

SUPREME COURT OF QUEENSLAND

CITATION: *R v RAV* [2016] QCA 84

PARTIES: **R**
v
RAV
(appellant)

FILE NO/S: CA No 52 of 2015
DC No 390 of 2014

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich – Date of Conviction: 18 March 2015

DELIVERED ON: 5 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 29 September 2015

JUDGES: Fraser and Morrison 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 THE EVIDENCE – where the
appellant was convicted after trial of maintaining an unlawful
sexual relationship with a child under 16 years – where the
appellant alleged that the evidence of the complainant was
inconsistent and incapable of supporting a guilty verdict –
where the complainant was eight years old at the time of
offending and nine years old when she gave pre-recorded
evidence – where the complainant had behavioural issues –
where the complainant appeared at times to be reluctant to
complain – where the complaints made were detailed and
sometimes graphic – where there were inconsistencies
between the evidence of other witnesses and the complainant
– where the prosecution relied entirely upon the complainant’s
evidence to support the allegations against the appellant –
where the trial judge properly addressed the jury on these
issues – whether it was reasonably open to the jury to find the
appellant guilty of the offence

Criminal Code (Qld), s 229B
Evidence Act 1977 (Qld), s 93A

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
D Balic for the respondent

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

- [1] **FRASER JA:** On 18 March 2015 the appellant was convicted of an offence against s 229B of the *Criminal Code* that between 30 June and 6 October 2013 he maintained an unlawful sexual relationship with a child under 16 years. The appellant has appealed against the conviction on the ground that it is unreasonable or cannot be supported having regard to the evidence. That ground of appeal requires the court to independently assess the evidence adduced at the trial, both as to its sufficiency and quality, and to decide whether upon the whole of the evidence it was open to the jury to find beyond reasonable doubt that the appellant was guilty of the offence.¹

Summary of the evidence

- [2] For most of the period charged in the indictment the complainant was eight years old. She was eight years old when she was first taken to a police station in connection with this matter on 10 October 2013 and when she made statements in a police interview on 28 October 2013 which were admitted in evidence under s 93A of the *Evidence Act 1977*. The complainant did not make further disclosures at subsequent interviews with police on 31 October 2013 and 14 and 17 September 2014. The complainant gave pre-recorded evidence in February 2015 when she was nine years old.
- [3] The appellant was 44 years old at the time of the alleged offence. He was the de facto partner of and lived with the complainant's maternal grandmother. The complainant's mother took the complainant to visit her grandmother from time to time and the complainant sometimes went to her grandmother's place on her own. Apart from the complainant's grandmother and the appellant, the complainant's uncle (her mother's brother), his girlfriend ("W"), their two young children, and another man ("T") resided at that address. The complainant's uncle and his family started living there in March 2013 (according to his evidence and the evidence of W). T gave evidence that he started living there in about July 2013. The complainant's mother gave evidence that at first the complainant stayed a couple of nights every now and then, and in August 2013 a room was provided for the complainant because her mother was having trouble with her behaviour.
- [4] The complainant made the following statements to police in her interview on 28 October 2013. The complainant said that "it" started with the kissing because she wanted to give her grandmother a kiss and then her grandfather wanted a kiss and he put his tongue in her mouth. When they were out fishing one night the appellant pulled her undies down. When they were cooking bacon and eggs the appellant took her into his room and did it. He kept doing it all the time. One night when she was going to bed the appellant pulled his private part out. When she sat down with him he pulled her underpants down. At the time they were fishing together, the appellant pulled his pants down, pulled his private part out, and put it into her private part; she

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.

did not like it and pushed the appellant away but he did not stop. On another occasion where there was grass the appellant did the same thing that he had done when they were fishing. He did the same thing in the car again. The complainant referred to the appellant pulling her pants down and trying to lick there but she quickly pulled her pants back up. The police officer asked the complainant to tell her more about the time they went fishing. The complainant demonstrated how the appellant pulled her pants all the way down to her feet and tried to lick her. The complainant explained she was referring to her vagina. She was pulling away but the appellant kept pulling her back. She pulled her pants back up and crawled away. She referred to the appellant having unfolded her legs whilst she was lying down and she ran out quickly. The complainant said that when the appellant pulled out his private part he wanted her to lick it but she did not. At that time she was lying down and the appellant was standing up. The complainant said the appellant's private part looked "straight" and the appellant played with it and "pus" came out. The complainant referred to the appellant lying down on top of her when she was on a mattress. He then picked her up and put her on top of him. She rolled off him and left. The complainant said that the appellant told her that she should not tell anybody. She got in the car. The appellant got into the car and pulled his private part out and pulled her head and put her mouth on top of him. The complainant described the appellant masturbating.

