SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCZ* [2016] QCA 232
PARTIES:	**R** **v** **BCZ** (appellant)
FILE NO/S:	CA No 74 of 2016 DC No 778 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 24 March 2016
DELIVERED ON:	13 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2016
JUDGES:	Philippides and Philip McMurdo JJA and Daubney J 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 – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was convicted of one count of indecent dealing with a child under 12 years and one count of rape – where, in a pre-trial hearing, a letter written by the complainant to her mother was ruled inadmissible as evidence of a preliminary complaint – where, in the course of cross-examination, the complainant answered "no" when asked if she had told anyone about each incidence of offending on the indictment – where upon re-examination, in the course of explaining why she had not told anyone of the offending, the complainant referred to the letter and her mother's response to it – where the appellant contends that the complainant's reference to the letter was inadmissible evidence of an earlier complaint – whether the complainant's evidence about the letter was admissible CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where, at the pre-trial hearing, it was ruled that statements made by the complainant to her mother that the appellant "had been touching me repeatedly

for many years" and to her friend that the appellant "had touched her vagina and touched her sexually … multiple times" were admissible as evidence of a preliminary complaint under s 4A *Criminal Law (Sexual Offences) Act* 1978 (Qld) – where the appellant contends that the statements alleged general misconduct and were not "about" the charged acts – whether the statements were admissible as preliminary complaints of the charged acts

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A

R v AJS (2005) 12 VR 563; [2005] VSCA 288, cited
R v NM [2013] 1 Qd R 374; [2012] QCA 173, cited
R v Riera [2011] QCA 77, cited
The Queen v Szach (1980) 23 SASR 504, cited

COUNSEL: C A Cuthbert, with Y Chekirova, for the appellant
T A Fuller QC, with J N Hanna, for the respondent

SOLICITORS: AMH Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Philip McMurdo JA and agree for the reasons given that the appeal should be dismissed.

[2] **PHILIP McMURDO JA:** After a trial the appellant was convicted of one count of indecent dealing with a child under 12 and one count of rape. The complainant was a step daughter of the appellant. The offences were said to have occurred when the appellant was aged five or six years. The appellant was acquitted of five further charges of indecent dealing with the same complainant.

[3] Originally there were four grounds of appeal. A fifth ground was added at the hearing. Only grounds 1 and 5 were ultimately advanced.

[4] Ground 1 is that the prosecution should not have been allowed to lead evidence of a letter which the complainant said that she wrote to her mother in 2005. There was evidence from both the complainant and her mother that the letter was sent. The letter was no longer available and in a pre-trial ruling, it was held that evidence of the letter was not evidence of a preliminary complaint under s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld). The appellant's argument is that the admission of evidence of the letter, upon another basis, effectively elevated the letter to the status of a preliminary complaint, thereby impermissibly boosting the complainant's credibility.

[5] The other ground of appeal (ground 5) complains of evidence which was admitted as a preliminary complaint or complaints, namely conversations in 2012 between the complainant and her mother and between the complainant and a school friend. It is argued that in each case, what the complainant then said was too general for it to constitute, in the terms of s 4A, a complaint "about the alleged commission of the offence".

The prosecution case at the trial

[6] The prosecution called five witnesses: the complainant, her mother, her school friend and two investigating police officers. The complainant's oral evidence was pre-recorded before Devereaux DCJ in December 2014. There was also tendered, under s 93A of the *Evidence Act* 1977 (Qld), a video recording of her interview by police in October 2012.

[7] The prosecution case was particularised by reference to five distinct incidents. Counts 1 and 2, being the charges upon which the appellant was convicted, came from an incident occurring in 2002 or 2003, when the complainant was sitting on the appellant's lap as he drove a car within the property where the family then lived. Her evidence was that he rubbed her vagina on the outside of her shorts before moving his hand under her clothing and rubbing her vagina (Count 1). He then inserted his index finger into her vagina (Count 2: rape). The complainant said that his penis was erect and she had asked him what was in his pants because it was hurting her.

