SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBD* [2008] QCA 343
PARTIES:	**R** **v** **MBD** (appellant)
FILE NO/S:	CA No 114 of 2008 DC No 927 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	31 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2008
JUDGES:	Keane JA, Jones and Atkinson JJ 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 – MISCARRIAGE OF JUSTICE – unreasonable or unsupportable verdict – where evidence circumstantial – where the appellant was convicted of five counts of indecent treatment of a child under 16 years of age with the aggravating circumstances that the child was under 12 years and of lineal descent *Criminal Code* 1899 (Qld), s 7 *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 52, applied
COUNSEL:	Appellant appeared on his own behalf A J Edwards for the respondent
SOLICITORS:	Appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Jones J. I agree with his Honour's reasons and with the order proposed by his Honour.

[2] **JONES J**: The appellant was convicted by a jury of five counts of indecent treatment of a child under 16 years of age with the aggravating circumstances that the child was under 12 years and of lineal descent. The prosecution case in respect of the first four counts was that the appellant aided one Shaw to be photographed in sexually explicit positions with a child known as, A. The child, then five years old, was the appellant's daughter. The aiding alleged was that the appellant made the child available by taking her to Shaw's house specifically for that purpose. The offending occurred on a date unknown between 1 October 1999 and 1 March 2001. In respect of the fifth count, the prosecution case was that the appellant himself indecently dealt with A by licking her vagina on a date unknown between 1 August – 18 November 2000. To prove this offence the prosecution relied upon the appellant's alleged admission of this conduct during an internet chat room conversation with Shaw undertaken on 18 November 2000.

[3] The appellant was sentenced to six years imprisonment in respect of the first four counts and a further one year imprisonment cumulative in respect of the fifth count.

[4] The appellant appeals against his conviction on the grounds –

1. Verdict unreasonable; cannot be supported having regard to the evidence.
2. Miscarriage of justice –
   (a) where prosecution seeks to prove accused guilty of another offence of which the accused had been acquitted;
   (b) Misstatement of evidence;
   (c) Misdirection;
   (d) Wrongful admission of evidence.
3. Where risk of fabrication of evidence.

These grounds were amplified and indeed, added to, in extensive oral submissions made by the appellant who argued the appeal on his own behalf.

Prosecution case

[5] Shaw's offending against A was discovered during police investigations of Shaw in respect of a number of matters relating to the sexual abuse of children. Shaw's computer was seized and forensically examined. The photographs which he arranged to be taken of himself and the child were discovered there. The police also discovered on Shaw's computer a 150 page internet chat log detailing communications between Shaw, who had adopted a user name Aussie (40786786) and various other users of the chat room programme provided by ICQ. Included amongst these was a user Pixel (39054086). A 10 page extract from the log detailing communications between Shaw and the user Pixel was tendered.[1]

[6] The police also found a number of emails between Shaw's hotmail address and the email address Pixel_34@hotmail.com.[2] Shaw identified the user of this name to be the appellant with whom he had social contact over a number of years. Evidence was led that the appellant opened a telephone account in December 1999 with the logon name of Pixel 13 and that he had an email address of Pixel_34@hotmail.com.au.

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1 See exhibit 7

2 See exhibit 8

[7] In asserting that the user Pixel was indeed the appellant the prosecution also pointed to the contents of the communications which showed that the Pixel recipient was referred to as "chris", whose birthday was on a date identical with the appellant's, whose wife's name was the same as the appellant's wife and who had "daughters". These matching details were relied upon as corroborating Shaw's testimony that the appellant was the person using the Pixel pseudonym. Also in the appellant's own computer the name installed as the registered owner of the Windows XP system was Pixel.

[8] Shaw pleaded guilty to the charges of his offending against A and was sentenced to a term of imprisonment with a recommendation for early eligibility on parole. At sentencing he gained a benefit, pursuant to s 13A of the *Penalties and Sentences Act* 1992 by undertaking to give evidence against the appellant.

