SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAH* [2008] QCA 265
PARTIES:	**R** **v** **PAH** (appellant)
FILE NO/S:	CA No 69 of 2008 DC No 3426 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2008
JUDGES:	Fraser JA, Mackenzie AJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed** **2. The conviction is quashed** **3. It is directed that a judgment and verdict of acquittal be entered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – where appellant convicted of one count of rape of her daughter – where the complainant child gave contradictory accounts of when the offence occurred and what it consisted of – where the complainant child's initial complaint referred to being in a "dreamlike state" at the commencement of the offence – where the complainant child, in interviews with police, referred to "blanking out" after the touching began – where the complainant child conceded in cross-examination that she could have been dreaming and could not be sure it was her mother who committed the offence – where the complainant child later affirmed her allegation under cross-examination – where the complainant child alleged similar acts had occurred over a period of six years, but could not provide details of such acts – where the inconsistencies in the complainant child's evidence and the lack of corroboration were the subject of proper directions

by the learned trial judge – whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt – whether, allowing for the advantages enjoyed by the jury, there was a significant possibility that an innocent person had been convicted

Criminal Code Act 1899 (Qld), s 668E

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied

COUNSEL: J J Allen for the appellant
A J Edwards for the respondent

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

[1] **FRASER JA:** I agree with the orders proposed by Mackenzie AJA and with his Honour's reasons for those orders.

[2] **MACKENZIE AJA:** This is an appeal against conviction and an application for leave to appeal against sentence. The appellant was convicted at trial of one count of rape of her daughter during the months of November 2005 to February 2006. She was sentenced to three and a half years imprisonment.

Grounds of Appeal against Conviction

[3] The only ground of appeal pursued was a contention that the verdict of the jury should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence. A ground relating to alleged non-disclosure by the Crown was abandoned.

The Evidence

[4] The evidence was in very short compass, consisting of a recorded interview between a female police officer, Constable Wiggins, and the complainant, who was nine years of age at the time of the interview and eight years old at the time of the offence, pre-recorded evidence in which the complainant was cross-examined, and oral evidence from MN, the de facto partner of the complainant's paternal grandfather, to whom the complainant child referred as "Nanna". The child had come to live with MN and her partner in March 2005. In November 2005, the appellant took the complainant and her sister back to her place of residence on the understanding that she would return the complainant three days later. That did not occur until 23 February 2006 following the issue of a recovery order.

[5] After the child returned, according to MN, she complained of being sore in the private area. MN asked the complainant had anything happened that she thought she needed to talk to her about. MN's evidence was that the girl told her that she remembered "in a dreamlike state someone coming into her bedroom of a night-time and sitting on her bed and playing with her private parts." Later in the conversation, she said, "I do remember that it was mum who did this to me". She was taken to the local hospital, but there were no results of that visit in evidence.

[6] It can be gleaned from the record of interview that there had been an attempt by a male police officer to interview the child on 30 March 2006 in which no complaint of rape was made. There was an admission of fact by the Crown, with the consent of the defence, that the complainant child had been examined on 1 April 2006 by a medical practitioner. The examination neither confirmed nor refuted the allegation. It was common ground that this meant that it was neither confirmed nor refuted that penetration of the child's private parts had occurred.

[7] There was then a further interview conducted by Constable Wiggins on 13 April 2006 during the course of which the complainant alleged that the appellant had inserted her finger into her vagina. To put the allegation into context it is desirable to refer to the contents of the interview. The police officer referred to the complainant's previous conversation with the male police officer in which, it was said, the complainant had said there were some things that she did not want to tell him but would be happy to tell the female police officer. A little later, she said the following:

> "… so I talked to you before, you spoke to the other police officer, Jamie, like I said and there were some things you didn't want to talk to him about. Can you tell me what… can you tell me what you wanted to… or what you didn't want to talk to him about?
>
> H: That Mummy did stick her finger in my fanny."

[8] Having been asked for detail, the complainant said the following:

> "Um she used to come in and do it at just five minutes after I had gone to bed and um she has this thing in her hand... "

[9] She described, by indicating with her hands, the dimensions of the object. Later, she spoke of a time when she was living at another place where she found that a female friend of her mother's had a "fake boy thing" in a closet. Later, she said that her mother subsequently had a falling out with the woman, details of which the complainant did not know. The complainant later described the object, in colloquial terms, as resembling a penis. She also said she had found, in a downstairs toilet, magazines with pictures of naked women, at which she looked. There was nothing resembling the object in them.