[8] The second incident, the complainant believed, was between 2002 and 2004. This was the subject of count 3, an allegation of indecent dealing by the appellant rubbing his hand on her vagina. This was said to have occurred at the house where the family lived at the time of counts 1 and 2.

[9] Counts 4 and 5 were alleged to have occurred in an incident at that same house between 2 April and 4 June 2005. The alleged conduct was the rubbing of the complainant's inner thigh and the top of the pubic area.

[10] Count 6 came from an alleged incident in bushland adjoining the house to which the family had moved after the incidents the subject of counts 1 to 5. The fifth incident, the subject of count 7, was said to have occurred at that same house. Counts 6 and 7 were said to have occurred between 27 March and 10 August 2007. The alleged conduct was the rubbing of her inner thigh and the outside of her vagina.

[11] Ultimately there is no argument here that the conviction upon two counts and the acquittal upon the other counts constituted an inconsistency of verdicts which was suggestive of some error.

The 2005 letter

[12] In 2007 police were investigating complaints against the appellant by the present complainant's older sister. In that context, the complainant's mother told police that she recalled being given a letter by the (present) complainant which said words to the effect: "[the appellant] is sexually harassing me, please don't be angry at me and other things". The mother recalled that she had asked the (present) complainant whether the appellant had "done anything to her" and that she had replied "no" and "didn't say anything", the complainant later adding that "she didn't like sitting on [the appellant's] lap". With that information, police then interviewed the present complainant and asked her about the letter to which her mother had referred. When police asked what she had meant in that letter by sexual harassment, the appellant said "well he used to, like, cause he used to like to hug … and then he'd touch my legs and things …". The police asked her "did he do anything else at all?" to which she answered "no". She was asked "and what happened after you wrote the letter and stuff? Did he do it again?", to which she answered "no".

[13] The appellant and the complainant's mother separated in 2007. It was in October 2012 that the complainant told her mother that she had been sexually abused by the appellant. The mother then reported her complaints to police. According to the mother's evidence at the trial (and in a witness statement which was before Devereaux DCJ for a pre-trial application to exclude evidence of the letter) the complainant told her mother that this conduct had been the reason that she had written the letter.

[14] In advance of the pre-recording of the complainant's evidence, Devereaux DCJ was asked to exclude any evidence about the letter. Referring to the evidence, such as it was, as to the text of the letter, he said that it was "almost impossible to be satisfied to any standard as to what the complainant wrote in a letter to her mother in 2005 or 2006 or when she was six or seven years old." He ruled that the letter should not be "left to the jury as [a] preliminary complaint about the accused committing an offence charged in counts 1 to 5 of the indictment" (Counts 6 and 7 allegedly occurred after when the letter must have been written). He reasoned that "[g]iven the mother's statements asserting a different text [of the letter from that indicated by the complainant's evidence on this pre-trial application], it would be unfair to admit the letter as evidence of complaint." Devereaux DCJ added that "the fact that the complainant wrote a letter may remain relevant to the 2012 disclosure to the mother …". He said:

> "It does not seem to me to create an unfairness or insurmountable practical problem to have mention of the letter in the mother's complaint evidence. It would simply be for the trial judge to direct the jury that there is evidence the complainant wrote a letter to her mother sometime perhaps in 2005; there is no clear evidence of what was written; that evidence is not proof of the commission of the offence; it is merely part of the story concerning the conversation between the complainant and her mother in 2012. It is a matter for counsel whether the mother's evidence may be led without reference to the letter."

[15] As is argued for the appellant, that course would have involved a risk that the jury would speculate about the contents of the letter and perhaps infer that the complainant had revealed the appellant's conduct to her mother as early as 2005, thus bolstering her credit. That was a risk which may not have been avoided by the directions Devereaux DCJ suggested.

[16] In the same pre-trial hearing, Devereaux DCJ ruled that evidence of the complainant's conversations in 2012 with her mother and her school friend could be admitted as preliminary complaints.

