SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBI* [2007] QCA 376
PARTIES:	**R** **v** **BBI** (applicant/appellant)
FILE NO:	CA No 140 of 2007 DC No 45 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2007
JUDGES:	McMurdo P, Dutney J and Douglas J Separate reasons for judgement of each member of the Court, each concurring as to the orders made
ORDER:	**Applications dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS - WHEN REFUSED – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where the applicant was convicted of maintaining an unlawful sexual relationship and two circumstances of aggravation - where in 2003 the Court extended the time within which he could appeal against his conviction - where the appeal was listed to be heard but the applicant signed a form abandoning his appeal which was then taken to be dismissed when the registrar received that notice - where the applicant applies again for leave to adduce evidence, another application for extension of time within which to appeal and a notice of an application to appeal against his conviction and sentence – whether the notice of abandonment should be set aside – whether the applicant has shown realistic prospects of success. *Criminal Code Act 1899* (Qld) s 229B (2) *Criminal Practice Rules* r 70(3)

Gallagher v The Queen (1986) 160 CLR 392, cited

R v Marriner (2006) 160 A Crim R 63, cited

COUNSEL: Applicant appeared on his own behalf
M J Copley for the respondent

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

[1] **McMURDO P**: The applications should be refused for the reasons given by Douglas J.

[2] **DUTNEY J**: I have read the reasons for judgment of Douglas J. I agree with those reasons and the order he proposes.

[3] **DOUGLAS J**: The applicant was found guilty of maintaining an unlawful sexual relationship with his daughter on 16 April 2003. The jury was also satisfied that two circumstances of aggravation, namely that the applicant raped the child and that he indecently dealt with her when she was under the age of 12 were proven. He was imprisoned for 11 years. On 29 October 2003 this Court extended the time within which he could appeal against his conviction. The appeal was listed to be heard on 16 February 2004 but, on 3 February 2004, the applicant signed a form abandoning his appeal which was then taken to be dismissed when the registrar received that notice.

[4] On 25 June 2007 he filed an application for leave to adduce evidence, another application for an extension of time within which to appeal and a notice of an application to appeal against his conviction and sentence. It is those applications that are before us now.

[5] For the Court to set aside his notice of abandonment of his earlier appeal the applicant must show that it is necessary in the interests of justice; see r. 70(3) of the *Criminal Practice Rules*; *R v Marriner* (2006) 160 A Crim R 63, 68 at [16]. The relevant issues in examining that issue in this case are the delay in bringing this application, the nature of the further evidence the applicant wishes this Court to examine and the prospects of success of any appeal that might be permitted as a consequence of the application.

Delay

[6] The applicant provided some evidence relevant to his earlier application for an extension of time within which to file an appeal in 2003. It appears that he notified the registry of the Court of Appeal by 30 October 2003 that he wished to withdraw his appeal although he did not sign the notice of abandonment until 3 February 2004. His solicitors at the trial assisted him to seek legal aid for his appeal but the likely inference seems to be that it was not forthcoming and that the applicant could not afford to pay for an appeal himself.

[7] He says in an affidavit filed 25 June 2007 that he was using anti-depressants, cannabis and drinking alcohol at a greater than normal level before and during his

trial. At the time he sought to appeal his evidence is that he was in a poor state and could not function properly which made things difficult for him. He does not say anything significant about the period since the abandonment of his appeal in February 2004 and the present although he does say that since he has been imprisoned he has maintained continuous employment and has sought help to get himself back on his feet.

[8] That evidence and the content of the affidavit to which I have referred encouraged the respondent to submit that the applicant had not satisfactorily explained either the delay of more than three years in bringing these applications or that his decision to abandon his original appeal was made other than deliberately and from an informed perspective. It is a reasonable conclusion to draw from the material.

[9] Otherwise the submissions focussed on whether there was any realistic prospect of success of an appeal. As the respondent submitted, that consideration requires an analysis of the evidence.

Evidence at the trial

[10] There was evidence from the complainant about the applicant's behaviour to her in the houses where they lived in the first half of 2002. It was detailed in an interview recorded by the police investigating the complaint that was originally made by the complainant to her mother about 22 June 2002. She provided convincing detail to the investigating officer in response to non-leading questions. She alleged, among other things, that the applicant asked her to masturbate him, that he put cream on her vagina before putting his penis in it and also on his penis before he did that and rubbed his penis inside her vagina. She also alleged that he made her suck his penis and describe how the applicant would ejaculate. She described the pain and the physical consequences for her of the intercourse and said that nobody else was at the house when the applicant did these sorts of things. She showed the police the houses where she then lived with her father.