- [5] The complainant also referred to an occasion when the appellant pulled his penis out of his trousers whilst he was sitting on the couch with the complainant and when somebody came into the area he quickly put it back in. The complainant gave graphic descriptions of what the appellant's penis looked like and how he attempted to cause her to fellate him.
- [6] The complainant gave pre-recorded evidence towards the end of February 2015. In evidence-in-chief she confirmed the truth of what she had said to the police officer in the interview on 28 October 2013. In cross-examination the complainant said that before she watched the interview she could not remember the appellant at all and she could only remember a little bit of what she had told the police officer. When it was put to her that she did not know if those things happened at all she said "No".² The complainant said the first person she spoke to about things happening with the appellant was her mother and W. When the complainant was asked what W had told her the complainant answered that, "she told me to tell the truth".³ That was so that the appellant could get into trouble. The complainant agreed that the complainant's mother and W believed that the appellant had done naughty things to her because "they saw some of it" and they told her that. The complainant repeated that the first thing said to her in that conversation was that W told her at the start to tell the truth; the complainant talked to her and told her what had happened. The complainant said she remembered going to police with her mother and talking to the police. The complainant denied that her mother told her the things she should tell the police about the appellant before going to the police station. The complainant agreed that in the car going to the police station her mother had helped her remember the things to say. The complainant did not remember drawing the diagram which became an exhibit. She remembered telling the prosecutor that she did not know who drew it. When asked by defence counsel whether the complainant drew that picture she answered, "[m]aybe".⁴ The complainant remembered being told to go and sit with the appellant to calm down. She would sit on his lap or on the side of his chair. The appellant

² RB 14.

³ RB 14.

⁴ RB 18.

would tap her on the top of the leg and tell her to calm down and after a while she would. She liked going with him. She said that she kissed everybody like she kissed the appellant, giving a big kiss on the lips. She denied suggestions by defence counsel that nothing had happened when she went fishing with the appellant and said that it had stopped. She denied suggestions that there was not a mattress next to where the ferry came and when they were fishing and she said there was. She denied suggestions that there was no sexual activity between her and the appellant when they were out fishing. The complainant denied suggestions that the appellant had not touched her private areas when she sat on his lap and that he had just patted her on the leg and told her to calm down. The complainant denied suggestions that the appellant had not touched her in any way sexually and that she had just said those things to W. The complainant denied suggestions that the appellant had not tried to put her head on the appellant's penis, that he had not touched her on or near her vagina, and that he had not put his penis near her vagina.

- [7] The complainant's mother agreed in cross-examination that the complainant had been diagnosed with Oppositional Defiance Disorder and was quite regularly suspended from her school. The complainant's mother and grandmother said that the complainant's behavioural difficulties tended to escalate through the afternoon as her medications wore off. Each of the complainant's mother, uncle, and W gave evidence that, whilst the appellant had initially disciplined the complainant for her behaviour, after some time he began to defend her, and he spent a good deal of time with the complainant. The complainant's mother agreed in cross-examination that she used calming behaviours with the complainant, including making her sit quietly or to do some activity to calm her down. She agreed that she saw the appellant sitting on the couch with the complainant on his lap or half on the chair and half on his lap. She saw the appellant fidgeting with the complainant's dress whilst talking to her, when the complainant would go from an agitated state to a calm state. The complainant's mother referred to an occasion when the complainant had complained of a sore "private region".⁵ The complainant's mother was occupied with her youngest child at the time. She subsequently observed the appellant in the bathroom washing with a washcloth between the complainant's legs. The complainant's mother told the appellant that she was not comfortable and would take over.
- [8] The complainant's grandmother gave evidence that when the complainant first started visiting her the appellant usually disciplined the complainant "with a severe smacking",⁶ but that changed because she (the grandmother) spoke with the appellant about the severity of those punishments and suggested that he "show her a bit of loving as well ...".⁷ After that the appellant hardly disciplined the complainant and instead spent a lot of time with her. They went fishing on a couple of occasions and the complainant would often be with the appellant whilst he was doing repair work around the house or tidying up. The complainant's grandmother often saw the appellant and the complainant watching television together. Sometimes the complainant sat on the lounge beside the appellant but mostly she sat on his lap on a recliner chair. She did not observe anything about them at that time. She quite often saw the complainant and the appellant alone together out near the fire. She recalled one incident when she walked out the door and found the complainant standing in front of the appellant having a "long kiss".⁸ The complainant's grandmother said she had personally experienced

