SUPREME COURT OF QUEENSLAND

CITATION:	*R v IB* [2008] QCA 356
PARTIES:	**R** **v** **IB** (appellant)
FILE NO/S:	CA No 111 of 2008 DC No 2493 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2008
JUDGES:	Keane and Holmes JJA and White AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of two counts of indecent treatment of a child under 16 who was his lineal descendant and one count of rape – where appellant complained that relevant evidence was not adduced in Crown case – where appellant argued that convictions were unsafe and unsatisfactory because of inconsistencies in the complainant's evidence and between her evidence and that of other witnesses – whether verdicts were unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where appellant sentenced to two and a half years imprisonment for one count of rape, to be

served concurrently with sentences of 12 and 18 months for two charges of indecent treatment of a child under 16 who was his lineal descendant – where complainant was the appellant's daughter – where appellant had no criminal history – where offences caused great distress to complainant – whether the sentences imposed were manifestly excessive

Evidence Act 1977 (Qld), s 93A

R v LQ [2005] QCA 356, considered
R v MAI [2005] QCA 36, considered
M v R (1994) 181 CLR 487; [1994] HCA 63, cited
R v NH [2006] QCA 476, considered

COUNSEL: The appellant appeared on his own behalf
M R Byrne for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Qld) for the respondents

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

[2] **HOLMES JA:** The appellant appeals against his conviction on two counts of indecent treatment of a child under 16 who was his lineal descendant and one count of rape, on the ground that those convictions were unsafe and unsatisfactory. He seeks leave to appeal against concurrent sentences imposed, of 12 months and 18 months imprisonment respectively, on the indecent dealing counts, and two and a half years imprisonment on the rape, on the ground that those sentences are manifestly excessive.

The complainant's evidence

[3] The complainant was the appellant's 15 year old daughter, R. The appellant was divorced from R's mother, and R and her younger brother and sister lived with him. R was interviewed by a police officer about the offences on 4 December 2005. The conversation then recorded, admissible in the ordinary course under s 93A of the *Evidence Act* 1977 (Qld), was excluded, because of its inaudibility, at an earlier, aborted trial of the appellant in November 2007. That ruling was not the subject of any reconsideration at the trial which gave rise to the verdicts currently under appeal. R's evidence had been pre-recorded for the purposes of the earlier trial, but her evidence in chief had consisted of the excluded s 93A statement. Consequently, it became necessary to undertake a further pre-recorded hearing in February 2008; that was the only evidence from R at the trial.

[4] In that hearing, R said that while a number of incidents of a sexual nature had occurred between the appellant and her, the first instance of indecent dealing that she could clearly remember occurred in September or October 2005. Her brother and sister were, she thought, watching television in the lounge room. She had been mildly unwell; her father went to her bedroom with her and gave her a massage while she lay on her stomach on her bed. In the course of it he performed what she described as "a slight rubbing" of her vaginal area on the outside of her clothing (the

first count of indecent treatment). At some stage – she was not sure whether it was before or after this incident – the appellant told her it was necessary for him to touch her to give her sex education.

[5] On an occasion in early December 2005, R continued, she was lying in her bed before going to sleep when the appellant entered the room and lay down behind her. He touched her breasts and then put his hand first on the outside of her underwear and then inside, rubbing her clitoris and around the opening of her vagina (the second indecent treatment). Her brother and sister were probably in their rooms sleeping, but she could not remember seeing them go to bed. The following night, at around 10.00 pm, after her brother and sister had gone to bed, her father took her into his room. He told her to lie down, despite her request to be let alone. He lay down too, and fondled her breasts. R described his movements, first outside and then inside her bra, as "very similar" to rubbing, but more like grabbing. He followed those actions by sucking her nipples. At one point he rubbed her vaginal area on the outside of her clothing; she pushed his arm away but he continued. Then the appellant digitally penetrated R's vagina with one finger in an up and down motion (the rape), before allowing her to leave the room. At some stage during those events R's younger sister had gone to the toilet, and the appellant got up to check what she was doing.