[17] At this hearing, there was no discussion of the possibility that the letter would emerge in the course of the *complainant's* evidence which, of course, was to be recorded prior to the mother giving her evidence at the trial. The evidence of the letter could not have been led from the complainant in her evidence-in-chief. Devereaux DCJ had ruled that the evidence was not admissible as a preliminary complaint and there was no suggestion that it was admissible as a fresh complaint. Evidence of the letter in evidence-in-chief would have been an improper attempt to bolster the complainant's credibility. However there was the prospect that the course of cross-examination of the complainant would make the letter admissible in re-examination. In the complainant's pre-recorded evidence, that is what occurred.

The complainant's evidence about the letter

[18] There was no reference to the letter in the complainant's evidence-in-chief or in cross-examination. But for each incident, the cross-examiner suggested to the complainant that she did not "tell anyone about this incident" and in each case the complainant answered "no". That was a proper and not unlikely series of questions and it confirmed the prospect that the appellant's counsel would argue to the jury that the absence of a complaint about any of these incidents until 2012 detracted from the complainant's credibility.

[19] The cross-examiner asked the complainant about her interview by police in 2007 and in response to a series of questions about this interview, the complainant answered that she had not then told police about the conduct which was the subject of the charges. In re-examination the complainant was asked, without objection, why she had not told the police in 2007 about what the appellant had done to her and she answered:

> "I think it was just because, like, I was only 11 years old and I was, you know, just told to - that I'm going to talk to this lady, just - you know, just about whatever and about [the appellant] and I had no idea why. I had no idea who this lady was that I was talking to. I was still a little kid and I wasn't about to tell someone like the most personal details of my life that - I had no idea who she was."

[20] The prosecutor then asked a question which was answered by reference to the letter, as follows:

> "You were also asked a number of times - it was also put to you a number of times that you didn't tell anyone about these incidents. Why didn't you tell anyone else when you were a kid? Why didn't you say anything to anyone about what had been happening to you?-- Well, just that one time when I did try to write that letter to my mum - and then, obviously, like that didn't work out just because you know … I was confused so I denied and like that took so much to even like try to tell my mum that and then after that - got completely shut down. I just felt like I could never tell anyone again … so I just didn't feel comfortable telling anyone again."

There followed this question and answer:

> "So when did you write a letter to your mum?-- When I was in grade 4 so - I can't remember like how old … I would've been …".

[21] At this point the appellant's counsel objected, submitting that "we're going into areas that have been held to be inadmissible and it's an impermissible way … for this evidence to come into play. I haven't touched on it and I was very specific about how I addressed those matters in the 2007 interview".

[22] In the above extract of the answer in which the letter was referred to, the complainant said further things which were also the subject of an objection and those words were excluded. What is presently relevant is that there was an objection to the reference to the letter. Counsel suggested that one reason why the admission of the evidence of the letter was unfair was that by deliberately avoiding the subject of the letter in her cross-examination, she had not been able to lead evidence of what the complainant had said to police in 2007 about the letter. As I have noted already, the complainant had told police in 2007 that the appellant would sometimes hug her and touch her legs but had not described the conduct which was

the subject of the charges. The complainant had also told police that after she had told her mother about the hugging and touching, the appellant had become upset, saying that he would not do it again and that in fact he did not do so. In that way what the complainant had said to police was helpful to the appellant's case, not only because she had not described conduct as serious as that the subject of the charges, but also because the conduct of hugging and touching had ceased after the letter, thereby further weakening the prosecution case on the counts which post-dated the letter.

[23] The outcome of the objection to evidence in re-examination about the letter was that, on the request of the appellant's counsel, she was permitted to further cross-examine the complainant. There was further cross-examination as follows:

> "In that record of interview in 2007 with the police, there was reference to a letter that was written in 2005?-- Yes.
>
> Okay. And you were asked the question:
>
> *And what happened after you wrote the letter? Did he do it again?*
>
> And you said no. Do you accept that?-- Yes."