[10] She said that the last time interference happened was at her mother's, five days before Nanna got her back. Paraphrasing her description of that incident, she went to bed about 7 pm. About five minutes later her mother stood at the door. She had "that thing" in her hand. Then she came in and "touched (my) fanny". She had her hand inside the complainant's clothes and wriggled her fingers in the manner the complainant demonstrated non-verbally on the video tape. After that, the complainant "blanked out" and went to sleep. That phrase "blanked out" was repeated a number of times during the interview. She said that she woke up having a dream about a fairy with bad friends who attacked the complainant with a knife and threw her off a cliff.

[11] After some conversation about other matters of detail, she was questioned about the thing in her mother's hand. She said that she did not know anything about it after she had initially seen it. The following conversation then ensued:

> "OFFICER WIGGINS: I'm just going to ask you one more question, you said that your Mum put her fingers on the inside of your clothes,

> on your fanny, did she put her fingers inside your fanny, or just on the outside?
>
> H: She's on the inside but she stuck um at least the first crease of her finger in there.
>
> OFFICER WIGGINS: OK, OK so what can you remember about that, you said she rubbed[1] it first, is that right, and what did she do then?
>
> H: Um.
>
> OFFICER WIGGINS: I know it's hard but if you can just talk about this then it should be finished soon, OK?
>
> H: Um… oh… um… I don't know.
>
> OFFICER WIGGINS: Is it, can you remember it or do you just not want to say?
>
> H: I can't remember it.
>
> OFFICER WIGGINS: OK, alright, can you remember her putting; can you remember her putting her finger in there or not?
>
> H: Yes.
>
> OFFICER WIGGINS: You can.
>
> H: I just felt her finger in there then I was cold and I… I blanked out."

[12] The police officer then put a series of leading questions to the complainant, containing her understanding of what the complainant had said. The result of that was that the complainant assented to a number of propositions. She could remember the appellant putting her finger in the complainant's vagina. The complainant then blanked out. The incident happened just before the girl returned to her Nanna's care. The appellant touched her vagina. She had done it before but the complainant could not remember those times. The complainant thought it had been going on for "six years". She did not know how many times it had happened. Just before the conclusion of the interview, in answer to a question whether anything important had been left out, the complainant told the police officer of occasions when she had had premonitions of something bad happening, which were followed by unpleasant events within a short period of time.

[13] In her pre-recorded evidence, she agreed that she had not told the male police officer that the appellant had touched her fanny. She had referred only to "weird kissing". She agreed that, in her interview with the female police officer, she had alleged that the appellant had put her finger in her fanny but had not referred to kissing. She agreed that she had told the male police officer that the kissing had occurred before Christmas 2005. When interviewed a fortnight later by the female police officer, she had said that the incident involving penetration occurred

[1] The transcript records "wrapped"; however the tape appears to say "rubbed".

five days before she returned to her Nanna's. When pressed about when the last incident involving her mother occurred, she settled on it being before Christmas 2005.

[14] She also agreed that she was unsure whether her mother was carrying anything when she came to the room. She agreed that she shared the room with her sister at the time.

[15] The applicant's counsel asked the following questions:

> "Now, on this occasion, this last occasion, can you tell us what your mother did to you?-- Well, she did what - she -----
>
> Do you say it was the kissing on the lips or something else?-- Something else.
>
> Right, what was that?"

[16] At this point, the complainant became distressed. After a short adjournment the questioning proceeded as follows:

> "[H], I think I was at the stage of asking you what your mother did to you on this last occasion, If you could tell the Court please?-- Okay. When she came into my room, she played with my - my fanny."

[17] When asked for more detail, the complainant explained how the appellant pulled down her pants, and repeated that she had put her finger in her fanny. She said that she was not sure whether she was lying on her back or her stomach at the time. She was also unsure how long it was before she "blanked out".

[18] Near the end of the cross-examination, the following passage appears:

> "Do you recall that you told your nanna something about your mother in about March of last year?-- Yes.
>
> And you told your nanna this: that you remember someone who you thought to be your mum coming into your room at night and playing with your fanny?-- Yes.
>
> Right. Now, you can't be sure, can you, that it was your mother who came into your room?-- No.
>
> No. You could have been dreaming, couldn't you?-- I could of."

The applicant then disagreed with the proposition that at no stage had her mother come into the room and put her finger in her fanny. Then, at the end of the cross-examination, the following question and answer appear:

> "If something like that happened to you, you've mistaken your mother for someone else and you can't be sure that it was your mother, can you?-- No."

[19] In addition to the matters already mentioned, it was confirmed that, despite the opportunity to complain earlier during the six years of the alleged offending, she had not done so, despite extended periods of opportunity, particularly in 2003 and 2005. It was also established that the complainant had a distinct preference to remain with her Nanna in preference to her mother. One aspect of this was that her Nanna had a more benign attitude toward discipline than her mother. There was

evidence elicited from MN that there were Family Court custody proceedings on foot at the time of trial, but, in submissions in relation to sentence it seemed to be accepted that the complainant was not aware of these in the period when the alleged offence occurred, since the first step taken was for the purpose of recovering her from her mother.

