SUPREME COURT OF QUEENSLAND

CITATION:	*R v W* [2002] QCA 288
PARTIES:	**R** v **W** (appellant)
FILE NO/S:	CA No 71 of 2002 DC No 43 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	9 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2002
JUDGES:	Davies and McPherson JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - OTHER OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - RAPE AND SEXUAL ASSAULTS - PRACTICE AND PROCEDURE - where appellant convicted of two counts of indecent dealing with a child under 16 - where the child was under the appellant's care - whether the verdict was unsafe and unsatisfactory - whether the trial judge erred in his direction to the jury CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant convicted of two counts of indecent dealing with a child under 16 - where offences occurred when complainant was 13 or 14 and 15 years of age - where complainant was 27 years of age at the trial - where inconsistencies in complainant's statements - whether the jury should have had a reasonable doubt about the complainant's credibility

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - CONSIDERATION OF SUMMING UP AS A WHOLE - where appellant convicted of two counts of indecent dealing with a child under 16 - where complainant gave evidence of uncharged sexual misconduct by the appellant - whether the learned trial judge erred in his direction with respect to uncharged acts

BRS v The Queen (1997) 71 ALJR 1512, considered
R v D [2001] QCA 256; CA No 16 of 2001, 29 June 2001, distinguished
R v W [1998] 2 QdR 531, considered
T (1996) 86 A Crim R 293, considered

COUNSEL: K M McGinness for appellant
S G Bain for respondent

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

[1] **DAVIES JA:** The appellant was convicted after a trial in the District Court at Kingaroy on 11 February this year on two counts of indecent dealing with a child under 16 with a circumstance of aggravation. That circumstance, in each case, was that the child, his stepdaughter, was under his care. The first of these convictions was alternative to a count of rape between 1 September 1988 and 31 December 1991 of which he was acquitted. The second was on a count of indecent dealing with a circumstance of aggravation also between 1 September 1988 and 31 December 1991.

[2] The appellant appeals against those convictions. It should be added that he was originally indicted, as well, on two other charges. On the first of those, before any evidence in the trial was called, the Crown indicated on 8 February 2002 its intention not to proceed; and on the second of those the Crown indicated its intention not to proceed at the end of its case on 11 February 2002. The complainant's evidence with respect to the second of these, however, remains of some relevance, the appellant relying on inconsistencies in that evidence in order to support his argument that the complainant's evidence was so unreliable as to make the convictions unsafe and unsatisfactory.

[3] The appellant's grounds of appeal, as originally contained in his notice of appeal were, in substance, that the verdicts were unsafe and unsatisfactory. Two specific particulars of this argument were set out in the grounds of appeal as follows:

> "(a) The guilty verdicts were unsafe and unsatisfactory in that to reach them the jury had to ignore completely or to place minimal weight on the following:-
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> (i) that despite the complainant giving evidence of literally dozens of occasions over several years when the accused had placed two fingers in her vagina and moved them with some vigour for several minutes at a time, a medical practitioner with expertize in child sex abuse cases

> concluded that the finding of an intact hymen in the medical examination conducted on the complainant after the alleged abuse ceased was significantly inconsistent with the allegations made;
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> (ii) that the three factual scenarios which gave rise to the charges laid in the indictment were not contained in the complainant's first statement to Police made in 1992, that they were not contained in a subsequent statement made in 2000 and they first arose after a meeting with a Crown Prosecutor in 2001 once she had been advised of the need to allege offences which could be properly particularised.
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> …
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> (c) The guilty verdicts were perverse and constitute a miscarriage of justice in that no fair minded or reasonable jury could be satisfied beyond a reasonable doubt as to the guilt of the accused in the light of the expert medical evidence called by the Crown to the effect that the enormous history of digital vaginal penetration was inconsistent with the complainant's medical presentation in 1991 immediately after the alleged abuse had ceased;
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> ... "

To that ground the appellant, by leave given on the hearing of this appeal, added a further ground as follows:

> "The learned trial Judge erred by failing to properly direct the jury as to the limited use they could make of the evidence of uncharged acts."

The unsafe and unsatisfactory ground

[4] The first of the counts on which the appellant was convicted, which was an alternative count to the count of rape which had been charged, was alleged to have occurred in October 1990 at a time when the complainant's mother was attending the complainant's brother's passing out parade in Melbourne upon his entry into the Navy. The other offence upon which the appellant was convicted was alleged to have occurred, it seems, in late 1988 or early 1989 soon after the family moved to live in a mobile home near Kingaroy. As the complainant was born on 19 February 1975 it seems therefore that she was 15 years of age at the time of commission of the first of the offences on the indictment on which the appellant was convicted and 13 or 14 at the time of the second of the offences on the indictment on which the appellant was convicted. She was almost 27 years of age at the time she gave evidence at the trial.

