SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ali* [2016] QCA 338
PARTIES:	**R** **v** **ALI, Wajid** (appellant)
FILE NO/S:	CA No 152 of 2016 DC No 453 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich – Date of Conviction: 25 May 2016
DELIVERED ON:	16 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2016
JUDGES:	Fraser and Philippides and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted, after a re-trial, of one count of indecent treatment of a child under 16 – where the appellant argued that there was insufficient evidence against him – where the respondent submitted that it was open to the jury to accept the complainant's evidence and that evidence was supported by the CCTV evidence – whether the verdict was unreasonable or not supported by the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted, after a re-trial, of one count of indecent treatment of a child under 16 – where the appellant sought to highlight shortcomings in the police investigation as a ground of appeal – where the respondent submitted those deficiencies were raised by defence counsel at trial – whether those deficiencies resulted in any unfairness to the appellant *Criminal Code* (Qld), s 668E(1) *Evidence Act* 1977 (Qld), 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 Agius [2015] QCA 277, cited
R v Ali [2015] QCA 191, cited
R v Baden-Clay (2016) 90 ALJR 1013; (2016) 334 ALR 234; [2016] HCA 35, cited
R v Maddison [2016] QCA 279, cited
R v RAU [2015] QCA 217, applied
R v SCH [2015] QCA 38, cited
R v Thomson [2016] QCA 259, cited
R v Vlies [2016] QCA 276, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

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

[1] **FRASER JA:** I agree with the reasons given by Philippides JA, and the additional reasons given by Philip McMurdo JA, and I agree with the order proposed by Philippides JA.

[2] **PHILIPPIDES JA:** The appellant was convicted by a jury on 25 May 2016, after a three day re-trial, of one count of indecent treatment of a child under 16. He had previously been tried before a jury in relation to this charge and found guilty on 7 May 2015. That conviction was the subject of a successful appeal against conviction to this Court which resulted in the conviction being set aside and a re-trial being ordered.[1]

[3] Following his conviction at the re-trial, the appellant was released upon entering into a recognisance for the sum of $200, on the condition that he keep the peace and be of good behaviour for a period of one year.

[4] In relation to the history of this matter, it has an unfortunate chronology. Following being charged with this offence on 9 September 2013, the appellant had his bridging visa cancelled with effect from 11 April 2014, with the result that the appellant has been kept in immigration detention since then (with the exception of a period of 52 days spent in prison). The trial judge at the first trial indicated that a sentence of nine months imprisonment would have been appropriate for this offending but moderated the sentence to the recognisance imposed after taking into account the period the appellant had spent in immigration detention up to that point. The trial judge at the re-trial endorsed this view of the appropriate sentence. It can be observed that the appellant has now spent a period of nearly 32 months in immigration detention.

Summary of evidence at trial

[5] The circumstances of the offending forming the subject of the count were summarised by Gotterson JA in *R v Ali*:[2]

> "The complainant's evidence was that he was visiting the Ipswich City Library with his family. He, his father and his sister went to the computers

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1 *R v Ali* [2015] QCA 191.
2 [2015] QCA 191 at [3]-[8].

> to search the library catalogue. He could not find what he was looking for in the catalogue and started looking through books stacked in the aisles.
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> He noticed a man of Indian appearance, the appellant, sitting in a lounge area, staring at him and being 'really creepy'. The complainant walked down the aisle he was in and out of the appellant's eyesight. Suddenly, he noticed the appellant in the same aisle. The appellant asked him his name and offered his right hand to him for a handshake. As the appellant was speaking to the complainant, the appellant started to feel and touch his pants in the groin area with his right hand. It seemed to the complainant that the appellant's penis was erect underneath his pants.
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> The appellant asked the complainant for the time. The complainant checked on his mobile phone and told the appellant the time that he saw displayed. The appellant said that that was the wrong time and that the complainant should accompany him back to his car so that he could show him the right time. The complainant was uneasy because he could see that the appellant had his own iPhone with him. The complainant walked away from the appellant.
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> The complainant resumed looking for books in the aisles. He noticed that the appellant was doing likewise. The appellant approached him a second time and again offered his hand. The complainant said, 'No'. The appellant mumbled. He asked the complainant his name and what he was doing that night. The complainant replied that he was going to hockey training. The appellant kept asking if he could drive the complainant home or if the complainant could go back to his (the appellant's) place. The complainant began to ignore the appellant.
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> The appellant then said, 'Excuse me' and went to walk past the complainant. But, instead, he put his hands around the complainant's waist. The appellant put his head on the complainant's shoulder and tried to kiss his neck. He moved one of his hands down the complainant's right arm towards his wrist. The complainant moved to step forward and away. The appellant stepped with him. The complainant could feel the appellant rubbing his penis against the complainant's body.
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> The complainant began to crack his knuckles. The appellant took a small step back. The complainant turned around and said to the appellant that he was going and walked away. He found his father and made a complainant (sic) to him. His father went searching for the person, the subject of the complaint, but was unable to find him."