[9] The prosecution case depended entirely on the evidence of Shaw. He gave evidence that when communicating with the user "Pixel" he was indeed communicating with the appellant. He gave evidence that the photographic session with A was arranged in a face to face conversation with the appellant at the appellant's house, that the appellant took A to Shaw's house and allowed her to be photographed in the manner depicted in photographs which were not tendered but were described in admissions tendered on trial.[3] No issue was taken at trial that the description of Shaw's actions depicted in the photographs constituted indecent dealing with the child. Shaw said that the activities were carried out in the bedroom of his residence and subject to conditions agreed with the appellant, namely, that the bedroom door would remain open and that he, Shaw, would not penetrate the child. Shaw maintained that the appellant was present in the house at the time the photographs were taken but he did not suggest that the appellant was the person who took the photographs. In fact, he maintained he could not recall who took the photographs.[4] Shaw conceded that the photographs reveal that at some stage the door to his bedroom was in fact closed. In response to the suggestion that he could have completed his offending within five minutes, Shaw stated that he did not know how long it took to undress the five year old girl and to take the 11 photographs that were found but that the time was longer than five minutes.

[10] The appellant had provided to police a statement detailing his and his family's association with Shaw over the period since 1986, including the fact that A would have been left alone with Shaw at times. At trial the defence asserted that Shaw was lying in his allegations that the appellant provided the child A for an indecent purpose. Counsel for the appellant drew attention to Shaw's bad character, his untruthfulness in giving evidence, his capacity for deceit and manipulation and the fact that in generating the ICQ logs there was "a mixture of fact and fiction".[5] The defence also submitted that the appellant was not the user "Pixel" for the relevant entries[6]; that it was possible for one person to simulate a chat room conversation between two different names[7]; that the conversations recorded in the ICQ log concerning the child A were generated by Shaw as a fantasy on his part[8]; that Shaw

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3 Record book p 444
4 Record book p 119/10-40
5 Record book p 124/15
6 Record book p 128/20
7 Record book p 128/22-40
8 Record book p 130/35

involved the appellant in his allegations to police to minimise his own responsibility[9] and to gain the advantage of s 13A of the *Penalties and Sentences Act*.

Unreasonable verdicts

[11] The jury could only have convicted the appellant on counts 1-4 if it accepted the evidence of Shaw. There was no other direct evidence linking the appellant to Shaw's offending. The child did not give evidence and the appellant made no admissions consistent with his involvement in Shaw's offending. Apart from the direct attack on Shaw's character and his credibility, the focus of the evidence was on the circumstances on which the prosecution relied to corroborate Shaw's evidence and in particular his allegation that the user of the name "Pixel" was indeed the appellant. Once the jury had accepted, as it must have done, that the appellant was the author of the texts under the pseudonym "Pixel" then the case against the appellant was overwhelming. That the jury did so is clear because the only evidence going to Count 5 was the admission made by "Pixel" to Shaw in the chat room on 18 November 2000. Referring to the child A Shaw had asked:-

> "…
> **Shaw: When was the last time you licked her pussy?**
> **Pixel: Bout a month ago.**
> **Shaw: Is she still enjoying her sex?**
> **Pixel: Seemed to then."**

This passage being the only evidence, it was necessary for the jury to be satisfied beyond reasonable doubt not only that the appellant used those words but that they were in fact true. The learned primary judge in a careful summing up instructed the jury to this effect.[10]

[12] The allegation that the appellant was the participant in the ICQ chat communications was challenged at trial and extensively again in oral submissions on appeal. The first basis of challenge was the inconsistency between the time noted on the ICQ log (exhibit 7) and the fact that the appellant's phone records show that his line was not in use at that time. This inconsistency occurred relevantly on 18 November 2000 when the log shows use between 5:40:54 am – 12:30:04 pm. In other words, throughout the morning of that day. The log entries in exhibit 7 were extracted from a log record by Mr Kingsley, a computer expert. He gave evidence that in the larger record there was no indication of whether the time was am or pm.[11] There is no clear evidence where the am/pm notation in exhibit 7 came from but Mr Kingsley surmised that it came from the filter used in making the extraction. However, the text of the communications made during this time show unequivocally that the conversation was being undertaken in the evening. For example, the following appears:-

> "8:53:48 you in your room alone?
> 8:54:53 For now. Amber getting ready for bed.
> 8:55:12 So how was your day?
> 8:55:36 Busy."

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9 Record book p 130/40
10 Record book p 257/22-258/20
11 Record book p 207/1

and

"12:29:33 I am off to bed
12:29:48 Me too"

The telephone records show that the appellant's phone was in use for three hours and 40 minutes during those times in the evening.

[13] The expert evidence also made clear that the time of the log entries was generated in the ICQ server and could not be manipulated in the user's computer. The jury were entitled to find that the conversations were indeed held in the evening as indicated by the text of the conversations.