[5] One particular of this ground relied on the circumstances in which the facts constituting these offences were first complained of by the complainant and on inconsistencies in her evidence about these offences. It was submitted that these should have caused the jury to have a reasonable doubt about the complainant's credibility.

[6] The complainant first made a complaint to her mother in May 1991 that the appellant had been molesting her. Her mother then confronted the appellant who then left the family home. It appears that sometime later a complaint was made, apparently by the complainant's mother, to the police and they obtained a statement from the complainant on 11 January 1992. She was taken to the police by her mother, unwillingly she said, and she did not want to go through with pressing

charges against the appellant. Consequently he was not charged. About eight years later the complainant decided that she did wish to have the appellant charged and made a further statement to police on 28 April 2000. This particular relied on the fact that in neither of these statements did the complainant state facts which constituted the particularized allegations of the charges of rape, on the alternative count of which the appellant was convicted or the charge of indecent dealing upon which he was also convicted. A similar criticism was made of the facts which were the subject of the charge which was discontinued at the conclusion of the Crown case.[1]

[7] On the first of these charges the complainant gave evidence at the trial which, if fully accepted, would have justified a conviction for rape. She particularized the occasion as the time whilst her mother was away in Melbourne attending her brother's passing out parade. She said that on the night in question the appellant came into her room, woke her up and told her to get into his bed. He then took her underwear off, pushed her nightie up around her shoulders, said he wanted to have sex with her because he wanted to be the first one and then commenced kissing her breasts and body, licked her vagina and then put his penis into her vagina. She said it was only in a little way, she pushed him off because it hurt and went back to her bed.

[8] In the statement which the complainant gave to the police on 11 January 1992 she described the same incident in the following terms:

> "I recall that he pulled me by the arm into the bed. At that time he was already in bed and I was wearing my nightie. He dragged me over on top of him and he tried kissing me on the lips and also on my private places and then he pulled my nightie up and tried kissing me all over. I got away from him and I got into my own bed and I said I had enough."

[9] The appellant's counsel, Mrs McGinness, in her thorough argument, relied on the absence in that statement of an assertion that the appellant's penis entered her vagina and indeed on the inclusion in that statement of a statement that "on no occasions has he ever actually tried to put his penis inside me". Unsurprisingly, at the trial the complainant was cross-examined at some length about this apparent discrepancy. She gave two reasons for it.

[10] The first was, in effect, that she did not wish to make this further assertion because her mother was with her during the police interview, she did not wish to upset her mother and she did not wish to talk in front of her mother about the appellant's penis. It seems plain from her evidence that, at the time she gave her first statement, she was an unwilling complainant to the police. It is not surprising, therefore, that she was unwilling to be explicit about an event so invasive. It also appears that, by the time she came to give her first statement, her mother had accused her of being a slut and she was, quite naturally, anxious not to make her mother more angry with her and she was finding it difficult to cope with her situation. She was then a month short of her seventeenth birthday.

[11] Her second explanation, which is by no means inconsistent with the first, was that she did not realize that when the appellant penetrated her a little bit that it was

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[1] It was discontinued because the prosecution could not prove beyond reasonable doubt that the indecent dealing alleged occurred before the complainant attained 16 years of age.

actual sex. It appears from the medical evidence that her hymen had remained unbroken. It is neither an irrational nor uncommon belief that something less than full penetration in this way was not sexual intercourse or, as she called it, "sex".

[12] Mrs McGinness, in her written outline, sought to contrast these as inconsistent explanations, complaining about the fact that the complainant appeared to alternate between them. However, as I have indicated, I do not think that they were inconsistent and it is likely, it seems to me, that the jury did not think they were. Indeed the likely explanation for the jury's verdict on this count, it seems to me, is that they, too, thought that what had occurred may not have constituted rape because of the limited extent of penetration. The learned trial judge's direction to the jury on this question permitted that misapprehension.

[13] It was only when the complainant came to be interviewed by Mr Swanwick, a Crown prosecutor, whom she found to be more approachable, as she put it, than either of the police officers to whom she had previously spoken, that the complainant went into full details about this event. I do not find her explanations in this respect incredible or even surprising. I think that the jury were entitled to conclude, as they did, on the basis of the complainant's uncontradicted evidence, that the appellant was guilty of indecent dealing with the complainant on this occasion.

[14] Although the complainant's evidence on this count was not supported specifically, her mother's evidence provided general support. Shortly after the appellant left the family home in May 1991 the complainant's mother confronted the appellant a second time about what the complainant had told her. She said:

> "He just said, well, I couldn't have you; he wanted just the closest thing.
> …
> ... he said I was boring.
> … in the sexual part of it."