[6] A s 93A interview was conducted with the complainant on 27 June 2013. During the interview, the complainant provided a description of the alleged offender. He described the offender's clothing, physical appearance, apparent ethnicity and the fact he had an iPhone.

[7] Evidence was given by an employee of Ipswich City Council, Mr Steel, whose role included reviewing Council CCTV. A CCTV system was installed in the Ipswich Library at the relevant time. On 26 July 2013, police provided Mr Steel with a description of the person sought to be identified. The description provided was of a person in dark jeans with a dark coat and of Indian appearance. Mr Steel reviewed footage from the

library's security system between 2.30 and 4.00 pm on 26 June 2013. He identified an image consistent with the description given on two cameras. One camera was viewing the library entrance. The other camera captured the children's area from the back part of the library. Footage, time stamped at 3.51.43 pm, captured from the camera viewing the entrance to the library was played to the jury. It depicted the identified person walking out of the library.

[8] The complainant's father gave evidence, confirming that he attended the library on 26 June 2013 with his entire family, including the complainant. He also gave evidence that he used the computer system in an attempt to look for a book for the complainant but that the complainant "took off on his own" while he remained at the computer. After about five to 10 minutes, the complainant came back and stated to his father that he had been approached by a person who kept asking him questions, pushing himself up against the complainant fairly closely and making the complainant uncomfortable. The complainant told his father that when he tried to move the person tried to follow him. The complainant's father unsuccessfully attempted to locate the person and the library staff were spoken to. In cross-examination, counsel for the appellant explored the extent of the disclosure made by the complainant.

[9] The complainant's mother confirmed the family's presence at the library on 26 June 2013 and that she saw her husband and the complainant hurrying around from aisle to aisle. Her husband relayed most of the information to her but the complainant also stated that "a guy tried to chat me up". After speaking to the library staff, the police were contacted.

[10] The complainant was then taken to a police station where he made disclosures to Senior Constable MacDonald in the presence of his mother. She recalled the complainant indicating to police that he had been approached in the library by a man that introduced himself, shook the complainant's hand and asked what time it was. It appeared to the complainant's mother that the complainant then became uncomfortable and sought out his father.

[11] By reference to contemporaneous notes, Senior Constable MacDonald detailed in evidence the extent of the disclosures made at that time to him. These disclosures were largely consistent, in terms of the sequence of events, with those subsequently made to police when the complainant was formally interviewed. Senior Constable MacDonald confirmed, however, that no reference was made by the complainant to the person attempting to kiss him on the neck nor any mention of the person rubbing his genitals against the complainant.

[12] On the following day, 27 June 2013, the complainant was taken to a police station where he was interviewed by Senior Constable Hagan. Through the course of investigating the matter, Senior Constable Hagan also obtained copies of CCTV footage from Safe City, Ipswich, which depicted the part of South Street in front of the library. The footage was played to the jury. It was dated 26 June 2013 and was time stamped at 3.53 pm. The footage depicted a person, alleged to be the appellant, leaving the library. A second file of footage was played. It depicted that same person walking up from East Street and onto South Street. This footage was time stamped 4.04.52 pm. The person could be seen going from the library all the way down to Bell Street Mall. The prosecution suggested that the footage depicted the appellant leaving in a hurried manner.

[13] Formal admissions were made that went, generally, to the issue of identity and the appellant's presence at the library on the relevant date. The admissions included that

the appellant was at the Ipswich Library on 26 June 2013 and that he owned an iPhone on this date.