[24] The re-examination then resumed, by a series of questions and answers returning to the subject of why the complainant had not told police in 2007 of the appellant's conduct, in which the complainant again said that she had been confused and frightened of talking to the police about that conduct. There followed this re-examination:

> "So just from your perspective - so just back in 2007 when the police asked you about that letter and they asked you 'Did anything' - 'Did [the appellant] touch you after you showed that letter?' and you said 'no', why did you say 'no'? Just explain why you said 'no' - So I just said no and I just denied it all just because, you know, after that letter - trying to tell my own mum and my own mum not even accepting it and listening to me - then, you know, like why would a stranger listen to me and I didn't want to have - like build up all that courage to tell someone again to just be shut down again."

The complainant was then asked why she had not told anyone of the particular incidents the subject of the charges, including a question of why she had not told anyone of the first incident (the subject of the charges of which the appellant was convicted), to which the complainant answered:

> "Well I didn't know whether what [the appellant] had done to me was wrong or right. I didn't even understand it. You know, I don't know what - I didn't know what sex was. I didn't know what an erection was. I didn't know about any of that …".

[25] The complainant's evidence about the letter was admissible in re-examination, because of her evidence in cross-examination that she had not told anyone about (or in other words complained about), the appellant's misconduct. The cross-examination raised an issue of her testimony not being credible for the absence of a complaint. An explanation for not complaining was relevant to that issue. In *R v AJS* Maxwell P, Nettle JA and Redlich AJA said:[1]

> "The basic rule is that re-examination is confined to matters arising out of cross-examination. It is not, however, confined to the clearing

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1 (2005) 12 VR 563, 575-576; [2005] VSCA 288 [48].

> up of ambiguities that have arisen in the course of cross-examination, but extends to answers given in cross-examination which, if left unexplained, may not constitute the whole truth or would leave the tribunal of fact with a distorted or incomplete account, to the disadvantage of the side which called the witness."

Their Honours there cited, amongst other authorities, *The Queen v Szach*[2] where King CJ said:[3]

> "In re-examination a party may in many cases 'adduce evidence which would otherwise be inadmissible, for the purpose of explaining away or qualifying matters which have emerged in cross-examination and from which inferences adverse to that party's case could otherwise be drawn' … It is probably impossible to devise a formula which would set the bounds of re-examination for every case. The variety of circumstances in which re-examination may be legitimate is too great. The fundamental requirement is that re-examination must in some way arise out of the cross-examination. Commonly re-examination is allowed to clear up ambiguities in answers given in cross-examination, to enable a witness to give his version fully of a topic which has been touched upon but left incomplete by the cross-examiner, and to re-establish the credit of a witness where answers given in cross-examination could be used to affect adversely the Court's view of the truthfulness or reliability of the witness."

The evidence in re-examination about the letter fell into the last of those categories described by King CJ. It was legitimate for the complainant to be re-examined about her explanation, if any, for not telling anyone of the appellant's misconduct. Contrary to the present submission for the appellant, the complainant's evidence by reference to the letter was not evidence of an earlier complaint of the appellant's conduct. Rather, it was an explanation for the absence of such a complaint.

Evidence of the complainant's mother

[26] In the appellant's argument, some reliance was placed upon what was said by the prosecutor in opening his case, where the prosecutor said:

> "Now, you'll hear that [the complainant] had attempted to raise with her mother some things that had been happening with the accused by writing her mother a letter in 2005. But she was ultimately able to speak to a friend about the offending by the accused in 2012 … and then she told her mother about it shortly after."

Of course when that was said to the jury, the complainant's evidence had already been recorded. What the prosecutor there said was a fair description of the effect of the complainant's evidence, which was that the letter went no further than an attempt to complain.

[27] The complainant's mother gave this evidence-in-chief about the letter:

> "[D]o you recall a time when [the complainant] was younger when she wrote a letter to you?-- Yes, I do.

