SUPREME COURT OF QUEENSLAND

CITATION:	*R v HAJ* [2008] QCA 18
PARTIES:	**R** **v** **HAJ** (applicant/appellant)
FILE NO/S:	CA No 118 of 2007 DC No 79 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	15 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2008
JUDGES:	de Jersey CJ, Muir JA and Fraser JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for an extension of time within which to appeal against conviction granted** **2. Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW- APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION- APPEAL AND NEW TRIAL- PARTICULAR GROUNDS- UNREASONABLE OR INSUPPORTABLE VERDICT- OTHER CASES- where the appellant was convicted of 4 counts of indecent treatment of a child, 1 count of attempted rape, 1 count of common assault, and 1 count of maintaining an unlawful sexual relationship with a circumstance of aggravation- where the appellant argued there were inconsistencies in the evidence of the complainant- whether it was open to the jury to be satisfied beyond a reasonable doubt of the guilt of the appellant - whether the verdicts were unsafe and unsatisfactory *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited
COUNSEL:	G P Long SC for the appellant G P Cash for the respondent

SOLICITORS: Michael Cooper Lawyer for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree that the appeal should be dismissed for those reasons.

[2] **MUIR JA:** The appellant was convicted on 2 April 2007 in the District Court at Rockhampton of three counts of indecent treatment of a child under 16, one count of indecent treatment of a child under 12, one count of attempted rape, one count of common assault and one count of maintaining an unlawful sexual relationship with a circumstance of aggravation. The offending conduct is alleged to have commenced when the appellant resided with the complainant, her mother and her two brothers in Yeppoon and to have continued when the family and the appellant moved to a house at Mt Wheeler. The appellant was 41 years of age when sentenced. The complainant was born in January 1989 and was aged between seven and 15 in the period to which the offences relate.

[3] The appellant and the complainant's mother commenced a sexual relationship in about April 1996 and started cohabitation shortly thereafter.

[4] The complainant's allegations of sexual misconduct first surfaced on 7 August 2004 after an incident in which the appellant attempted to administer corporal punishment to the complainant with his customary corrective instrument, a plank of timber. The complainant was then about 15 and a half years of age. Her mother's evidence was to the following effect. She heard her daughter screaming out, telling the appellant to leave her alone and saying, "You're never going to touch me again." The complainant was extremely upset. Asked about her state, the complainant said that she couldn't tell her mother because her mother would want to kill her and the appellant also would want to kill her. At this time the appellant was, "outside in the hallway and the lounge, just wandering around the house . . .". The complainant was packing clothes and possessions with a view to leaving.

[5] Pressed by her mother to say what was wrong, the complainant asked if she could, "Write it down". She then wrote on a piece of paper, "At night when I'm asleep he usually comes in and touches me and I say I'll tell u and he usally [sic] hits me, it's happn [sic] since Grade 7."

[6] The complainant was taken immediately by her mother to the home of a friend, where she resided temporarily. The complainant and her two sons remained in the house they shared with the appellant until the complainant's mother located and moved with her children to alternative accommodation on 16 August. On that day the complainant's mother gave a statement to a police officer. The complainant gave her first statement to police the next day.

[7] In the trial the complainant's mother also gave evidence of the following conduct on the appellant's part. The appellant would, "Grab [the complainant] on the bottom all the time and pat her on the bottom and make comments about her breasts . . . her developing and things like that." She remonstrated with the appellant about his conduct, but to no effect. This conduct commenced from when the complainant was about 12 and continued thereafter. She noticed a change in the relationship

between the appellant and the complainant from when the complainant was about 12. The complainant then became more distant from the appellant and she noticed that the complainant sought to avoid close contact with him.

