

# SUPREME COURT OF QUEENSLAND

CITATION: *R v BCD* [2011] QCA 370

PARTIES: **R**  
**v**  
**BCD**  
(appellant)

FILE NO/S: CA No 192 of 2011  
DC No 329 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 16 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 24 November 2011

JUDGES: Fraser JA and Mullins and Douglas JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – JUDGE’S SUMMING UP – CONSIDERATION OF SUMMING UP AS A WHOLE – where inconsistencies in the evidence given by the complainant – where the primary judge highlighted to the jury the inconsistencies present in the complainant’s evidence during the judge’s summing up – where a redirection was sought at the trial towards the end of the primary judge’s summing up where the judge was asked to refer to some cross-examination of the complainant – where the primary judge accepted the request for redirection and reminded the jury of what the complainant had said in accepting she had thought she had suffered a nightmare – where the appellant submits the primary judge ought to have redirected further about inconsistencies – whether the summing up considered as a whole lacked judicial balance and occasioned a miscarriage of justice

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – where the appellant indecently treated his

niece – where the complainant gave evidence pursuant to s 21AK of the *Evidence Act 1977* (Qld) – where the appellant was convicted of indecent treatment of a child under the age of 12 – whether conviction appealable

*Evidence Act 1977* (Qld), s 21AK

*R v Perera* [1986] 1 Qd R 211, considered

COUNSEL: J McInnes for the appellant  
T A Fuller SC 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 reasons for judgment of Douglas J and the order proposed by his Honour.
- [2] **MULLINS J:** I agree with Douglas J.
- [3] **DOUGLAS J:** The appellant was convicted of indecent treatment of a child under the age of 12 on 21 July 2011 and sentenced to a term of imprisonment of 12 months suspended after serving six months. He has appealed against his conviction on the ground that the trial judge had erred in his summing up by unfairly supporting the prosecution case such that the summing up, considered as a whole, lacked judicial balance and occasioned a miscarriage of justice. The alternative ground, that the verdict was unsafe and unsatisfactory, was abandoned.

### The evidence

- [4] The prosecution case was that the appellant had indecently treated his niece while staying at his sister’s house for the evening. The sister had given him an inflatable mattress to use to sleep on the verandah. He later moved it inside, complaining of mosquitoes. The house was locked by his sister after the appellant came inside.
- [5] The appellant’s sister woke during the night to find the complainant, her eight year old daughter, standing next to her bed, apparently unsettled. At that time both she and her daughter heard the appellant use the toilet and return to the lounge room where his mattress was. The mother asked her daughter whether she had suffered a nightmare to which she replied: “I must have”.<sup>1</sup> She also asked whether her daughter had bumped into the appellant in the dark and been frightened. The complainant responded by asking whether her uncle was “tall with a pointy nose”.<sup>2</sup>
- [6] The complainant remained with her mother during the rest of that night but did not go back to sleep. The mother assumed then that she had had a bad dream. About two weeks later, the mother, with her daughter and son, who was younger than the daughter, were travelling in a car when the mother sensed that something was troubling her daughter. Upon inquiry, the mother was simply informed by the complainant that it related to the appellant. However, while her mother was away from the car buying fuel the complainant told her brother that the appellant had

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<sup>1</sup> R27 1.19.

<sup>2</sup> R27 1.49.

stood over her and touched her on the vagina. Her brother informed the mother who asked the complainant what had happened and she repeated that information to her mother.

- [7] In a later interview with police, the complainant said that the appellant came into the room she was sharing with her brother after she had gone to bed. She described the appellant touching her at the top of her bottom and in between her legs and associated that with the occasion when the appellant stayed over and slept upstairs, which was the last time, on the mother's evidence, he had stayed at their home.
- [8] She described the person who touched her as fairly tall with short hair and a pointy nose. Her uncle was not particularly tall, described as about 5 feet 7 ½ inches by his sister. There was a man who was about 6 feet 2 inches living downstairs at the time but he did not have access to the area where the complainant lived. Nor did he have a pointy nose.
- [9] When examined pursuant to s 21AK of the *Evidence Act 1977* (Qld), the complainant gave evidence that her uncle was of medium height. She was also cross-examined as to whether she had simply had a bad dream and agreed that at first she was trying to work out whether she had imagined something or whether it was real. Later, in re-examination, touching on whether she had dreamed up the event, she explained, articulately for a 10 year old, why she had concluded it was not a dream.<sup>3</sup>

“When you said you originally thought you imagined what happened, why did you think you imagined it?-- Well, only because I – I just couldn't think that something like that could happen to me. Like, I hadn't really heard of it before that much.