[14] On appeal the appellant stressed the point that the logs were obtained from the forensic examination of Shaw's computer and no similar finding was made in the examination of his computer. Whilst that is factually correct, it is of little substance. The police computer analyst, Mr Illett, gave evidence that one can "delete files from the hard drive or data from a hard drive that is impossible to retrieve".[12] That evidence was to be weighed against the background that the appellant became aware of the likelihood of charges against him in October 2002 but his computer was not seized for examination until 8 September 2003.[13]

[15] A further point raised in oral submission but not in the Notice of Appeal should be dealt with now. The appellant contended that he had been denied the opportunity of calling a computer expert in his defence and as a consequence he was denied a fair trial. A perusal of the record shows that the prospect of the defence introducing expert evidence was signalled on Day 3 of the trial before the prosecution called their computer experts. The learned Crown Prosecutor was reluctant to call his experts without prior notice of any challenge to their expertise or their evidence. To that point the appellant had not produced any report in compliance with the provisions of s 590B of the *Criminal Code*. Counsel for the appellant sought the indulgence of the Court to allow him further time to consider the appellant's position but agreed to proceed with the cross-examination of the prosecution experts. When the Court resumed the next day and before the prosecution had closed its case, certain factual matters were dealt with by way of admissions. These included the appellant's acceptance that the ICQ chat log (exhibit 7) and the emails (exhibit 8) had been obtained from Shaw's computer and that their terms were accurate. Having regard to the fact that the appellant had previously stood trial on related charges in 2007 and that this issue was arising on the fourth day of the present trial, there had been ample opportunity for the appellant to seek the advice of computer experts and to adduce evidence from them if he so desired. No such expert was identified at the trial and no application for an adjournment was made. I can detect no unfairness in the way in which the expert evidence was adduced nor any restriction in the opportunity for the appellant's counsel to cross-examine those experts.

[16] It was open to the jury to accept the evidence of Shaw and to accept that the appellant was indeed the person with the user name "Pixel". Once that conclusion

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12 Record book p 198/43
13 Record book p 418

is reached, there was corroboration for the evidence of Shaw whose evidence has clearly been accepted by the jury. The question for this Court is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. *MFA v The Queen*[14]. The answer, in my view, is unequivocally that the verdict was so open.

Miscarriage of justice

[17] The appellant argued that the bringing of the charges in counts 1-4 relating to the taking of the subject photographs impinged on the double jeopardy rules. The submission seems to proceed on the basis of his perception that he was being dealt with because the taking of the photographs amounted to an indecent act and as well the actual content of the photographs constituted an indecent act.[15] He then argued that if the evidence of the content of the photographs had not been led there would be no factual basis for the charges in counts 1-4.

[18] The mere statement of this argument shows that it is entirely misconceived. The allegation against the appellant was that he offended by making the child available in order that Shaw could commit an indecent act with her. The content of the photographs was simply evidence of the nature and extent of Shaw's actions. There was no suggestion that the appellant took the photographs or that the taking of them was part of the appellant's offending. There is no substance in this ground of appeal.

[19] The next argument suggests that there was a misstatement of evidence. From the appellant's written submission the argument appears to be based upon the inconsistency between the times shown in the ICQ log and the telephone records. In oral submissions, the appellant suggested that if the log times are out by the 12 hours as suggested it means those records have been manipulated and that should invalidate the whole lot. The argument asserts that the times displayed in the ICQ log were correct; that the evidence of the expert Mr Kingsley, to the effect that the time was generated at the ICQ server and not at the user's computer, should be accepted. On that basis the appellant's phone was not in use and that would contradict the evidence of Shaw.

[20] The am/pm controversy about the times on the ICQ log were raised before the jury and were dealt with at length by the learned primary judge in his summing up.[16] The issue did not give rise so much to a misstatement of the evidence as to a conflict between evidence. That was left as a factual matter for the jury to determine. There is no basis for doubting the correctness of the jury's determination on that issue.

[21] The appellant contends that there was a misdirection in respect of the formal admissions of fact tending during the course of evidence suggesting that the jury might regard them as an admission of guilt. The prospect of that happening was

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14 [2002] 213 CLR 606 at p 615

15 Transcript p 1-26

16 Record book pp 265-268

countered immediately when the document was tendered. The learned primary judge said:-

> "It does not mean – does not suggest guilt or innocence. It is used in law interchangeably almost with the word "agree"…You should not regard it as a word suggesting that the defendant in any way has lost the presumption of innocence."[17]

Again, in his summing up, his Honour limited the effect of the admission to the jury's acceptance of "the truth of each fact stated in it".[18] The summing up dealt expressly with the elements about which the jury had to be satisfied before returning a verdict of guilty. The matters of fact dealt with by way of admission were, in the main, uncontroversial. There is no substance in this contention by the appellant.