[8] She regularly found the appellant at night in the room in which the complainant was sleeping. In the early hours of one morning she woke up, noticed that the appellant was not in her room and located him in the complainant's room, "Apparently asleep . . . with his feet sticking out . . . behind her [the complainant's] bed." Asked what he was doing, the appellant said that the complainant had been awake and he was in there helping her get back to sleep. The appellant, who was wearing only underpants, further explained that the complainant was awake and restless and that he would stay in there and talk to her until she would go back to sleep. Similar things were said on other occasions on which she found the appellant in the complainant's bedroom at night. Her evidence was that the complainant had no difficulty in sleeping on the many occasions on which the appellant was not in the house.

Grounds of appeal

[9] The sole ground of appeal is that the jury's verdict is unreasonable or cannot be supported, having regard to the evidence.

The appellant's arguments in support of the ground of appeal

[10] It is submitted on the appellant's behalf that there are a number of significant inconsistencies in the evidence of the complainant. These inconsistencies, it is contended, assume particular importance when regard is had to the following:

a. The emergence of the complaint out of a hostile confrontation between the complainant and the appellant;

b. The existence of familial concerns about the appellant's behaviour in relation to the complainant before the making of the subject complaints;

c. The existence of "significant earlier occasions" on which a complaint about the appellant's offending behaviour might have been expected to have been forthcoming but, on which there were "inconsistent and direct denials" that there was any problem;

d. The divergence of evidence between the complainant and her mother as to a significant spillage of lubricant onto a mat in the complainant's bedroom and the lack of scientific support for the rape or the presence of lubricant on the mat.

[11] In order to examine the validity of these contentions, it will be necessary to have regard to those parts of the complainant's evidence relied on by the appellant and the criticisms levied by him. In that regard it will be convenient to consider in turn each aspect of the evidence and the relevant complaint.

The evidence-in-chief relating to Count 1

[12] In her pre-recorded evidence-in-chief the complainant said:

> "One night I woke up and found Greg in my room and his hands were down my pants and he reckons I was restless or something like

> that, and he was trying to calm – relax me or something, and I woke up and I freaked out and pushed him away and – yeah. He eventually sort of calmed me down and left the room."

[13] The complainant explained in relation to the incident that when she woke up, the appellant was squatting beside her bed. His hand was rubbing on her vagina through her underwear, but under her boxer shorts and she recognised the appellant from his voice. He attempted to calm her by reassuring her that she was just restless and she reacted by pushing his hand away. This was the first occasion on which overtly sexual touching occurred and she was pretty sure she was in Grade 6 at the time.

Count 1 – alleged inconsistencies and other evidentiary difficulties

[14] In her first interview with a police officer, the complainant said that the subject incident occurred when she was in Grade 7.

[15] Prior to giving pre-recorded evidence on 4 September 2006 pursuant to section 21AM of the *Evidence Act* 1977 (Qld), she had watched the video tapes of her police interviews "in order to clear up the confusion and incorrect statements. In that regard she said, referring to the police interviews, " . . . it was a big mess . . . I didn't even understand half of what I said . . . because I put certain incidents everywhere". She was asked "You are saying you got things in the wrong order?" And she responded, "Yes . . .but when I watched it again I pretty much remembered."

[16] In her police interviews she described the subject incident as one in which the appellant climbed into bed with her, touched her vagina "all over and inside" and did not say anything to her. When she attended to discuss her evidence at the office of the DPP in January 2006 her descriptions were noted and she had recourse to the notes in order to refresh her memory prior to giving her evidence on the trial. In those notes, contrary to her sworn evidence, she expressed certainty that the appellant's hand had been between her underpants and boxer shorts. In her sworn evidence she said that the appellant's hand was underneath her underwear.

Count 1 – comment

[17] The correction by the complainant of her initial recollection that the acts relating to Count 1 occurred when she was in Grade 6 rather than Grade 7 is not a matter of any particular significance. The complainant first came to the conclusion that the conduct occurred when she was in Grade 7 on the night when she handed her note to her mother. She was then highly distressed. There is evidence that she was still suffering a degree of stress when first interviewed by police. Counsel for the appellant pointed to no circumstances which would cause this change of evidence to be viewed as a matter of substance reflecting adversely on the complainant's credibility in any material way.