[6] The following day (4 December) R said, she was at a Sunday class at the mosque which the family attended when she burst into tears and told one of the teachers that her father had touched her. That led to her being taken to the police. Before then, in October or November of that year, she had told her younger sister S that her father had been doing something to her, but she could not recall exactly what she had said.

[7] In cross-examination, R agreed with these propositions about how things stood between her and the appellant in the last few months of 2005: he had some concerns that she was in a lesbian relationship with her friend T, as a result of some notes he had seen; he had asked her not to associate with T; he had been angry with her in early December about a poor mark in one of her subjects; he argued with her about her untidiness; he had sustained an injury forcing him off work with the result that the household income, and in turn, her pocket money had been dramatically reduced; and relations between them over that period had been "a bit strained". In that period, R said, she had told T what had been happening and that she wanted to get away from home.

[8] The tape-recording of the interview made on 4 December 2005 was not totally inaudible; counsel for the defence was able to cross-examine in respect of some of the things R had said in it. R accepted that there were these inconsistencies in her statements about the occasion of the rape: she had told the police officer on 4 December 2005 that she had taken her bra off, but in evidence said she was wearing it; although in evidence she had described the touching of her breasts as a grabbing motion rather than rubbing, when speaking to the police officer she had said it was rubbing; and when the police officer had asked whether her father rubbed her genital area at all on that occasion, she had answered, contrary to her evidence, in the negative. It was put to her that each of the events she described had not happened at all; in each case she rejected the proposition.

Evidence of preliminary complaint

[9] On 4 December 2005, R's younger sister S, who was 14 years old, was interviewed by police, and gave this account. At the mosque that day, before R's distress was

observed by her teacher, R had spoken to her, saying "What am I going to do? He keeps touching me". S understood what that meant, because R had previously complained to her of her father poking her chest area, and hugging her tightly; and R had said, not long ago, that her father kept touching her in her vaginal area. More recently, R had said that her father would come to her room at night and try to "lay with her". S could also recall R saying that her father sucked her breasts. On the preceding Friday, R had told her that her father had tried to touch her, and had hit her when she resisted. Asked about the previous night, S said that she had got up twice to go to the toilet. The second time, at around 10.00 pm, the house was in darkness.

[10] S was cross-examined at a pre-recorded hearing. She agreed that it had only been in the last month or two prior to 4 December 2005 that R had complained to her; she denied that over that period she had seen her sister and father "arguing quite a lot".

[11] T, R's friend, was interviewed by police in early January 2006. She said that when the topic of R's difficulties with the appellant first arose, R was too embarrassed to tell her in person what the problem was, and instead sent her a text message saying "he touched me". Later, in a letter, R elaborated, saying that she had gone to bed unwell and drowsy from medication; her father had massaged her legs and then her breasts. T thought that might have been as early as June, but she could only guess. A couple of weeks later, R told her that her father had done it again and that "it was the same place". From then, according to what R had told her, the appellant began to do things like touching R's bottom and kissing her on the neck. T produced some text messages from R in which R said that her father had started to kiss her on the neck rather than the cheek, something he had not formerly done. The interviewing police officer photographed those messages, all of which were from November 2005. Towards the end of 2005, T said, R told her that the appellant had "done it again" but this was "down there".

[12] In respect of the two assaults immediately prior to 4 December 2005, T was vague about what happened when, but she thought that the first occasion might have been an occasion when the appellant took off R's bra and started to kiss her breasts, and that on the second occasion the appellant had pulled R into her room and fingered her. T said that she remembered R telling her that her father had discussed putting his penis into her and said that on the following night he would "lick her out". On 4 December, after R had gone to the police station, she telephoned T at work. When T asked what happened, R said that her father had put his fingers in her. More recently, on 3 January, R had sent her a text message about something which had happened at the start of the school holidays; it read, "he hugged me and was pressing it into me and he came". No photograph was taken of that message.

[13] T gave evidence at a pre-recorded hearing. In cross-examination, she said that from what R had told her, her father was fighting with her (as opposed to R fighting with him) and R was thinking about running away from home in late 2005.