Now, before this happened, had you ever had dreams before?-- Yes.

And have you had nightmares before?-- Yes.

And can you tell the difference between dreams and nightmares and reality?-- Yes.

And what is the difference?-- A dream is something that you just imagine and something that you didn't – that didn't actually happen and reality is something that – that really did happen and you, like, know that it happened and a nightmare is just some – a bad dream.

Now, [witness], you told us that you had dreams before this happen about the bogeyman, what sort of-----?-- Yeah.

-----dreams would you have about the bogeyman?-- Just like dreams where like a monster or something was chasing me or something like that.

So, when you said you had a dream about a monster man, are you talking about the same thing, a monster man and a bogeyman?-- Yes. Yes.

Now, before this incident, had you ever had dreams that the bogeyman or monster man had touched you in the way you describe?-- No.

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<sup>3</sup> R204 1.38 – R205 1.24.

Now, can you tell us whether what you said happened to you at [XYZ] Street, was that a dream?-- No.

All right. Now, I'm just a bit confused about the description of the person who touched you. I just want you to help me out. Can you just give me a description of what you remember about the person who touched you on the bottom and on the fanny?-- Short hair, brown or black, a pointy nose, medium to tall, like, he wasn't fat, he wasn't skinny, he was about medium ...”

### **The defence case**

- [10] The main thrust of the defence case was that the jury should have had a reasonable doubt as to whether the event actually occurred but the address below to the jury also relied on what were described as inconsistencies in the complainant's evidence as relevant to that issue. The examples given during the appeal included inconsistencies between the evidence of her and her mother as to what she said to her mother when she went to her bedroom, whether the inflatable mattress had been set up in the lounge at the time the complainant went to bed, whether the appellant had hair which was “slightly longish to the shoulders”<sup>4</sup> and whether the mother had spoken about the incident to other adults in the complainant's presence.
- [11] It was also argued that the complainant's evidence was inconsistent internally in respect of what were conceded to be, considered alone, minor or explicable matters such as how often her uncle had stayed upstairs overnight, whether she had rolled onto her belly at all at some stage in the incident and whether she had awoken quickly or slowly during the episode.
- [12] The appellant also relied on the inconsistent descriptions of the height of the assailant, pointing out that the first description by her was that the assailant was “tall with a pointy nose” but that her descriptions of the assailant moved closer to a description of her uncle's height over the subsequent days before she spoke to police. It was also pointed out that when she was re-examined at the s 21AK hearing she included the hair colour of the assailant when previously she had said she could not identify that colour.

### **The summing up**

- [13] It was in this context that the following passage of his Honour's summing up was criticised:<sup>5</sup>

“It was suggested she was inconsistent in some areas, an example that was given was the description of the person being fairly tall, changing to being one of medium to tall. Whether you consider that to be an inconsistency or not, ladies and gentlemen, is a matter for you. It was suggested she had an uncertain demeanour, an uncertain recollection.

It was submitted to you that [her brother] agreed he was reminded of what to say before being interviewed. You would note, ladies and gentlemen, there was no evidence whatsoever of [her brother] being asked what it was he was reminded to say and, in fact, for all we know he was reminded to say nothing other than the truth.

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<sup>4</sup> R24 l.44.

<sup>5</sup> R85 ll.1-51.

It was also submitted to you that the complainant's father, upon being told of the allegation, was he remained calm and had a subsequent discussion with the accused that was a calm discussion. The relevance of that, I must say, members of the jury, escapes me completely and should play no role in your deliberations.

As I said to you earlier, the family's instincts really also plays no role in your considerations. It was suggested or submitted to you that with her, that is the complainant's doubt and uncertainty, you would yourself have a reasonable doubt and would acquit.”

[14] The submission was said not to do justice to the state of the evidence about the inconsistencies in the complainant’s evidence by referring simply, in the first paragraph quoted, to the one instance of inconsistency and not placing it in the context of the changes in the complainant’s version over time as relevant to the issue whether she had actually experienced the event or dreamed it.

[15] The criticisms implicit in the other three paragraphs in that passage were conceded to be legitimate in context but it was argued that their placement in the structure of the summing up resulted in or contributed to an imbalance in the summing up. The conclusion argued for was that the failure of the learned trial judge to list the possible inconsistencies comprehensively combined with what was described as his dismissive remarks about some aspects of the defence submissions led to a lack of balance in the summing up viewed as a whole.