[18] Nor does the fact that the complainant watched video tapes of her interviews, and thus refreshed her memory, reflect unfavourably on her credit. As counsel for the respondent pointed out, refreshing memory in this way is similar in its practical effect to a witness refreshing his or her memory from a written statement.

[19] The notion that on this occasion the appellant had "climbed into bed" with the complainant appears to have arisen from an erroneous assumption by the questioning police officer. Asked to describe what happened on the first occasion

on which the appellant "climbed into bed" with her, the complainant responded "Oh, sometimes he just sort of squats beside the bed." The questioner persisted with the assumption that on this occasion the appellant got into bed with the complainant and the complainant failed to correct him. In her evidence-in-chief when the cross-examiner put to her what she had said in her police interview, the complainant said she was confused and then stated that she was "positive he was squatting beside my bed." From the above discussion it is apparent that the jury would have been entitled to conclude that any relevant confusion arose out of a misunderstanding between the questioner and the complainant.

[20] The essential difference between the complainant's evidence-in-chief and her earlier statements and notes was as follows. In her evidence-in-chief the complainant described rubbing on her "vagina" under her boxer shorts through her underwear. In the first police interview her evidence was that the appellant's hand was underneath her underwear and that he touched "all over and inside" her vagina. In the notes taken of a conference in January 2006 in the office of the DPP, the complainant was sure that the touching was inside her shorts but could not recall it was inside her underpants. The evidence is thus consistent as to the touching of the complainant's vulval region in bed at night. Insofar as there is an inconsistency, the jury was entitled to take into consideration the stress from which the complainant was suffering at the time of her interview. They could reasonably have formed the impression also that the complainant was not a person inclined to exaggerate the conduct of which she complained. It is relevant also that the complainant in her interviews and evidence was somewhat imprecise or inaccurate in her anatomical descriptions, equating in most instances, "vagina" with "vulva". Those questioning her never sought to draw any distinction between the two anatomical parts.

The evidence-in-chief relating to Count 2 - charged between 1 March 2000 and 1 April 2002

[21] The complainant gave evidence to the effect that in the small bedroom in the house in Yeppoon to which she moved after the acts constituting Count 1 she felt " a really bad pain between [her] legs", awoke and found the appellant with his hands down her pants trying to push his fingers in her vagina. The appellant was squatting on the right side of her bed, his fingernails were digging in, his hand was in her underwear but she did not think that his fingers got as far as entering the vaginal canal. The incident occurred at night.

Count 2 – alleged inconsistencies and other evidentiary difficulties

[22] The appellant described the subject acts as the last incident occurring in the house at Yeppoon. She had also been "more definitive" in describing an attempt "to put two fingers into her vagina."

Count 2 – comment

[23] There is no material distinction between a description of trying to insert "two fingers" as against "fingers". The complainant was consistent in her description of being hurt and of keeping moving in order to ward off the appellant.

The evidence-in-chief relating to Count 3 - charged between 1 March 2000 and 1 April 2002

[24] The appellant explained that one evening:

> ""I was awake when Greg came in and he was rubbing my back 'cause he was there so I was restless again, and his hand eventually

> started to get lower and I've started getting uncomfortable 'cause he started to touch my bum. And, um, so I've rolled over and he was rubbing my stomach and chest, and his hands started going under my pants, and then we heard that Mum's bedroom door open and he's jumped over and hidden beside the bed. And Mum eventually came in and asked what he was doing there and, yeah, I can't remember what was said or anything."

[25] The complainant said she was wearing a singlet, boxer shorts and underwear. She was unsure as to whether her chest was rubbed inside or outside her singlet and was unsure if the appellant's hand was inside her underpants.

