SUPREME COURT OF QUEENSLAND

CITATION:	*R v W* [2003] QCA 308
PARTIES:	**R** **v** **W** (appellant)
FILE NO/S:	CA No 191 of 2003 DC No 413 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	22 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2003
JUDGES:	de Jersey CJ, Davies JA and Helman 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 – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where inconsistencies between complainant's fresh complaint and evidence in chief – where learned trial Judge described inconsistencies as major and fundamental – whether conviction unsafe *Evidence Act* 1977 (Qld), s 93A *M v R* (1994) 181 CLR 487, considered *MFA v R* (2002) 77 ALJR 139, considered
COUNSEL:	A J Rafter for the appellant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted by a jury in the District Court of having unlawfully and indecently dealt with a child under the age of 12 years, then in his care. He appeals on the ground that the verdict is unsafe and unsatisfactory, particularised by reference to inconsistencies in the evidence of the complainant such as to render her evidence, it is said, unreliable.

The offence allegedly occurred on 23rd February 2002, when the complainant was 10 years old. The appellant was convicted on 17th of June, 2003. So that the circumstance which sometimes gives the Court cause to pause in such cases, the lapse of a substantial interval between the alleged offence and trial, is not present in this case. On the other hand, as Mr Rafter points out there was no potentially corroborative evidence.

The complainant's evidence-in-chief was given by means of a video taped interview admitted under section 93A of the Evidence Act. That interview took place on the 28th of February 2002, which was five days after the alleged offence. During the interview the complainant told the police that while the appellant was looking after her on the relevant day at about noon, her mother being at work, they were lying on a mattress in the lounge room watching television.

She said that the appellant took her hand and rubbed it against his nipple, then forced her hand on his penis, saying, "Play with it baby". The complainant was cross-

examined at the trial. Her mother also gave evidence to the effect that after she returned home from work that day, the complainant asked to speak with her in the bedroom. The complainant told her mother that the appellant had positioned himself next to her and while watching a video with her started to tickle or kiss her ear. He then proceeded to try to get her to touch his nipple area and then tried to put her hand down the front of his pants.

The criticisms which found the contention that the verdict is unsafe centre on inconsistencies between the fresh complaint and the complainant's evidence-in-chief in so far as she told her mother that the appellant tried to get her to touch his nipple area and penis, rather than his actually doing so, an inconsistency which the learned Judge described in his direction to the jury as "major and fundamental"; arguable inconsistency within the complainant's evidence as to their comparative positions as they lay on the mattress; inconsistency between the complainant's evidence at committal and at trial, as to whether she saw the appellant undo his shirt buttons; and suggested significance in the complainant's not having raised the complaint when speaking to her mother during the mother's lunch break at work. That was not necessarily, I should say it once, of any significance however because the appellant was near by at the time.

The arguably most significant of those discrepancies concerns the reference, in the fresh complaint, to the appellant trying to do the things which lie at the

foundation of the charge. As to this, counsel for the Crown submitted it was explicable as mere looseness of language and should be understood first, as typical of the tentativeness with which complainants initially approach their elders in these circumstances and second, as a reflection of the unpleasantness of the experience and of the recollection of it.

In such circumstances it was submitted, using the language of counsel, "idiomatic use of the expression, tried to, does not inevitably lead to the conclusion that the attempt was met by failure". I generally agree with those observations. The jury may have taken that approach and if they did so, it was not unreasonable.

It is significant that the extent of the inconsistency was so directly brought to the attention of the jury by the learned in his direction. None of the other arguable inconsistencies or discrepancies should have been regarded by the jury as of major significance either separately or in combination. Reviewing the case as we must in accordance with authority including M (1994) 181 Commonwealth Law Reports 487 and MFA (2002) 77 Australian Law Journal Reports 139, I am not satisfied that the aggregation of those arguable difficulties should have persuaded a jury acting reasonably to acquit the appellant. As submitted for the Crown it was a reasonably strong case. An examination of the record at least, suggests the complainant gave her evidence with a degree of clarity and forthrightness. The Crown certainly did have the potential advantage as to

credibility of a very recently made fresh complaint in which the substantial issues, namely that the event involved the appellant's nipple area and later penis, were articulated.

There was no evidence contradicting the complainant's account and there was also uncovered no serious motivation why the complainant would have approached the matter untruthfully. In my view the appellant has not established that the conviction is unsafe and the appeal should be dismissed.

DAVIES JA: I agree.

HELMAN J: I agree.

THE CHIEF JUSTICE: The appeal is dismissed.