[16] His Honour summed up in a conventional way in respect of matters such as how the jury should deal with the evidence they had heard. He mentioned that matters which would concern them would include the credibility of the witnesses, particularly the complainant, and the reliability of the witnesses’ evidence. He gave an appropriate direction in respect of circumstantial evidence and identified the central issue for the jury, namely whether the incident occurred as described by the complainant.

[17] He reminded the jury of the witnesses’ evidence in appropriate detail and, in discussing the significance of inconsistencies between the other witnesses and the complainant earlier than the passage complained of, said:<sup>6</sup>

“Likewise any inconsistencies between those accounts and the complainant's evidence may cause you to have doubts about the complainant's credibility or reliability. Whether consistencies or inconsistencies impact on the reliability of the complainant is a matter for you. Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable and the inconsistencies are a matter for you to consider in the course of your deliberations.

The mere existence of inconsistencies does not mean of necessity you must reject a particular person's evidence or the complainant's evidence. Some inconsistency is to be expected because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time to tell a slightly different version each time.”

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<sup>6</sup> R73 1.32-74 1.8.

- [18] His Honour then described to the jury the elements of the offence, reminded them of the relevant parts of the complainant's evidence and of counsels' addresses, mentioning again the issue whether the complainant's recollection was of an actual event or a dream, and reminding them that the defence was that the event did not happen.
- [19] In that context his Honour said:<sup>7</sup>  
 "It was suggested to you that [the complainant] has deduced what happened to her: That she started off confused, that she was asking her brother questions and when she spoke to her mother she was confused as to whether it was a dream. It was suggested that her story becomes more sure as time passes and after she hears people speaking about it a number of times."
- [20] His Honour went on to mention what might be thought of as other inconsistencies or confusion in the complainant's story when summarising defence counsel's address shortly after when he said:<sup>8</sup>  
 "She acknowledged she was confused about a number of things. She, at one stage, said she saw the person lay [sic] down, not what, in fact, she saw. It was suggested to you it would be unlikely she would get up the next morning and say, 'Good morning,' or play on the verandah or be excited about going to [another town]."
- [21] A redirection was sought at the end of the second day of the trial towards the very end of his Honour's summing up when he was asked to refer to some cross-examination of the complainant. It was also asserted by counsel for the appellant at the trial that there were inconsistencies accepted by the child in the cross-examination to which his Honour replied: "I am not suggesting otherwise".<sup>9</sup> At the start of the next day, before he sent the jury out, he reminded them, accepting the request for a redirection about the cross-examination, of what the complainant had said in accepting that she had thought that she had suffered a nightmare. It was submitted he should then have redirected further about the inconsistencies.

### **Consideration**

- [22] When one reads the summing up as a whole and takes into account that this was a brief trial where the summing up began 20 minutes after the defence counsel's closing address it is my view that the summing up was comprehensive in respect of the issues that the jury needed to be informed about and fair. Counsels' addresses were not transcribed in the record but it seems fair to assume that the inconsistencies relied on had been referred to in the defence counsel's address. There should have been little need for his Honour to repeat in greater detail than he did the relevant inconsistencies such a short period after they had been identified in counsel's address. One might think, also, that the particular inconsistency referred to by his Honour in the passage objected to was one of the important parts of the evidence for the jury to consider and was, as his Honour said, a matter for them. Nor was it the only inconsistency to which he referred.
- [23] The appellant relied upon a passage in *R v Perera*<sup>10</sup> where, in significantly different factual circumstances, the Court of Criminal Appeal criticised the timing and way in

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<sup>7</sup> R83 11.45-60.

<sup>8</sup> R84 11.17-27.

<sup>9</sup> R87 1.10.

<sup>10</sup> [1986] 1 Qd R 211, 220.

which the trial judge dealt with a particular submission, saying that it did not in the Court's view present a balanced view to the jury.

- [24] When one considers this summing up as a whole it was balanced and appropriate, highlighting the true issue in dispute between the parties, whether the event had occurred at all, and fairly summing up the evidence on that issue. The references to the inconsistencies in the complainant's evidence were suitable and the other instances, which it was submitted should have been referred to, were ones which were consistent with slightly varying versions of events given over time by witnesses doing their best to recall events within the normal limitations of human memory. They were perfectly capable of being considered by the jury with the assistance of the usual direction about inconsistencies given by his Honour and without the need to detail each of them with chapter and verse.
- [25] That the learned trial judge may have seemed dismissive about irrelevancies in the defence counsel's address is not an occasion for criticism in this case. The jury was entitled to be told what is irrelevant to its deliberations to help it focus on the relevant.

### **Order**

- [26] I see no reason to disturb the verdict and would dismiss the appeal.