beyond reasonable doubt of the appellant's guilt of each of the offences of which he was convicted.

Proposed order

[33] I would dismiss the appeal.

[34] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[35] **PHILIP McMURDO JA:** I agree with Fraser JA.