[11] She was also examined by a paediatrician who gave evidence that the complainant only had a rim of a hymen in the vaginal opening which suggested trauma or penetration which could have been caused by a penis or a finger.

[12] Although the complainant was only seven years old at the time of her pre-recorded statement, she appeared, from the record, to be able to give clear evidence in convincing detail. There was, therefore, a significant body of evidence on which the jury relied to find the applicant guilty.

Further evidence sought to be led

[13] The application for leave to adduce evidence referred to a number of witnesses whose evidence was claimed to be relevant to these further proceedings by the applicant. One of the proposed witnesses, Mr Morrison, was called as a prosecution witness at the trial. It seems that the applicant hopes that Mr Morrison would be able to give evidence of conversations between the complainant and her mother who was estranged from the applicant. There was no evidence before us, however, from Mr Morrison as to what he might be able to say. The evidence said to be able to be provided by that witness appears to be likely to relate to an issue stemming from the complainant's mother's attempts to obtain custody of her, namely whether the mother would have encouraged the complainant to falsify her evidence. That issue

loomed large at the trial and was a significant focus of the defence counsel's address to the jury; see the transcript at R 168 l. 7 – R 175 l. 38.

[14] The applicant also wished to call evidence from a prison chaplain who appears to have attempted to assist him to communicate with his daughter after his conviction. That evidence was not relevant to the issues canvassed at the trial.

[15] Other evidence highlighted by the applicant in his affidavit referred to notes by a psychologist who had interviewed the complainant and by the paediatrician who had been told by the complainant that her father had been "doing rude things" to her causing her discomfort and that it had been an ongoing problem since the complainant had been approximately five years of age although the last episode was prior to Christmas 2001.

[16] The statement to the paediatrician, was made on 28 June 2002. She gave evidence at the trial. The relevance of the evidence in her statement was that the prosecution had particularised several acts by the applicant relevant to the charge of maintaining an unlawful relationship between 1 January 2000 and 28 June 2002 as having occurred during the first half of 2002. That was based on evidence of the complainant given by her in a pre-recorded interview which related to events said to have occurred in two separate houses in which she lived with the applicant during the first half of 2002. The fact that she and the applicant lived in those houses during that period is also established by other evidence.

[17] It seems clear that the defence counsel was aware of the significance of this potentially inconsistent statement to the doctor, namely that the last episode of abuse was before Christmas 2001 rather than during the first half of 2002; see R. 60 l. 45 – R. 61 l. 5. There the complainant confirmed what she had said to the doctor. Defence counsel at the trial, during his address, appears to have relied on that evidence to suggest that the complainant should not be believed because of inconsistencies in her conduct in agreeing to stay with the applicant after a time when, according to her, the sexual abuse of her had well and truly begun; see at R. 177 ll. 14-22. It may have been a tactical decision by him not to explore further the inconsistency between the complainant's statement to the paediatrician about the timing of the abuse and her own statement to the investigating police officer because of its potential to highlight the lengthy period over which the abuse was said to have occurred. The complainant was also only 8 years old at the time of the trial.

[18] The evidence from the psychologist post-dated the trial and included allegations by the complainant to the psychologist that she would regularly cry and scream when living with her father, that on one occasion she called for the police and also told her neighbours what was occurring but that nobody believed her. The truth of those statements said to have been made to the psychologist has not been established in this application.

[19] The applicant contended that these statements, if proved, were inconsistent with the complainant's behaviour in having continued to stay with him and could, one assumes, be used as a further attack on her credit if there were to be a retrial. It would amount, however, to a further canvassing of issues that were covered at the trial where the complainant had said that the abuse had occurred since she was five years old and when similar evidence from the paediatrician about the timing of the

abuse was available and had been used to help attack the complainant's credit. The psychologist's evidence is consistent with the evidence the complainant gave about the period over which the abuse occurred, not likely to assist the applicant where the jury believed the complainant when she gave such evidence and unlikely to affect the result considered in conjunction with the evidence already given at the trial. In my view it would not reasonably have led the jury to return a different verdict; see *Gallagher v The Queen* (1986) 160 CLR 392, 395-396.

[20] Other evidence sought to be led by the applicant similarly post-dated the trial or sought to reargue matters canvassed at the trial.

Prospects of success of any appeal

[21] The applicant has formulated a number of grounds of appeal totalling 23 in a document he filed as a potential notice of appeal.

[22] Ground one claims that the learned trial judge erred in not ruling on a request by counsel for the defence that the prosecutor particularise a statement made by the complainant's mother. There is no such request apparent on the record although counsel for the defence did argue that the particulars that had been provided of the acts alleged were potentially duplicitous and did not reasonably define the time when each of them occurred.