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2 (1980) 23 SASR 504.

3 (1980) 23 SASR 504, 568-569.

When was that?-- She was in year 3.

And do you recall what the letter said?-- I don't recall all of it.

All right. Just tell us what you do [recall] about the details of what words were in the letter?-- The details? That she felt uncomfortable sitting on his lap, and …

When you got that letter, did you talk to her about it?-- Yes I did.

Without going into what was said, did you talk to [the appellant] about it?-- Yes, I did.

And after the letter did you make any changes to the way you did things in the family, if I could put it that way? … Yes, I purchased a stool for [the complainant] that she could use when she was on the computer so she felt more comfortable …

Previous to that, what happened when she was on the computer? Before you bought the chair, what had happened?-- [The complainant] … would sit on his lap in front of him …

So after you bought the chair for [the complainant], did she then sit on her chair?-- She did, but there were still occasions when she would sit on his lap."

[28] The complainant's mother gave this evidence of what had occurred in, she said, October 2013 (a mistaken reference to October 2012). This was the evidence of a preliminary complaint to the mother to which objection had been taken in the pre-trial application. There was this evidence-in-chief:

"Now, some years later did you have a conversation with [the complainant] that involved reference to the letter?-- Yes.

Can you tell us how that conversation came about and what was said?-- [The complainant] and I were watching television.

Sorry if you can say when this was?-- This was in 2013 - October 2013.

… [S]o just tell us what you were doing?-- We were watching a program … that [the complainant] particularly likes to watch. …

Just tell us what she said to you?-- She turned to me and she said I – I need to tell you something and it's not very nice. You're not going to be happy. And I said to her, sweetie, you tell me whatever you need to - whatever it is. She said that - remember when I wrote that letter. And I said yes. And she said, well, I wrote that because [the appellant] had been touching me repeatedly for many years.

Did she go into any detail about the way [the appellant] had been touching her?-- No.

How did she seem to you when she said that to you?-- Extremely upset.

How long did she seem upset for?-- A couple of days.

And after that did you … take her to the police?-- Yes.

And she made a statement?-- Yes."

[29] In cross-examination there was this evidence about the letter:

> "Now, the letter that you gave evidence of that you say was from [the complainant] - you didn't keep that letter, did you?-- Regretfully, no.
>
> And, as a consequence of the letter, you purchased a stool for [the complainant]?-- Yes."

[30] Consistently with the complainant's evidence about the letter, the complainant's mother described something which, on its face, was not a complaint of sexual misconduct.

The trial judge's directions about the letter

[31] The trial judge (Farr DCJ) said this in his summing up:

> "You should also not speculate as to the contents of the letter that [the complainant] wrote to her mother when she was in grade 3. The Crown would suggest to you that the relevance of her writing that letter is the purpose for which she said she wrote it, and you would recall her evidence in that regard, although you have heard the defence submissions and it is suggested on behalf of the defendant that there is considerable doubt in that regard."

The direction that the jury should not speculate as to the contents of the letter was appropriate. And his Honour correctly identified the relevance of the letter as being, as the prosecution had argued, that it was written for a particular purpose, namely as an *attempt* to inform the complainant's mother of misconduct by the appellant.

[32] The trial judge went on to remind the jury of the respective arguments as to the letter. The appellant's counsel had argued that there was an inconsistency between the complainant's version of the letter and that of her mother, such that the jury would have doubts about the complainant's credibility or reliability. He referred to the prosecutor's argument that any inconsistency between the respective versions was insignificant. The trial judge reminded the jury of the appellant's argument that the long delay between, in particular, counts 1 and 2 and the time when "the complaint was made" made the allegations difficult to defend.