⁵ RB 52.

⁶ RB 166.

⁷ RB 166.

⁸ RB 168.

the complainant kissing herself like that but she had pushed the complainant away and told her that was not how to kiss people. The complainant's grandmother spoke to the appellant about that kiss. The appellant said that nobody showed the complainant love and he did not want to push her away.⁹ The complainant's grandmother recalled the incident in the bathroom when the appellant had cream on his hand which he had intended to place on the complainant's vagina. The complainant was wearing a dress and underwear. The complainant's grandmother asked the appellant not to do that ("that's not your job") and the appellant left the bathroom.¹⁰

- [9] T gave evidence of the appellant taking the complainant on fishing trips. T saw the appellant touching the complainant on many occasions, including touching her legs whilst they were on a couch. On numerous occasions T observed the complainant sitting in front of the appellant between his legs facing away from him. T saw the appellant touching the complainant in the upper thigh area and on her upper legs. When, after dinner, the children would walk around and kiss those present on their cheeks, in the appellant's case he would kiss the complainant many times in a row on the lips. T gave evidence of what he saw on the night before the complainant stopped visiting her grandmother's place. He walked into the appellant's lounge room and saw that the complainant was sitting in between his legs facing the television. The appellant was running his hands up and down her legs and placing his hands on her legs. During the course of the same night T went outside the house and looked in through the window. He again saw the appellant rubbing his hands up and down the complainant's legs and playing with her dress. In cross-examination T said that the appellant was fiddling with the complainant's dress somewhere up near the top of her thigh; "playing with her legs and stuff ... inner upper thighs".¹¹
- [10] The complainant's uncle said that he observed the appellant physically interacting with the complainant, sitting on his lap and a lot of whispering between them. The complainant did not sit on other people's laps and talk to them in the same way and the other children would only rarely sit on the appellant's lap and interact in the same way. He once observed the complainant unbutton the appellant's shirt and touch his chest whilst whispering, and he saw the complainant and the appellant kissing for a time. Sometimes he saw them sitting out by the fire. They also sat together a lot of the time. On one occasion he saw the complainant sitting on the appellant's lap facing towards him and having a "prolonged kiss"; they were kissing each other for about five minutes during which he watched from another room. The complainant's uncle also said that during meals a lot of the time the complainant and the appellant would sit together, sometimes somewhere other than where the others in the house ate their meals.
- [11] W gave evidence of an occasion where she saw the complainant sitting on the appellant's lap. The appellant had his arm around her and was playing with her dress directly in front of her vagina. After leaving the room W returned, she opened the door to the room quickly, and she saw the complainant lying on top of the appellant. He was lying on his back on the recliner, which was reclined. They were face-to-face and the appellant was kissing the complainant with a long kiss on the mouth. As W walked out (into the lounge room), the appellant pushed the complainant away. After she left the room she listened at the door and heard the appellant say to the complainant "don't you ever do that in front of anybody ever again, do you understand me."¹²

⁹ RB 171.

¹⁰ RB 169.

¹¹ RB 111.

¹² RB 152.