[14] The appellant neither gave nor called evidence at the trial.

Grounds of appeal

[15] The appellant appealed against his conviction on the following grounds:

> "1. The verdict is unreasonable and cannot be supported by the evidence
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> 2. The trial was unfair because of the shortcomings in the police investigation, namely:
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> a. the failure to secure all CCTV footage from within the Ipswich City Library;
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> b. the failure to produce any DNA testing of the clothing worn by the complainant on the day of the alleged offence; and
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> c. the failure to attend the Ipswich City Library to determine if there were any other material witnesses in the library at the time."

Relevant principles

[16] As explained in *R v RAU*,[3] the ground of appeal against conviction raised is to be regarded as a contention pursuant to s 668E(1) of the *Criminal Code* (Qld) 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. The relevant principles were summarised in *RAU*,[4] in the following passages, that have been adopted on subsequent occasions:[5]

> "In *MFA v The Queen*,[6] McHugh, Gummow and Kirby JJ noted that a review of this kind:
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> > '… 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.'
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> In *R v SCH*,[7] the relevant principles were summarised as follows:
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> > '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

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3 [2015] QCA 217 at [5]-[6].
4 [2015] QCA 217 at [5]-[6].
5 *R v Agius* [2015] QCA 277 at [6] per Fraser and Philippides JJA and Bond J; *R v Thomson* [2016] QCA 259 at [5] per Boddice J, with whom Gotterson JA and Douglas J agreed; *R v Vlies* [2016] QCA 276 at [37]-[38] per Philippides JA, with whom Gotterson JA and Douglas J agreed; *R v Maddison* [2016] QCA 279 at [12]-[13] per Philippides JA, with whom Gotterson and Morrison JJA agreed.
6 (2002) 213 CLR 606 at 624.
7 [2015] QCA 38 at [7]-[8].

> the defendant was guilty.[8] In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such 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.[9] 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.[10]
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> This Court must, therefore, undertake "an independent assessment of the evidence, both as to its sufficiency and its quality"[11] in accordance with [these] principles …'"

[17] The long established approach referred to in *M v The Queen*[12] and *MFA v The Queen*[13] as to the primacy of the jury in criminal trials was recently reiterated in *R v Baden-Clay*,[14] where the High Court observed:[15]

> "It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact.' Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way …
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> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'"

The appellant's submissions

[18] The appellant provided the following written submissions:

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8 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.
9 *MFA v The Queen* (2002) 213 CLR 606 at 623.
10 *M v The Queen* (1994) 181 CLR 487 at 494-494; *MFA v The Queen* (2002) 213 CLR 606 at 623.
11 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at 406.
12 (1994) 181 CLR 487.
13 (2002) 213 CLR 606.
14 (2016) 334 ALR 234.
15 (2016) 334 ALR 234 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

> "There are many security guards working in many libraries around all over Australia, each library have lots of CCTV cameras and different sections of the library.
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> I was living in Brisbane and worked at IPSWICH library in Brisbane, I had my library card and witnesses and I passed my work documents to my barrister. The complainants has no proof against me to prove at court that I assault him. He has no proof about my car and I usually used public transport. He has no proof of CCTV footage and finger print etc.
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> When the police interviewed him, the police need to collect all the proof first and then take action against me. Police need to take my interview but they did not. This is very important case to me and police needs to read both sides of the story to did the proper investigation by right way but they did not.
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> Police prosecutor supporting the boy same as their family member against me. Police officer is looking like their very close friend, The boy did not complained on me but his parents did.
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> I gave my job proof, accommodation proof in Brisbane, My car proof that I did not use any car for my work and I used public transport and my job supervisor named Julie she has signed my library card attendents (sic), paper work etc. Library card and transport card has been proved, I proved that I have not assault these boys.
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> I gave every single proof at Court but the jury passed negative comments and the Judge was not agree with Jury comments that's why Judge suggested the jury to attend more classes at court then they would be able to pass the right comments, or take the right decision.
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> I am very responsible person, I am supporting my wife, kids, parents and whole family. Since I lost my job my family been through very hard time, my kids could not continue their study and my mother got mentally depressed. Mental depression caused her lots of health issues to my mother. They played with my life. The complainant, these boys and police mentally and emotionally tortured me for more then (sic) 3 years. They detained me in different immigration center's (sic) for more than 2 years and 7 months and I am currently being detain in Christmas Island immigration detention centre of nothing. I need justice please, and I hope the judge will take right decision to rescue me please."