[22] The appellant contended that the learned primary judge erred in his directions as to the use of the expert evidence. The appellant wished to rely upon parts of the evidence of the computer expert Mr Kingsley to support his submissions about the accuracy of the timing of the ICQ log entries. The appellant contended that where the expert evidence was unchallenged that the jury were bound to accept the evidence.

[23] Such a submission is also misconceived in so far as it seeks to control the jury's freedom to determine the facts upon which it acts. The directions given by the learned primary judge as to the use to be made of the expert's evidence were entirely appropriate.

[24] The appellant argued that the learned primary judge's direction about the degree of care to be taken when considering the evidence of Shaw was insufficiently robust, such that it resulted in a misdirection. A perusal of his Honour's summing up shows that he took considerable care to identify all the risk factors inherit in relying on the evidence of Shaw who was not only an accomplice but also received a benefit by agreeing to give evidence against the appellant. Not only did his Honour instruct the jury that they should scrutinise Shaw's evidence with great care and only act on it if they were convinced of its truth and accuracy. But he also went on to identify some of the reasons Shaw may have had for giving false evidence. These included Shaw's familiarity with the details of the crime, that he did not present as honest and reliable, he had lapses of memory, he had the motive to lie, he showed in other behaviour that he was manipulative and deceitful, that he knew sufficient details of the appellant's family to manipulate the record. His directions concluded with his Honour instructing the jury that it would be dangerous to convict the defendant on the evidence of Shaw unless the jury found his evidence was supported in a material way by independent evidence implicating the defendant in the offences.[19]

[25] In argument before this Court the appellant suggested he was unaware that the prosecution was proceeding against him relying upon s 7 of the *Criminal Code*. There can be no doubt that that was the way the case was opened and, in fact, presented to the jury. The appellant was represented at trial by experienced counsel

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17 Record book p 161/35
18 Record book p 227/1
19 Record book pp 234-237

and he is himself not without some experience in the trial process. No direct complaint was made about the content of his Honour's summing up on the requirements of s 7 and it is sufficient to note that his directions in this connection were entirely appropriate.

[26] The next ground of complaint by the appellant concerned the admission of the prosecution's description of what was depicted in the photographs. The appellant contended that a less inflammatory description ought to have been given. Ultimately, the description of what the photographs depicted was the subject of the formal admission; the descriptions in the main are factual and not embellished. There can be little doubt that the tendering of the descriptions was far less prejudicial than the tendering of the actual photographs which the prosecution had the right to do. The appellant has no basis for complaint in respect of this issue.

[27] A further point raised by the appellant in the course of oral arguments was that there was no formal complaint by the child. He suggested in those circumstances the charges should not be laid. This was a matter that attracted the interest of counsel and the learned primary judge at trial and evoked a discussion as to what direction should be given to the jury about the lack of evidence from the child complainant. His Honour in fact gave directions in terms which had been discussed with counsel and about which there is no basis for complaint now.[20]

Risk of fabrication of evidence

[28] Neither in his written outline nor in his oral argument did the appellant specifically identify where, how or by whom this risk was likely to arise. He did suggest there was fabrication of evidence concerning the identity of participants in the ICQ chats and the timing of those chats on the log. The latter point has been dealt with above. As to the first point, it was submitted to the jury that the user Pixel was someone other than the appellant. It was put to Shaw that he engaged in a fantasy chat with himself adopting the details of the appellant as the second party. The means by which that could happen was put to Shaw and the prospect of his doing so was suggested. The jury clearly rejected both propositions.

Conclusion

[29] In summary then, the appellant has not shown any basis for his contention that there was a miscarriage of justice in the prosecution of the case against him. The learned primary judge gave to the jury careful directions replete with warnings about relying upon the evidence of Shaw. In the end the only redirections sought went to minor matters. It was open to the jury to act upon the evidence of Shaw and on that evidence to be satisfied beyond reasonable doubt about the appellant's guilt on all charges.

[30] I would therefore dismiss the appeal.

[31] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by Jones J.

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[20] Record book p 251-3