- [12] The complainant's mother gave evidence that she stopped taking the complainant to the grandmother's place following a disclosure made by the complainant in October 2013. On the day after the complainant's mother stopped taking the complainant to her grandmother's place, W and the complainant's mother spoke to the complainant in her bedroom. The complainant's mother gave evidence that she asked the complainant to be honest and tell the truth, and say whether or not any adult in or outside the family had done inappropriate things, "like sexual things or kissing", to her. The complainant said that the appellant had done so; the appellant kissed her; he used his fingers; he licked her "fanny"; the complainant pointed to her thumb and said "this is the hard one, and he sometimes uses this one". When the complainant was asked if there was anything else, she responded that the appellant kissed her and took her to the shed and licked her "fanny" one day, and it felt funny. The complainant mentioned that this started on her birthday. W gave evidence that she recalled saying to the complainant that she could trust her mother and W. The complainant said that she and the appellant had a secret. The complainant said that the appellant had told her not to tell anybody because then they would not be able to see each other anymore. The complainant said the appellant played with her "moi -moi"; she explained "what fingers meant and this one was the not so hurty finger ... this one is the really, really hurty finger". W asked the complainant what happens when she and the appellant sat on the couch watching television. The complainant said that the appellant "makes me play with his thingy".
- [13] W gave evidence that during that conversation the complainant drew a picture in a notebook which, the complainant explained, showed the complainant and the appellant, and what looked like the appellant's penis. (That page of the notebook was tendered in evidence. It contains a rough diagram of a man with a large stomach labelled with the appellant's first name and a very much smaller diagram labelled with the complainant's first name. Below those drawings is what appears to be a representation of a penis. The words "foouk", "fu(o)k", and "fuk" are written on the diagram.) In cross-examination W said that the complainant made that drawing whilst her mother was also there but the complainant did not show the diagram to her mother. W said that she ripped the diagram out of the book and did not show it to the complainant's mother. W gave the diagram to someone at the police station when they took the complainant there. A police officer gave evidence that at the time when he obtained a statement from W, W handed to him the page with the complainant's drawing on it. The complainant's mother gave evidence in cross-examination that the complainant did not draw the diagram during that conversation. The complainant's mother was not aware that the complainant had drawn any such diagram.
- [14] The appellant did not give or call evidence.

Consideration

- [15] The appellant referred to statements by the complainant in her police interview that she had to leave to ask her mother because she forgot why she was there. Before that statement, the complainant had told police that she was there to talk about what the appellant had done to her. The complainant did appear at times to be reluctant to complain, but in the course of that interview she made detailed and sometimes graphic complaints of sexual conduct by the appellant. Her evidence seems believable and persuasive. She made some concessions in cross-examination but she maintained all of her allegations of sexual misconduct by the appellant. In summing up to the jury the trial judge referred to the statement identified by the appellant, and to other statements identified by defence counsel, and directed the jury that they were relevant in the consideration of the reliability of the complainant's evidence. It does not follow that the jury should have regarded those matters as being significant.

- [16] The appellant argued that it would be highly improbable for him to have done what the complainant said at a time when others were cooking bacon and eggs very close nearby. That was a matter for the jury to consider. The jury could also take into account the complainant's statements that the appellant "quickly put it back in" when somebody came in to the room.
- [17] The appellant referred to the fishing trip and argued that it was improbable that what the complainant said happened could have happened in full view of the ferry and the people on it. The complainant's evidence was not that it happened in full view of people on the ferry. Rather, she said that events happened next to the ferry and she could see cars and people on the ferry, and cars waiting to get on the ferry. The appellant submitted that it was not believable that nothing happened when they went home and that there was no medical evidence, even though the complainant referred to the appellant having hurt her with his finger. There was no evidence whether or not the complainant was examined by a doctor. The trial judge drew that to the jury's attention as a matter upon which defence counsel relied. The trial judge also reminded the jury of the submissions upon those points made by defence counsel in his address to the jury.
- [18] The appellant argued that the police officer who took the complainant's statement would have appreciated that there was no mattress near the Moggill ferry. Similarly, the appellant referred to statements by the complainant about the appellant making a hole in her pants and argued that the police officer would have investigated that. There was no evidence on those topics.
- [19] The appellant argued that the complainant had been coached to say what she said about him. The complainant, her mother, and W denied defence counsel's suggestion to that effect. The jury were entitled to accept and act on that evidence. It was not contradicted by any other witness's evidence.
- [20] The appellant also referred to the complainant's statement about obtaining a "special thing" after the police interview. Her mother and W gave evidence that they were not aware of any gift having been given to the complainant. There was no evidence of what she meant by "special thing".
- [21] The appellant referred to the evidence about him being about to put cream on the complainant's vagina and submitted that, because the complainant did not mention it but recalled other things, it was very unlikely it occurred. This event was not one of the offences of a sexual nature upon which the prosecution relied in seeking to establish the element of the offence that the appellant had maintained an unlawful sexual relationship with the complainant. Rather, the prosecution relied upon this event as an indication of the closeness of the relationship between the appellant and the complainant. Whether or not it occurred and its significance (if any), notwithstanding that the complainant did not refer to it in her own evidence, were matters for the jury to consider.
- [22] The appellant referred to the trial judge's direction that the prosecution relied entirely on the complainant's evidence to support the allegations against the appellant and argued that there was nothing to substantiate any of her evidence. The appellant also argued that other witnesses attempted to depict what was normal behaviour with suspicion and sexual innuendo. Defence counsel put that case in cross-examination and in his address to the jury. These were matters for the jury to consider. There is every reason to think that the jury did consider them. The trial judge directed the jury that, there being no independent evidence supporting the complainant's allegations, the jury needed to scrutinise the complainant's evidence very carefully and closely before relying upon it to convict the appellant. The trial judge went on to identify the