Count 3 - alleged inconsistencies and other evidentiary difficulties

[26] In her statements to the police the complainant said that appellant had not rubbed her chest and that he had touched her under her underpants and "inside her vagina".

Count 3 – comment

[27] There were inconsistencies in the complainant's evidence in relation to Count 3. As recorded above, the complainant explained that she was confused at the time of the interview as well as "scared". She explained that at the time of the events in question she didn't want to get into trouble and was "shit scared". Her evidence in relation to this incident receives a degree of corroboration from her mother's evidence, which is set out above.

The evidence relating to Count 4 – charged between 1 March 2000 and 1 April 2002

[28] This incident was said by the complainant to have occurred also in the small bedroom at Yeppoon. She explained that she woke up and found the appellant above her trying to put his penis into her. She "didn't know where they [her boxer shorts] were, they just disappeared." The appellant was supporting himself with his right arm. His legs were spread and he was using his other hand to direct his penis. She couldn't say if the appellant's penis went into the vaginal canal, but she experienced a "stinging" pain after the appellant "hopped off". "He was sort of squatting between the bed and the built-in wardrobe . . . he only had a shirt on" and she saw his penis. He was holding a little red torch in his mouth. She asked for a glass of water and the appellant went and got that for her. The complainant could not recall any other incidents in detail but said that there were other occasions when the appellant came into her bedroom to "rub [her] back or something" and that this sometimes occurred "every night or whatever" when he was home from the mines and at other times once a week but she could not say for sure whether anything else sexual ever happened.

Count 4 – Alleged inconsistencies and other evidentiary difficulties

[29] In describing this incident in her police interviews, she described an incident where she was awoken to find the appellant "using his fingers" and "it was hurting down there".

Count 4 – Comment

[30] The complainant in her police interview and in her evidence-in-chief gave a consistent account of the appellant's attempt to insert his penis, but in her evidence-in-chief she omitted mention of reference to the appellant "using his fingers". The jury was entitled to conclude that the omission of this detail did not bear materially

on the consistency of the complainant's accounts of the incident, the most significant feature of which was the attempt at intercourse.

The evidence-in-chief relating to Counts 5 and 6 – charged between 1 March 2002 and 17 August 2004

[31] The complainant described an occasion at Mt Wheeler when:

> "I was in my room and Greg came in and he was trying to lie upon the bed and I wouldn't let him and, yeah, he – I was awake and he put his hands down my pants. I can't say if they were under my underwear or not but, yeah, and then, um, I was just moving around to sort of like get – tell him in a say show him a hint that, "Go away", but, um, yeah, he eventually was about to leave and he wanted a hug and I said, um, no, and leave like 'Go away and leave me alone', and he got really angry and slapped me across the face and said something like I don't do anything for him. I don't pay any rent and I said I was going to tell Mum and he said, "you do that and like you're kicked out and your mum won't be able to keep her car and keep the horses and dogs'.
>
> When asked what she was going to tell her mother, the Complainant responded:
> "Um, that just – yeah that Greg came in that night and hit me but I don't know. It depends how I was feeling, like 'cause usually the next day I really do like sort of think of it, like just didn't really care sort of wanted not to remember."

[32] The complainant could not recall any other particular incidents of a sexual nature but the complainant described that the appellant would touch her "butt" and ask for kisses and hugs and played a trick on her and her brothers where they were grabbed between the legs. [R.35.20 – 60] However, on the third occasion when she was asked if there were other incidents, she described rubbing of her genitals either under or through her pants and underwear sometimes every night and other times, every now and then [R.51.1 – 50]

Count 5 – alleged inconsistencies and other evidentiary difficulties

[33] The only complaints which appeared to be levied in respect of these counts are an asserted implausibility about the slapping incident, the late assertion of the existence of further incidents of genital touching at night and the inconsistency of evidence concerning the frequency of these incidents.