[14] Ms Pirayesh, the teacher to whom R spoke at the mosque on 4 December 2005, was called at the trial. She confirmed that R had begun to cry, and when asked what was wrong, initially said "I cannot tell you". Ms Pirayesh asked whether there was something wrong at school; R said that she had not done well at English, but had passed the subject. Ms Pirayesh persisted, promising not to tell anyone. R responded, first, "I don't want to go home" and then, crying again, "my Dad touches

me". Ms Pirayesh eventually took R to a police station. In the car she asked R whether her father touched her outside her clothes. R answered "No, he puts his finger in my private part". Later, unprompted, she said, "My dad come into my bedroom and tells me that he's trying to teach me about sex when I meet a boy I know what to do [sic]".

Other evidence at trial

[15] At the trial, the police officer who had interviewed the girls was called to produce the s 93A statements of S and T and photographs of the text messages on T's phone; his evidence does not otherwise seem to have been of any moment. The remaining witness for the Crown was a paediatrician, Dr True, who said that she had examined R on 4 December 2005. R's genitals were normal; there were no signs of acute or old injury and the hymen was intact. The membrane was elastic in nature. Digital penetration could occur easily if no significant force was involved and the complainant was relaxed; it was not necessarily to be expected that any injury would be seen. Generally speaking, it was entirely possible for an examination to elicit nothing abnormal despite digital penetration.

[16] The appellant did not give evidence.

Flaws in the Crown case?

[17] The appellant was not legally represented on the appeal. He made a number of complaints that relevant evidence was not adduced by the Crown. R's s 93A statement was not provided to the jury, nor was the original pre-recording of her evidence played. One infers that the appellant means to convey that there was something in the s 93A statement and in the earlier pre-recorded evidence that would have indicated R's unreliability. There are a number of points to be made about that. In the first instance, there was no suggestion by defence counsel at the trial that either recording should be played. Secondly, it is apparent from the cross-examination of R that defence counsel was able to put inconsistencies from the s 93A statement to her. Thirdly, it does not appear defence counsel identified any inconsistencies in the previous pre-recording of R's evidence, because none were put to her in cross-examination. There is no basis for supposing that the fact that the jury did not have the earlier recordings produced any miscarriage of justice.

[18] Other complaints were that parts of the tape recording of S's interview did not appear in the transcript provided to the jury for their assistance when the tapes were played; that Dr True's report was not given to the jury; that there was no report on R's mental health, although Ms Pirayesh had described her as serious and unsmiling, or on any drug use by her; that no forensic evidence was obtained from either R's body or the bedding to confirm her account; and that the jury was not provided with a complete record of the text messages between R and T between September and December 2005, which would, the appellant asserted, have shown a plot against him.

[19] As to the first, since the transcript, as was made clear to the jury, was not evidence, and the tapes were complete, the deficiencies in the transcript were of no consequence. As to the second, it was, of course, in accordance with usual procedure that the medical witness gave her evidence orally rather than in documentary form. There was no suggestion by the defence at trial that R suffered from any mental health problem; it seems unlikely, in fact, that it was in the interests of the defence to enquire as to the causes of her apparent despondency.

Nor was there any suggestion at all of drug use by her. The appellant's attempts now to fly the notion that R was affected by mental illness and drug use are made without supporting evidence, are of dubious relevance to the question of whether she was indeed assaulted and, fatally, are embarked on far too late.

[20] It might have been desirable for the police to seek forensic evidence; but while its existence would, undoubtedly, have assisted the Crown case, its absence would not have disproved R's account. Assaults of the type she alleged were not likely to produce much, if anything, in the way of biological material. A complete set of the text messages between R and T might or might not have advanced the Crown case, but it is pure speculation to suppose that they would have shown some conspiracy against the appellant. I am unconvinced that the absence of such evidence produced any unfairness to the accused.

Unreasonable verdict?