[20] No complaint was made at trial or in the present proceedings about the contents of the summing-up. It was accepted that the directions concerning credibility and reliability were favourable to the applicant. The directions about the credibility and reliability of the complainant being the crucial issue, the need to scrutinise her evidence carefully, the inconsistencies in her evidence and its uncorroborated nature were all appropriate directions.

Appellant's Submissions

[21] The appellant submitted that, in determining whether it was reasonably open to the jury to find the appellant guilty of rape, there were a number of issues that impacted on the complainant's credibility. They may be summarised as follows. There was a lack of corroboration of her evidence. The terms of the initial complaint to MN were problematical because of the reference to remembering "in a dreamlike state" "someone", only later said to be her mother, coming into her bedroom, sitting on the bed and playing with her private parts. There was also the failure to disclose the alleged offence during the first interview with the male police officer, and the inconsistencies between the two interviews with the police as to when the last incident occurred and what it consisted of. The complainant's evidence at trial was that she was unsure whether she was lying on her stomach or her back when the offence occurred. Also, the passage of evidence near the conclusion of cross-examination might be taken as a concession that she could not be sure that it was her mother who came into the room or that she could have been dreaming.

[22] The essential submission from the appellant was that the evidence lacked probative force to such an extent as to lead the Court to conclude that, even after making full allowance for the advantages enjoyed by the jury, there was a significant possibility that an innocent person had been convicted (*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63).

Respondent's Submissions

[23] Counsel for the respondent pointed out that the jury were appropriately directed on a number of occasions concerning the central issue in the trial, the credibility and reliability of the complainant. The need to scrutinise the evidence very carefully, the consequences for the appellant as a result of the delay in making the complaint, the inconsistencies in her evidence and the lack of corroboration were all the subject of proper directions.

[24] It was also submitted that the applicant had said in her complaint to MN, in her taped interview with Constable Wiggins, and in her pre-recorded evidence that, during the period when she had last lived with her mother, the incident to which the indictment relates had occurred. It was submitted that the jury might have considered her reluctance to complain of sexual interference to the male police officer and only complain of "weird kissing" to be of little consequence. By that time, she had already complained to MN of the conduct upon which the indictment was based. The jury may also have thought that her failure to make an earlier complaint was not unusual. When MN provided her the opportunity, when she had

complained of soreness in the area of her private parts, she took advantage of it and made the complaint. It was submitted that the description of a "dreamlike state" to which MN referred to may have been considered to be consistent with the complainant's evidence that she blanked out and fell asleep after the offence was committed. It may also have taken some comfort from the complainant assuring MN that she remembered that it was the appellant who had done what she complained of. Counsel referred to MN's evidence that there was some conversation at length about what had happened after the initial complaint.

[25] By way of comment on those submissions, what view of the facts the jury may or may not have acted upon is speculative. Also, a general reference to conversation after the initial complaint was made could be of no assistance to the jury because there was no evidence of what the content of that conversation was.

[26] It was further submitted on the respondent's behalf that the references to blanking out after the touching began, being in a dreamlike state, and the answer in which the complainant conceded that she may have been dreaming should not be taken to detract from the complainant's statement that, at a time when she was awake, the appellant put her finger inside the complainant's vagina. The possibility that the applicant's experience was simply a bad dream was minimal. It was submitted that the complainant differentiated in her evidence between dream and reality, particularly when referring to the particular bad dream that she had.

[27] It was submitted that the answers to the questions about the complainant not being sure it was her mother who came into the room should not be given weight since the complainant also rejected the suggestion that her mother did not commit the offence. In particular, the last answer she gave in cross-examination was to a question that contained two propositions, and the answer "no" to it rendered it unclear which part of it she was answering. The jury might also have considered the uncertainty about whether the complainant was lying on her back or her stomach at the time was of little significance.

Other Relevant Matters

[28] One other aspect of the complainant's evidence that attracted comment, although it is not apparent from the record whether it was mentioned in addresses, is that she says the finger was inserted at least to the "first crease". In submissions on sentence, when the Crown Prosecutor was speaking of the degree of penetration, the learned trial judge observed that it could hardly be supposed to be something the girl actually saw and must have been an expression of sensation. Another unusual aspect of the case is that while the complainant referred to other similar incidents over a period of six years, unlike the more frequent experience in cases of this kind where some description can be given, she was unable to give any detail at all about the circumstances of them. Another matter, referred to in the summing up, was that there was evidence from the complainant that at the time the offence allegedly occurred, her younger sister would have been in the bedroom in another bed.