[34] Despite describing, in respect of Count 6, a hard slap to the face, the complainant would not be drawn about whether she subsequently noticed any marking on her face. The complainant's mother did not recall noticing any bruising on the complainant's face.

Counts 5 & 6 - comment

[35] The complainant gave a detailed account of the slap which she said was with the appellant's open hand. The incident happened at night and it would not be particularly surprising if any mark left by a slap had largely or entirely gone by the

following morning. Nor would it be particularly remarkable if there had been a mark the following morning which the complainant could not recall seeing.

[36] The sworn evidence of frequent touching of the complainant's genitals outside the incidents the subject of Counts 1 to 6, is consistent with statements made by the complainant in her first police interview. For example, the complainant said in relation to the appellant's conduct at Mt Wheeler, "sometimes he'd do it, like, every night or other times it was just whenever but he'll just do the same thing."

The evidence-in-chief relating to Count 7

[37] This count was maintaining an unlawful sexual relationship with a child under 16 with a circumstance of aggravation that the relationship included an attempted rape. The period in question was between 1 June 1996 and 17 August 2004.

Count 7 - alleged inconsistencies and other evidentiary difficulties

[38] Despite describing other and more recent incidents as occurring in 2004, the complainant asserted that she could not recall any details of such incidents. She said the four or five main ones:

> "Stand out to me, the rest just, sort of, are a blur . . . I can't remember much out of them."

Count 7 – comment

[39] As the complainant's account was one of a regular pattern of misconduct from which some incidents stood out, her evidence of things being "a blur" in respect of many of the incidents is unremarkable.

The medical evidence

[40] It was argued that the evidence of a medical practitioner concerning damage to the complainant's hymen did not "substantially advance the Crown case" as the doctor's evidence was that such damage "could exist without sexual or digital penetration". The doctor's evidence on the point was attended by a degree of confusion. On balance, it is my impression that the doctor's opinion was to the effect that the injury noticed by her was caused by "some kind of penetration" of the vagina. It is not necessary, however, to consider this aspect of the case in any detail. The appellant's counsel conceded that the evidence was relevant and properly led. At worst for the Crown case, the evidence was consistent with the complainant's evidence.

Other areas of criticism

[41] The appellant argues that doubt is cast upon the credibility of the complaints by the circumstances in which the complaints emerged and by the appellant's failure to make her complaints on earlier occasions when the opportunity arose. In particular, reliance is placed on a complaint made in January 2003 by the complainant to her grandmother about being uncomfortable with the appellant coming into her bedroom and touching her. This complaint led to a family discussion in which nothing was said by the complainant one may infer, of the genital touching which forms the substance of the charged complaints. Reliance is also placed on the failure of the complainant to raise the subject complaints with her mother when questioned by her mother before the family discussion. There is evidence that the complainant was subjected to harsh corporal punishment by the appellant and was afraid of him. There is evidence also that she was afraid of the reaction of her mother should she become aware of the appellant's conduct. The circumstances in

which the complainant's allegations first came to light bear eloquent testimony to the complainant's apprehensions in this regard.

[42] Although it is perhaps arguable that the circumstances in which the complaints emerged provided grounds for scepticism about the complainant's bona fides, it was plainly open to the jury to regard the relevant evidence of the complainant and her mother as providing a plausible explanation for the complainant's delay in complaining and as supporting the credibility of the complainant's evidence.

Conclusion

[43] In my view, "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the [appellant] was guilty"[1]. This is not a case in which, "after making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted . . ."[2]

[44] The appeal was instituted out of time but an application for leave to extend time within which to appeal was unopposed. Accordingly, I would order that the time within which to appeal be extended to 18 May 2007 and order that the appeal be dismissed.

[45] **FRASER JA:** I agree with the reasons of Muir JA and the orders proposed by His Honour.

[1] *MFA v The Queen* (2002) 213 CLR 606 at 615
[2] *MFA v The Queen* (2002) 213 CLR 606 at 623