[21] The appellant made a number of submissions about matters which he said should have caused the jury doubt. R had not reported the rape immediately, although she had a mobile telephone and was aware of the existence of emergency services. R had told T she was drowsy when her father massaged her at the time of the first count, so her recollection should be regarded as unreliable. Ms Pirayesh had put words into R's mouth by asking her whether her father had touched her "over the clothes". The medical witness had not found any injury on R, and it must follow from what she had said that R was either relaxed or was not raped at all. R's siblings had not seen anything untoward happening. R's recollection in her pre-recorded evidence was uncertain; she had stated a number of times that she was not sure or gave an answer as to what had "probably" happened. There were inconsistencies in R's evidence, and between what R said and the evidence of S and T. R's involvement with T had caused a strain in her relations with her father; her desire to leave home and to get back at her father provided a motive for a false complaint.

[22] The appellant does not raise anything which would not have been apparent to the jury. As to whether those matters are such as to create a doubt about the verdict, it should be noted, first of all, that R did, in fact, bring the rape to the attention of the authorities the day after it happened. She could hardly be criticised for delay in that regard, and earlier incidents had been the subject of preliminary complaints made to S and T. R's evidence as to the first of the assaults was clear and direct, and it was not suggested to her in cross-examination that she was at all confused about what happened during the massage. Rather it was put that the incident had not happened at all: the appellant had not gone into her room and there had been no massage. The submission now, that her initial drowsiness on that occasion somehow casts doubt on her reliability, is not compelling.

[23] Ms Pirayesh's question as to whether R had been touched outside her clothing was not leading in a context in which R had already told her of the touching. Although it seems improbable that R could have been "relaxed", as the word is commonly understood, during digital penetration, Dr True was not asked to explain what she meant in using the term, and R was not asked any questions about her frame of mind, either in evidence in chief or in cross-examination. It would have been difficult for the jury to reach any firm conclusions about the significance of what Dr True said in this regard; the point made by the appellant at best was a minor one in favour of the defence. There does not appear to have been anything about the

three incidents which was particularly vigorous or violent so as to attract the attention of the other children; so the jury members may well have found the lack of evidence from them unsurprising. They may, however, have considered R's credibility reinforced by S's recollection of her complaints over "a month or two prior" to 4 December 2005.

[24] The delay in the recording of R's evidence and her consequent uncertainty as to some detail might have made the Crown's task more difficult, but it did not reflect on R's credit. The jury was entitled to accept what she said, making allowance for the inevitable blunting of her memory by the passage of time between the events at the end of 2005 and the taking of her evidence at the beginning of 2008. R accepted that there were some inconsistencies in her account of the third incident: whether her father had taken her bra off; whether he used a grabbing or rubbing motion on her breast; and whether there had been some rubbing on the outside of her vagina before digital penetration. The second of those is so inconsequential as hardly to rate mentioning; the others do not amount to substantial discrepancies and are readily explained by the lapse of two years between the first interview and the taking of R's evidence.

[25] There were some details in T's account of what R had told her which did not appear in R's evidence; for example the content of the text message about being hugged or that her father intended to lick her. Similarly, S spoke of an occasion on which R had told her that her father had struck her when she refused to let him touch her; that was not mentioned in R's evidence. But R had said in her evidence that there were other incidents happening, the specifics of which she could not recall. None of the inconsistencies was momentous: at the highest they indicated some inaccuracy in R's recollection about detail. Again, those inconsistencies, if such they are, are explicable by the lapse of time before R's evidence was recorded.

[26] The learned judge instructed the jury as to the relevance of inconsistencies in considering the credibility and reliability of R's evidence. He also reprised defence counsel's submissions in her address as to why R's evidence should not be accepted: R had appeared hesitant and expressed a degree of uncertainty on a number of occasions; she could not recall the detail of events other than the three charged; she had been in conflict with her father and there were tensions about his strictness and money problems; the jury should conclude that she had invented the allegations out of frustration. It is plain that the jury did not find those arguments compelling, and accepted R as a witness of truth. No convincing argument has been made as to why it was not entitled to do so.

[27] For completeness I should say that I have watched the video recording of R's evidence; there is nothing in her demeanour which would excite concern about her truthfulness. She was clear and forthcoming and made appropriate concessions. Her evidence could not be described as "lack[ing] credibility for reasons which are not explained by the manner in which it was given".[1] The jury was entitled to accept her evidence and to be satisfied beyond reasonable doubt that the appellant was guilty of each count of which he was convicted. The appeal against conviction should be dismissed.