Conclusions as to the first ground of appeal

[33] It cannot be accepted that there was an error in allowing the prosecution to lead the evidence which it did about the letter. As I have discussed, the fact that the letter was sent was part of the complainant's explanation for why she had not revealed any of the alleged incidents, which was that by the letter she had attempted to do so, but unsuccessfully. Further, the appellant's trial counsel apparently accepted, as an appropriate disposition of her objection, that she be permitted to further cross-examine. That cross-examination had at least the potential to significantly damage the prosecution case about any of the incidents which could have post-dated the letter. Therefore there was no error by Devereaux DCJ in admitting evidence from the complainant of the letter. In turn, the reference to the letter in the mother's evidence was relevant, at least because it supported the complainant's explanation for why she had not complained. By this time, of course, the complainant's evidence as to the letter had been admitted.

[34] The respondent argued here that the evidence of the letter was relevant in other ways. It was argued that it formed an integral part of the preliminary complaint to the mother and that it was also relevant in assisting "with respect to the timeframe of when counts 1 to 5 occurred." The evidence was also relevant in those ways, although its probative value, if relevant *only* in those ways, might have been so slight as to warrant its admission, given prejudicial effect. However, as I have discussed, it had a greater probative value upon the basis that it explained the absence of a timely complaint.

The other ground of appeal

[35] Much of the appellant's argument for this ground of appeal, namely that the conversations in 2012 with the complainant's mother and her school friend ought not to have been admitted, seemed to focus upon the reference in the mother's evidence to the letter. Nevertheless this was argued as a distinct ground of appeal. The argument was that neither conversation constituted a "complaint about the alleged commission of the offence" because in neither conversation did the complainant relate any of the alleged offences, but instead made only a general statement about some misconduct.

[36] The complainant told her mother that the appellant "had been touching me repeatedly for many years", without going into any detail. She told her school friend that "she had been sexually abused by her stepfather when she was younger, when she was living with him, and … he had touched her vagina and touched her sexually … multiple times". This witness said that she was unable to remember anything more of the conversation but that it was "a pretty general conversation … nothing too detailed."

[37] In the pre-trial hearing, Devereaux DCJ declined to exclude evidence to this effect as evidence of a preliminary complaint. He referred to *R v Riera*[4] and *R v NM*[5] and to the statements by Chesterman JA in the former case and Fryberg J (with the agreement of Holmes JA and Martin J) in the latter case, that complaints about uncharged acts would normally not be admissible under s 4A because they could not be characterised as complaints about the alleged offence or offences. Devereaux DCJ said that he did not understand those judgments "to go so far as to disqualify from admissibility complaints of conduct that are consistent with charged offences just because there are uncharged allegations of similar conduct." I respectfully agree. In *R v NM*, Fryberg J said:[6]

> "Identification of the ambit of surrounding events referred to in the complaint which are made admissible by the section is a question of fact which will depend upon the circumstances of each case …
>
> In a trial for a sexual offence, evidence of uncharged acts of sexual abuse by the accused against the complainant may be admissible for the purpose of explaining and rendering intelligible the complainant's account of the charged acts, or to show that he or she was not purporting to describe an isolated event if otherwise his or her account might appear implausible."

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4 [2011] QCA 77.
5 [2013] 1 Qd R 374; [2012] QCA 173.
6 [2013] 1 Qd R 374, 381; [2012] QCA 173 [24]-[25].

[38] In the present case, the suggested difficulty with this evidence is the generality of the complaints. It is argued that this precludes a conclusion, essential for admissibility under s 4A, that the complaint was about one or more of the alleged offences. That argument cannot be accepted. What the complainant said to her mother and her school friend, although in general terms, was unambiguously referable to conduct as she subsequently described in more detail when interviewed by police but a few weeks later. The generality of the complaints may have provided the appellant with an argument as to the weight to be given to the evidence or indeed an argument that the complaint was so general that it should not be relevant at all to the complainant's credibility. But the assessment of that effect of the evidence, was properly a jury question. The complaints were unambiguously about conduct which was either constituted by or which at least included the incidents which were the subject of the charges. This ground of appeal should be rejected.

Order

[39] I would order that the appeal be dismissed.

[40] **DAUBNEY J:** I agree with Philip McMurdo JA.