Applicable Legal Principles

[29] The relevant principles for determining whether the conviction is unsafe and unsatisfactory, to use the former terminology, are set out in *M v R* and *MFA v R*. *M v R* establishes a number of propositions about the exercise by appellate courts of the powers conferred by s 668E of the *Criminal Code* 1899 (Qld) and like provisions. The question which the court must ask itself is whether it 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. In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where a jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the appellate court, the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.

[30] If the evidence, on the record itself, contains discrepancies, inadequacies, is tainted, or otherwise lacks probative force in such a way to lead the court to conclude that, even allowing for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence. In doing so, the court is not substituting trial by the Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[31] In *MFA v R*, it is reiterated that, given the jury's role, sometimes described as a constitutional role, as the tribunal for deciding contested facts, setting aside a jury's verdict, is, on any view, a serious step. But where a doubt is experienced by an appellate court, it is only where the jury's advantage of seeing and hearing the evidence can explain the difference in conclusions about the accused's guilt that the appellate court may decide that no miscarriage of justice has occurred. The function of s 668E of the *Criminal Code* and like provisions is to afford a mechanism against a prospect that an innocent person has been wrongly convicted upon unreasonable and unsupportable evidence and has therefore suffered a miscarriage of justice, while operating in a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual issues concerning the guilt of an accused in serious criminal trials.

Conclusions

[32] There are several features of the case, some of more force than others, that need particular consideration. Firstly, the complaint was initially made in terms of "someone" coming into the room and it was later in the conversation that the complainant told MN that she remembered it was her mother. The evidence of MN about the terms of the complaint referred to the complainant remembering the commencement of the incident in a dreamlike state.

[33] Secondly, there were concessions in the cross-examination in the pre-recorded evidence that she could have been dreaming and that she could not be sure it was her mother who came into the room. Later in cross-examination she gave evidence inconsistent with this. Thirdly, there is the contradictory state in which the evidence was left as to when the charged act occurred and what it consisted of. Initially, the complainant's evidence was that the acts occurred not long before she was returned to MN's care. In cross-examination she resiled from that and settled on it being before Christmas. At the most it can be said that the evidence, whichever version was correct, put the conduct in the period when she was in her mother's care. She told the male police officer only that there was "weird kissing" and the female officer only that there was digital penetration.

[34] Fourthly, there was the inability of the complainant to give evidence, except in the most general of terms about the other acts alleged to have occurred over a six year period.

[35] Fifthly, there is the reference to "blanking out". The meaning of this expression was never explored during the course of the investigation or the taking of evidence. It is perhaps susceptible of more than one meaning. One might be lapsing or even reverting into a non-cognitive state, sleep or otherwise. Another might be simply an attempt to shut out from her mind what was happening. One possible meaning is no more compelling than the other. It should be mentioned in passing that there was some comment in the respondent's written submissions to the effect that the defence had not cross-examined to clarify what was meant by the references involving dreaming. To the extent that suggests that if there are ambiguities in the evidence, it is incumbent upon the defence to remedy them, it may involve a reversal of the onus, especially if, on the evidence led by the Crown, there is a lack of clarity which the defence treats as being to its advantage. The same applies to references to "blanked out".

[36] Sixthly, there is her inability to remember how she was lying at the time of the incident.

[37] These were all matters that, in my view, taken together, raise a not insubstantial concern about the sufficiency and quality of the evidence to support a conviction. Both her recorded interview with the police officer and her pre-recorded evidence are available in electronic form. Having viewed both, there is nothing that suggests to me that it is a case where the jury could gain any special advantage over this Court from seeing the complainant give evidence. The only other witness to give evidence was MN. Her evidence was quite brief and essentially uncontroversial.

[38] Applying the principles in *M v R* and *MFA v R*, I am left with a doubt whether, on the whole of the evidence, the guilt of the appellant has been established beyond reasonable doubt. I have factored in the important issue of whether due weight has been given to the role of the jury in a case of this kind, but have concluded that there is no reason to think that the verdict reached by it was the product of any special advantage the jury had over this Court in forming an assessment of the reliability of the complainant's evidence. In the circumstances, the appeal against conviction should be allowed and a verdict of acquittal entered. It becomes unnecessary because of that to consider the application for leave to appeal against sentence.

Orders

[39] In the result, the following orders should be made:

1. The appeal against conviction is allowed;

2. The conviction is quashed;

3. It is directed that a judgment and verdict of acquittal be entered.

[40] **DOUGLAS J:** I agree also with the orders proposed by Mackenzie AJA and with his Honour's reasons for those orders.