[23] Ground two seeks to argue that the charge was not sufficiently particularised. The learned trial judge ruled that a reasonable degree of particularity had been given by the prosecution at R. 17 ll. 14-33. The particulars that had been provided listed five occasions during the first half of 2002 alleging sexual activity between the complainant and the accused in particular rooms in particular houses at an identified location where the applicant lived at the relevant time.

[24] At that time s. 229B(2) of the *Criminal Code* provided that the offence of maintaining an unlawful relationship of a sexual nature could be established "notwithstanding that the evidence does not disclose the dates or the exact circumstances" of the three or more occasions then required to be shown where the applicant did an act to constitute an offence of a sexual nature. The events relied upon occurred only about one year earlier than the trial in April 2003. As the trial judge ruled, the charge was sufficiently particularised to allow the applicant to defend the charges adequately. In my view an appeal on the first two grounds would fail.

[25] The third proposed ground of appeal appears to be that the learned trial judge erred by misleading the jury as to what they should make of a statement by the complainant's mother when she was being cross-examined. He submitted that the transcript was not an accurate record of what occurred at the trial and that she gave evidence to the effect that: "We had to get the story straight". That evidence does not appear in the transcript although there is a passage at R. 108 ll. 59-60 where that witness said:

> "I just wanted to make sure the story was correct."

[26] That occurred in the context of the mother being cross-examined to the effect that the complainant first mentioned sexual misconduct by the applicant to her on 22 June 2002 and said that she wanted to see a doctor. That occurred, according to the witness at about 10.30pm on a Sunday night and she thought it better that she

wait to take the complainant to a female doctor on the Monday. There was some doubt as to the dates when she was told this by the complainant, whether it occurred on a Saturday night or a Sunday night. The complainant's mother had just given evidence, before the relevant sentence, that she wished the complainant to see a female doctor and "wanted her to think about it for a while": See at R. 108 l. 47. The evidence is consistent with the mother wanting to be sure that the complainant's story was accurate rather than, as the applicant would have it, that the mother was conniving with her daughter to fabricate a story. The mother's delay in taking the complainant to see a doctor was also a significant aspect of the argument made by defence counsel at the trial. The accuracy of this particular sentence in that context where there was no challenge to the transcript at the time does not establish a likely ground of appeal.

[27] The fourth ground asserts that the prosecutor narrowed the allegations of the commission of the offences to the period between March and June 2002 at particular locations but the evidence did support those dates and places as the times and locations where the events referred to in the particulars occurred. Again that is not an attractive ground of appeal.

[28] Grounds 5, 6 and 7 deal with assertions about defence counsel's conduct in allowing photographs of a room and tubes of Dettol cream to be received into evidence, in failing to put forward a defence that was not described and in failing to ask witnesses questions which again were not described. The respondent's argument in this context was that, even if the photographs of Dettol cream were inadmissible, no prejudice arose from their admission. He also argued correctly, that the defence counsel was not obliged to follow the applicant's instructions and that the applicant bore the onus of showing how his counsel's conduct caused a miscarriage of justice. That has not occurred. These grounds are not established.

[29] Ground 8 asserts that the police failed to give the applicant an adequate warning as to his rights to have a solicitor present and as to his right to silence when they were searching his house. No objection was taken at the trial to evidence about what the police found at the applicant's residence. No complaint was made about the legality of the search nor was the detective investigating the matter asked any questions about his conversations with the applicant. Again this is an unpromising ground of appeal.

[30] Ground 9 alleges that the prosecutor failed to notify defence counsel about evidence from a Mr Morrison including phone contact between him and the complainant's mother. As I have already pointed out Mr Morrison did give evidence as a Crown witness to the effect that he and the complainant lived in the same house between February and May 2002. The complainant was living with them at the same time but she did not allege that anything occurred between her and the applicant when other adults were present. Defence counsel at the trial cross-examined Mr Morrison briefly without referring to any conversations said to have been held between him and the complainant's mother. If such conversations occurred, which has not been established, and if they were relevant, it has not been shown that any failure to cross-examine about them led to a miscarriage of justice.

[31] From what the applicant said on the appeal, it appears that he wished to argue that the complainant's mother wanted to have custody of the complainant and may have had a motive to encourage the complainant to make false allegations but, as I have

already indicated, that was clearly an issue at the trial. It has not been shown that Mr Morrison could have added to the evidence relevant to that issue. That ground would also fail.

[32] Ground 10 asserts a failure by the prosecutor to notify defence counsel about evidence that a second doctor was treating the complainant. The applicant has neither established that the prosecutor failed to notify defence counsel of that fact or that, if there was such a failure, it caused a miscarriage of justice.