[15] The event the subject of the appellant's second conviction occurred, it will be recalled, before that the subject of the first. The family had just moved into their mobile home near Kingaroy and the appellant was driving to Maroochydore, as he often did at that time, to pick up the complainant's mother who had been visiting her mother there. The complainant was sitting in the front seat with the appellant and her younger sister S was sitting in the back seat. S was a little over a year younger than the complainant. As they were driving along the appellant, according to the complainant, pushed her head down onto his lap, requiring her to fellate him. He had, according to the complainant, told S to lie down on the back seat and sleep. Her evidence was supported by that of S who recalled that, on one of these drives to Maroochydore, the appellant suggested that she put her head down and have a rest which she did. She recalled then the appellant grabbing the complainant by the head and pushing her down. She did not see what happened thereafter, the front seat being a bench seat, but when they arrived at Maroochydore the complainant appeared to her to be upset and went for a walk on her own.

[16] Mrs McGinness points to the fact that this incident was not referred to at all by the complainant in either her January 1992 statement or her April 2000 statement. She referred to it for the first time during a conference with Mr Swanwick. There was also some inconsistency in the complainant's evidence as to when she first recalled

this incident, whether it was a couple of weeks before speaking to Mr Swanwick or the day before. And there was some inconsistency between the complainant and her sister as to whether the complainant had spoken to the sister before the latter was asked to recall this event.

[17] As to the first of these criticisms, whilst it is true that the complainant did not mention this specific event before the interview with Mr Swanwick, she had spoken generally about occasions on which the appellant had required her to fellate him without particularizing them. It was only when asked to give particulars of a specific occasion on which this had occurred that she was able to recall and specify this occasion. The complainant's failure to mention this incident earlier was pointed out to the jury by counsel for the appellant and by the learned trial judge. In my opinion the jury were entitled to accept the complainant's explanation for the failure.

[18] As to the inconsistency between the complainant and S as to whether they communicated on this question before S gave her statement, even on S's evidence that they did there was no suggestion that the complainant had told S what had occurred or made any more specific inquiry than as to whether S could recall any trips to Maroochydore where anything strange had happened. This inconsistency, and that as to when the complainant first recalled this specific event, are, in my opinion, no more than one might expect of an honest witness, in the course of a vigorous cross-examination, endeavouring to recall past, albeit recent past events.

[19] In my opinion the jury were entitled to accept the complainant's evidence with respect to this count, supported as it was by the evidence of S and also, more generally, by the evidence of their mother to which I have already referred.

[20] There were a number of other inconsistencies in the complainant's evidence with respect to the events the subject of these charges and also with respect to the event the subject of the count which was discontinued at the end of the Crown case. However these inconsistencies were the subject of very extensive and, as I have mentioned, vigorous cross-examination and apparently also of an extensive address by defence counsel. They were also discussed at some length by the learned trial judge. There cannot be any doubt that the jury must have had them in mind in assessing the complainant's credibility. It is not at all surprising that there would be inconsistencies between a statement given by the complainant in 1992 when she was about 17 and one given about eight years later, particularly when the first of them was given in the presence of her mother in the circumstances I have outlined. Nor is it surprising, in my opinion, that, when her mind was directed, for the first time, to the need to identify specific events rather than generalized evidence of improper conduct by the appellant, the complainant should, for the first time, describe the details of specific events of a kind which she had described generally before.

[21] The second particular relied on which, it was submitted, ought to have caused the jury to have a reasonable doubt about the complainant's credibility was that, notwithstanding that the complainant had deposed to digital penetration by the appellant on a number of occasions and the penetration consisting of the conduct relied on for the rape charge, Dr Morgan who examined the complainant on 7 May 1991 saw no evidence of any injury including to the hymen; and he also agreed in cross-examination that, if he had noted any scars, abrasions or old injuries he would have recorded this. However he also said that these things, by which he must have

meant the penetrations which I have described, can occur without any signs of injury or damage. Dr Greenham a doctor who was called to give expert evidence without having seen the complainant also said that damage to the hymen may heal very well and that a healed tear may be difficult to detect. It was also, for a number of reasons, possible to fail to observe tears of the hymen on examination. I do not think that any of this evidence should have caused the jury to have a reasonable doubt as to the commission of either of these offences.

The ground that his Honour erred in his direction with respect to uncharged acts

[22] The complainant gave evidence that sexual misconduct by the appellant began when she was about nine, that the first occasion upon which she was required by the appellant to fellate him was shortly after the family moved to Emu Park, she thought in 1986, and that this also occurred on a number of occasions after they moved to Gympie which, according to her mother, was at about Christmas 1987. She also said that the appellant digitally penetrated her on three or four occasions between 1988 and 1991 when he moved out. Fellatio also occurred during this period. She gave some particulars of some of these events but, in none of them, sufficient to justify a specific charge of indecent dealing.