factors which were relevant to consider in the assessment of the complainant's evidence. Those factors included the suggested deficiencies in the police investigation upon which the appellant relied, the fact that the complainant was only eight years old at the time the events occurred as well as when she spoke to her mother and W and when she spoke to the police officer, and only nine years old when she gave evidence. The trial judge referred to the evidence that the complainant had behavioural issues and was regularly suspended from school for bad behaviour, and that her parents had only recently separated and her mother was left with her care and the care of two younger siblings. The trial judge referred to various inconsistencies between the evidence of W and the complainant's mother about what the complainant said to them and the evidence of what the complainant said to the police officer. The trial judge referred the jury also to the circumstance that the complainant initially did not volunteer any disclosures and made disclosures only as a result of questioning. The trial judge gave the jury appropriate directions.

- [23] The elements of the offence alleged against the appellant were that at the time of the alleged offence (1) the appellant was an adult over 18 years of age (which was admitted), (2) the complainant was a child under the age of 16 years (which was admitted), and (3) the appellant maintained an unlawful sexual relationship with the complainant, being a relationship that involved more than one unlawful sexual act.¹³ The focus at trial was appropriately upon the third element. In summing up to the jury the trial judge gave conventional directions about the requirements for proof of an unlawful sexual relationship and accurately identified the alleged sexual offences upon which the prosecution relied and of which the complainant spoke in her interview with the police officer. They were that: the appellant put his tongue into the complainant's mouth, pulled off her underpants, exposed his penis to her, touched her genitals, put his penis into her vagina, tried to lick her genitals on a fishing trip, tried to put her mouth on his penis in the car, and masturbated to ejaculation in her presence.
- [24] The evidence of the witnesses other than the complainant allowed the jury to find that the appellant had ample opportunity when he was alone with the complainant to commit the offence. This evidence was also generally consistent with the complainant's evidence. Whether or not the appellant committed the offence did depend upon the evidence of the complainant. As I have mentioned, the complainant's evidence of the offence was detailed and apparently persuasive. The general consistency between the complainant's evidence of sexual misconduct by the appellant and the evidence of her complaints of sexual misconduct by him could be relied upon by the jury as enhancing her credibility. Notwithstanding the inconsistencies and other matters to which defence counsel pointed at trial and upon which the appellant relied in this appeal, the jury were entitled to accept the complainant's evidence of the appellant's sexual conduct and find that the complainant's evidence proved each element of the alleged offence beyond reasonable doubt.
- [25] I conclude that upon the whole of the evidence it was reasonably open to the jury to find the appellant guilty of the offence of which he was convicted.

Proposed order

- [26] I would dismiss the appeal.
- [27] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order proposed by his Honour to dismiss the appeal.
- [28] **PHILIP McMURDO JA:** I agree with Fraser JA.

¹³ *Criminal Code* s 229B(1), (2).