[33] Ground 11 appears to refer to the judge's summing up about the medical evidence at R. 208-210 and to criticise him for allowing the paediatrician to give evidence outside her expertise. Her evidence was not the subject of objection at the trial. She did not stray outside her area of expertise and the summing up about the effect of her evidence appears to have been appropriate. This ground is also not made out.

[34] Ground 12 asserts there was not a fair trial on the basis that "most of the evidence was unsubstantiated background evidence". The charge was one of maintaining an unlawful sexual relationship and there was evidence by the complainant that the applicant had been misbehaving with her since she was five. That evidence was admissible but was made the subject of a direction by the learned trial judge that the jury should treat it as background information and confine their attention to the specific allegations made and particularised by the prosecution in their written particulars which were also the specific allegations made in a video interview played to the jury; see R. 217-218. Again this ground of appeal was not made out.

[35] Ground 13 asserts that the prosecutor was allowed to badger and attack the applicant when he gave evidence. The cross-examination was relatively brief and focussed. The questions were clear and met the prosecutor's obligation to put the essence of her case to the applicant. In that sense she attacked the applicant's version of events but that was her duty as the prosecutor. The form of the questions does not suggest that she was badgering the witness. There is nothing to suggest that the applicant was unable to cope with the questioning and the very first exchange between him and the prosecutor at R. 139 ll. 25-30 suggests that he was perfectly capable of seeking clarification of a question he did not understand fully. This ground would also fail.

[36] Ground 14 asserts that the trial was not fair as the prosecutor, arresting officer, doctors and "all those on the side of the case against the accused" were female. It gives this argument more credence than it merits to point out that the judge was male. This ground also fails.

[37] Ground 15 is hard to understand but was characterised by the respondent as essentially a complaint that the summing up was unbalanced. On my reading of the summing up it was a balanced and fair traverse of the evidence and the relevant legal issues. This ground would fail.

[38] Ground 16 appears to be a complaint that the particulars relied on by the prosecution of acts occurring in the first half of the year of 2002 could not be correct because the complainant was in her mother's custody from late December 2001 until 25 February 2002. That ground is not made out as it is clear that the complainant was with the applicant for a significant part of the period particularised and in respect of the events of which she gave evidence, which were said to have

occurred in the period when she lived with the applicant. This ground would also fail.

[39] Ground 17 appears to proceed on the same basis as ground 16 and would also fail.

[40] Ground 18 asserts that there were no warnings about fresh complaint to the jury and asserts that the learned trial judge erred in summing up to the jury by failing to give adequate warnings about the dangers of convicting on uncorroborated evidence. This ground also refers to evidence said to have been given by the complainant's mother and the doctor that does not appear on the record. As to the dangers of convicting on uncorroborated evidence, the learned trial judge told the jury to scrutinise the complainant's evidence with "considerable" care and "great" care at R. 206 ll. 30-40. The applicant's counsel at the trial considered that it was not a case where the jury should have been warned that it was dangerous to convict; see R. 150 ll. 45-50. This ground would also fail.

[41] Ground 19 is, in effect, a complaint that the verdict was unreasonable. I have already referred to the complainant's evidence. It was clear and detailed for a child of her age. The medical evidence about the state of her vagina was also consistent with her account of what her father had done. She complained to her mother shortly after she began to live with her again and the applicant's case about the mother's wish to obtain custody of her daughter was put clearly to the jury. This ground is also not made out.

[42] Ground 20 is a complaint about the sentencing process and irrelevant to this application. The same applies to ground 22.

[43] Ground 21 involves a mere assertion that there was a miscarriage of justice when counsel for the defence had lunch with the trial judge during the course of the trial. There was no evidence that such a lunch took place or that anything happened that could have led to a miscarriage of justice. Even if there were such a lunch, and it sometimes does occur that counsel for all parties and the judge share a meal in circuit towns, any likelihood that such a meeting would lead to a miscarriage of justice was not established on the hearing of this application. This ground would fail.

[44] Ground 23 deals with the further evidence sought to be led. As the respondent points out it is not fresh evidence nor does it establish either that the applicant is innocent or that it is of such cogency that no jury could have been satisfied of the applicant's guilt beyond reasonable doubt had it been received at the trial.

Conclusion and order

[45] Accordingly the applicant has failed to show that it is necessary in the interests of justice that his notice of abandonment of his earlier appeal be set aside. He has not adequately explained his delay in bringing the application nor shown that his decision to abandon the original appeal was made other than deliberately and from an informed perspective. Nor has he shown any realistic prospect of the success of an appeal whether or not the evidence he submits should be received were to be received.

[46] I would dismiss the applications.