Application for leave to appeal against sentence

[28] The appellant was 50 years old at the time of the offences and 53 when he was sentenced. He had no previous convictions. Born in Pakistan, he came to Australia

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1 *M v R* (1994) 181 CLR 487 at 494.

in 1992, and worked as a part-time taxi driver until, in September 2005, he was injured in a car accident. A victim impact statement from R was tendered. In it she spoke of her feelings of trauma and embarrassment, the damaging effect of the events on her schooling, the loss of her family through separation and in particular the loss of her relationship with her younger brother. The learned sentencing judge referred to the dramatic impact of the events on R and made the incontrovertible point that the offences involved a serious violation of trust. He had regard to three sentences in comparable cases: *R v NH* [2006] QCA 476; *R v MAI* [2005] QCA 36; and *R v LQ* [2005] QCA 356.

[29] In *R v NH*, it fell to this Court to re-sentence an appellant on three counts of indecent dealing and one count of rape by digital penetration in circumstances where another conviction of rape had been set aside. The appellant was 51 years old with no previous convictions. He was married with three children and his wife was ill. He worked as a teacher and had a number of educational and professional qualifications. He had gone to trial on all counts. The four incidents occurred on three different occasions. The appellant had touched an eight year old on the vulval area three times and in a fourth incident put his hand into her vagina with sufficient force to cause observable signs on medical examination. He was a friend of the complainant child's family; her father was in jail, and he had threatened to tell others of that if she disclosed what he had done. This Court imposed concurrent sentences of two and a half years imprisonment on all counts.

[30] In *R v MAI*, the applicant for leave to appeal against sentence was convicted of three counts of indecently dealing with his 15 year old daughter while she was in his care. The complainant lived alone with her father. The offences occurred on a single occasion: he exposed his erect penis to her, rubbed her vagina outside her underpants, performed oral sex on her and digitally penetrated her vagina three or four times. The applicant was convicted after a trial and showed no remorse. This Court made these points: the applicant was in a special position of trust; he did not have the significant mitigating factor of cooperation with the administration of justice in his favour; and he was a mature man of 53 who took advantage of a vulnerable 15 year old daughter. Sentences of three years imprisonment, imposed concurrently on each count, were held not to be manifestly excessive.

[31] In *R v LQ* the appellant was convicted after a trial of three counts of indecent dealing with his 14 year old daughter. On one occasion he pulled down her skirt and his shorts and made her sit on his lap. On another, he took her clothes off and made her sit on his lap. Then he took her into a bedroom, pushed her onto a bed, and wearing only a t-shirt, moved up and down on top of her. McMurdo P, with whom Keane JA agreed, described his conduct as "a brutish breach of parental trust towards a vulnerable adolescent". The appellant had not demonstrated remorse, nor cooperated with the administration of justice and the offences had a very detrimental effect on the complainant. On the other hand, he had an impressive military record, and he had no prior convictions for like offences. A sentence of two years and six months imprisonment was upheld.

[32] Some of the features identified in the cases referred to above exist in this case: the appellant was a mature man of 50 at the time of the offending; his daughter was particularly vulnerable since he was her custodial parent; the offences occurred over time, not on a single occasion; the effects on the complainant were, as was to be expected, devastating; the appellant showed no remorse and did not cooperate with

the administration of justice; and the only mitigating factor was his previous good character and lack of previous convictions. In the circumstances, and in the light of those authorities, the sentence of two and a half years imposed on the most serious of the charges was clearly within the range of a sound exercise of sentencing discretion. I would dismiss the application for leave to appeal against sentence.

Orders

[33] The appeal and application for leave to appeal against sentence are dismissed.

[34] **WHITE AJA**: I have read the decision of Holmes JA and agree with her Honour for the reasons that she gives that the appeal should be dismissed.

[35] When the serious breach of trust is considered together with comparable authorities it is clear that the sentence imposed was not manifestly excessive.

[36] I agree with the orders proposed by her Honour.