[23] At an early stage in the course of his summing up the learned trial judge told the jury that it was important, in a case like this where there are many allegations many of which are not the subject of any charge, to keep firmly in mind that they were trying this man upon each of the two counts in the indictment only. They were, he reminded them, separate offences and they were required to regard them separately and consider them separately.

[24] Then, after describing the evidence which the complainant gave about uncharged sexual acts of the appellant, the learned judge reminded the jury once again that these were not the subject of any charges and reminded them also of his earlier statement that they were not trying the accused on some generalized charge of immoral behaviour but only on the particular charges with which he had been charged; that they must focus on that and not be distracted by the more generalized allegations to which he had just referred.

[25] His Honour then said to the jury that the relevance of this evidence of other acts was that it provided a background against which they could consider the complainant's evidence relating to the charges; that it provided a context against which they might assess the evidence relating to the charges. By that his Honour plainly meant that they could look at this evidence in order to see the context in which the complainant said the acts which constituted the specific charges occurred. This evidence did not, he said enhance the complainant's credibility in any way.

[26] However Mrs McGinness submitted that, in addition, the learned trial judge should have told the jury:

(a) that this evidence could only be used for the limited purpose of determining whether a sexual relationship existed between the complainant and the appellant;
(b) not to reason that the accused is the kind of person likely to commit the offence charged; and
(c) that evidence of other sexual activity does not itself prove the offences charged.

She referred in this respect to *BRS v The Queen*,[2] *R v W*,[3] and *T*.[4] She also referred, by way of analogy, to the decision of this Court in *R v D*.[5]

[27] The precise terms in which such a direction should be given will depend on the circumstances of each case. However the purpose of the admission of this evidence, if it is accepted, is that, by showing a continuous course of conduct, it provides a credible context in which the specific offences charged were said to have occurred. Evidence about the occurrence of these offences, without evidence of that context, might seem inherently incredible. In my opinion that is plainly what his Honour was telling the jury when he said that this evidence provided a background against which they could consider the evidence relating to the charges, a context against which they might assess that evidence. That, together with his Honour's statement that they should focus their attention on the specific acts charged and not to be distracted from that course by the more generalized allegations of uncharged acts seems to me to answer the appellant's concerns referred to in (a) and (e) above.

[28] It is true that his Honour did not specifically add that, even if they accepted this evidence of other sexual acts, they should not use it to conclude that the appellant was someone who had a tendency to commit the type of offence with which he was charged. It might have been better had his Honour added this explicitly but that, in my opinion, was implicit in his statements, already referred to, that the evidence could be used only in order to provide a context in which to assess the complainant's evidence with respect to the specific charges, that it could not be used in any way to enhance the complainant's credibility, that they should be concerned only to decide whether the specific charges had been proved and that they were not trying the accused on some generalized charge of immoral behaviour but only on the particular charges the subject of the indictments.

[29] In this way, in my opinion, the jury were not misled into thinking that they could, in any way, use the evidence about uncharged acts to prove the charges the subject of the indictment.

[30] In *D* this Court held that such a direction was necessary. However as McPherson JA made clear in that case, the uncharged acts there had two features not always found in cases of this kind. One was that they related not only to sexual acts but to other non-sexual acts of violence. The other was that those acts of violence related to persons in addition to the complainant herself, namely her brothers. Moreover counsel for the accused in that case did not object to the admission of this evidence and sought to show that these acts simply represented a rather idiosyncratic method of disciplining the children. But all of this increased the danger that, if the accused was a violent man, the jury might reason that it was more likely that he committed the offences charged. On the facts of this case and in the light of his Honour's directions referred to above I do not think that a failure to give that direction gave rise to that danger.

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2 (1997) 71 ALJR 1512.

3 [1998] 2 QdR 531 at 534 - 535.

4 (1996) 86 A Crim R 293 at 299 - 300.

5 [2001] QCA 256; CA No 16 of 2001, 29 June 2001.

[31] For the reasons mentioned this ground of appeal fails also. I would therefore dismiss the appeal.

Order

Dismiss the appeal.

[32] **McPHERSON JA:** I agree with the reasons of Davies JA for holding that this appeal should be dismissed. The inconsistencies and discrepancies, such as they were, in the evidence of the complainant at the trial are not such as to warrant the conclusion that the jury, acting reasonably, ought not to have accepted her evidence. I also agree with what his Honour has written about the trial judge's directions on the evidence of uncharged acts of a sexual nature given at the trial. The real function of such evidence, it seems to me, is to rebut an inference that might otherwise arise or be advanced that the fact that the acts charged were isolated instances occurring some time apart makes it objectively unlikely that they took place at all. Considered in this way, the directions on the subject given to the jury at the trial were adequate for their purpose.

[33] The appeal against conviction should be dismissed.

[34] **WILSON J:** I agree with the reasons for judgment of Davies JA and with the order he proposes.