[19] On the hearing of the appeal, the appellant also maintained his submissions alleging deficiencies in the police investigation.

Consideration

[20] As the respondent acknowledged, the Crown case depended on the acceptance of the evidence of the complainant. It is to be observed that the trial judge made that clear to the jury and also directed the jury as to the need to examine very carefully the evidence of each of the witnesses, and particularly that of the complainant, before relying on that evidence.

[21] As to the first ground of appeal, the respondent submitted that the evidence of the complainant was frank, clear and consistent regarding the substance of the offending

conduct. In particular, the complainant gave evidence that was age appropriate and plausible. In the context of the other evidence given, the opportunity for the offences to be committed in the way described by the complainant existed. In that respect, the evidence indicated that the appellant was present in the library on the relevant date and, as depicted in the CCTV footage, at the relevant time. This was consistent with both the evidence led and admissions made. In my view, any inconsistences in the complainant's evidence were explainable and reasonable. As the respondent argued, the cross-examination of the complainant did not reveal any material issues or inconsistencies that went to the core of the offending. In the circumstances, the evidence of the complainant could be relied upon and the jury were entitled, on the evidence of the complainant, to accept his account of the events.

[22] As to the second ground of appeal, while the appellant sought to highlight shortcomings in the police investigation as a ground of appeal, it is apparent from the trial judge's summing up that those deficiencies relating to the police investigation were features raised by the appellant's counsel at trial as a mechanism to undermine the jury's confidence in the complainant's evidence. As the respondent submitted, the deficiencies in the investigation were therefore either evidentially neutral or positively benefited the appellant's defence. In my view, it cannot be concluded that there was any resultant unfairness to the appellant.

Order

[23] I would propose that the appeal against conviction is dismissed.

[24] **PHILIP McMURDO JA:** I agree with the reasons of Philippides JA for dismissing this appeal.

[25] As the trial judge directed the jury, the indecent act or acts of the appellant were said to have been his placing his hands on the complainant's waist, placing his head on the complainant's shoulder and rubbing himself against the complainant.

[26] The complainant's evidence was susceptible to the criticism that there were inconsistencies between what he said of the event to his parents and Senior Constable MacDonald on the one hand and, on the other hand, what he said in the interview by Senior Constable Hagan which was admitted at the trial.[16]

[27] The complainant's father said that the complainant told him that the appellant had been "pushing himself up against him fairly close; making [the complainant] uncomfortable." But in cross-examination the father said that he was told that the appellant had been "very close to him, close enough to be nearly pressed up against him." The complainant's mother said that prior to being interviewed by police, the complainant had told her simply that "someone had tried to chat him up". Senior Constable MacDonald interviewed the complainant in the presence of his mother. Referring to his notes, he recalled the complainant saying that the appellant had "walked behind … and brushed up against him … and grabbed hold of the complainant's arm", apparently trying to shake his hand. Senior Constable MacDonald agreed that he was told nothing about any attempt to kiss the complainant or anything of the appellant "rubbing his genital area against the boy".

[28] On what was said by the complainant to his parents and that police officer, the appellant's conduct could not have justified a conviction of this offence. It was his

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16 Under s 93A of the *Evidence Act* 1977 (Qld).

s 93A evidence, confirmed by the complainant's (pre-recorded) oral evidence which evidenced the conduct upon which the prosecution ultimately relied. Whilst the differences between that evidence and his statements to his parents and Senior Constable MacDonald provided a substantial argument by the defence to the jury, the complainant provided an explanation for these differences. When challenged about them in cross-examination, the complainant said that he had not disclosed everything to his parents or Senior Constable MacDonald because he was then embarrassed to talk about them. He explained that he was more forthcoming with Senior Constable Hagan because this interview was not in the presence of his mother. It was open to the jury to accept that explanation and to accept the complainant's evidence notwithstanding those discrepancies.