# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v MDG* [2020] QCA 113 |
| PARTIES: | **R**<br>**v**<br>**MDG**<br>(appellant/applicant) |
| FILE NO/S: | CA No 244 of 2019<br>DC No 379 of 2017 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Beenleigh – Date of Conviction & Sentence: 29 August 2019 (Chowdhury DCJ) |
| DELIVERED ON: | 29 May 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 March 2020 |
| JUDGES: | Sofronoff P and Fraser JA and Bowskill J |
| ORDERS: | **1. Dismiss the appeal against conviction.**<br>**2. Leave to appeal against sentence refused.**<br>**3. Direct that the verdict and judgment recorded be amended to correct the sentence imposed on count 2, so that it reads 10 months imprisonment.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of indecent treatment of a child under 16 who was under his care – where the appellant was sentenced to 18 months imprisonment on the first count and a concurrent 10 months imprisonment on the second count, suspended for an operational period of two years from 28 May 2020 – where the appellant essentially contends the conviction was unreasonable by reiterating his case at trial - that the incidents did not happen, and that the child lied to the police, at the urging of the aunt, who did not like the appellant and wanted her sister to leave him – where this Court's task is to perform an independent examination of the whole of the evidence, to determine whether it was reasonably open to the jury to conclude beyond reasonable doubt that the appellant was guilty of committing the offences – whether the conviction was unreasonable or cannot be supported having regard to the evidence |

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant submitted that he did not contend the head sentences were excessive, but was seeking to be released earlier than ordered by the sentencing judge, to enable him to get back into the community, to his partner, and return to work – whether there is any reason to conclude that the sentence imposed, including as to the period to serve before suspension, was anything other than just and reasonable – whether the sentence was manifestly excessive

*R v Brown* [2020] QCA 69, cited

COUNSEL: The appellant/applicant appeared on his own behalf
E L Kelso for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Bowskill J.

[2] **FRASER JA:** I agree with the reasons for judgment of Bowskill J and the orders proposed by her Honour.

[3] **BOWSKILL J:** The appellant was convicted following a trial in the District Court at Beenleigh of two counts of indecent treatment of a child under 16 who was under his care. He was sentenced to 18 months imprisonment on the first count and a concurrent term of 10 months imprisonment on the second count, to be suspended for an operational period of two years, from 28 May 2020 (that is, after serving nine months). He appeals his conviction on the ground that it is unreasonable or cannot be supported having regard to the evidence; and the sentence as being manifestly excessive.

[4] As recently summarised by Fraser JA:[1]

> "The ground that the verdict is unreasonable requires the Court to make an independent assessment of the sufficiency and quality of the evidence and to decide whether upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted.[2] If, after 'making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence'.[3] In *R v Baden-Clay*[4] the High Court observed that, 'Given the central place of the jury trial in the administration of criminal justice over the centuries, and the

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1 In *R v Brown* [2020] QCA 69 at [16].
2 *MFA v The Queen* (2002) 213 CLR 606 at 614 – 615; *SKA v The Queen* (2011) 243 CLR 400 at 406, 408.
3 *MFA v The Queen* at 623 – 624, quoting from *M v The Queen* (1994) 181 CLR 487 at 494. See also *Pell v The Queen* [2020] HCA 12 at [9].
4 (2016) 258 CLR 308 at 329 [65]. Internal citations have been omitted.

> abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.'"

[5] Each count on the indictment charged the defendant that on a date unknown between 1 January 2012 and 30 January 2015 the appellant unlawfully and indecently dealt with a child who was under 16 and under his care. The child is the daughter of a woman the applicant was in a relationship with at the time. She was aged nine to 12 during this period.

[6] The child's evidence comprised the statement she made to police in an interview on 9 November 2015 (when she was 13) and her oral evidence, pre-recorded on 30 April 2018 (when she was 15).

[7] In her statement to the police, the child said "I came here to talk to you about my stepdad has been like touching me and harassing me...". She described an incident when the appellant offered her a back massage "[b]ut then he kept on going lower and lower down". She described him kneeling down beside her, as she was laying down on the bed, "[a]nd then he kept on going down lower down like to my butt and then my legs and everything" and "when he got my butt he kept on going in between my legs and then started rubbing my um, private parts", later saying by this she meant her vagina. She said the appellant touched her vagina, under her clothes. This happened in her mum's room. No one else was present in the bedroom, although her uncle was in the lounge room, asleep. The child told police this happened "at our old house", in the second year that they lived there; at first saying she thought she was about 11 or 12 when this happened, but then clarifying that she may have been nine or 10. This incident is the subject of count 1. She did not tell anyone about what happened, as she was afraid they would not believe her "or he was gonna hit me or something like that". She said the appellant had not hit her before, but had hit her little brother, and "yells a lot".

[8] The child said that after that occasion the appellant kept coming into her bedroom, and making excuses why he was in there. On one occasion she said he came in with five dollars and put it under her pillow and told her not tell her mother or her brothers. Sometimes he would tickle her feet and her legs, and he touched her bum once or twice. She told police one time that happened she was lying on her bed, facing the wall. The appellant came in and she felt something touching her bum, on the outside of her clothes. She quickly turned and saw him there. This incident is the subject of count 2.

[9] There was an inconsistency in the child's evidence, as to which house she was living in when the incident the subject of count 2 occurred. In the police interview, and the first part of her pre-recorded evidence, she had said it happened in the same house as the massage incident (house A). But later in her pre-recorded evidence she said it had happened when the family were living at another house, later on (house C).

[10] The child described another occasion, when she was in the lounge room of another house they lived in (house B), and the appellant sent her a number of text messages. She said the messages first asked if she was on her period (she said the words he used were "are you blooding?") and then asked if she wanted a rub. She showed her mother these text messages.

[11] In cross-examination, it was put to the child that the appellant had given her a massage on her back in the lounge room, while her mum, her two brothers and her uncle were present. She denied that, and reiterated her evidence that the massage incident occurred in her mum's bedroom. It was also put to the child that the appellant had given her a massage on her back, neck and hip, in "your parents' bedroom", at the request of her mother, because she had a sore back from playing AFL. She said she did not recall that. In relation to the massage incident the child had told the police about, it was put to the child that her mum was present throughout. The child denied that.

[12] It was also put to the child that her aunt did not like the appellant. She agreed they did not like each other. She also accepted that before she went to talk to the police about this matter, she wanted to live with her aunt; and that after she had gone to the police she went to live with her aunt. It was put to her that the aunt told her what to say to the police about the appellant; that the aunt told her to make up these allegations against the appellant; and that she had lied to the police when she told them the appellant had touched her vagina. The child denied all of these propositions.

[13] It was otherwise put to the child that the appellant did not do any of the things she described, or come into her room, or send her the text messages she described. She maintained that he did.

[14] The child's mother gave evidence at the trial. Among other things, she gave evidence of a preliminary complaint by the child: she said that on about 7 November 2015 she had a conversation with the child in which she told her mother that the appellant "had touched her up". She offered to take the child to the police station after this, but the child refused, although she did then go to the police on 9 November 2015.

[15] The mother said she had been in a relationship with the appellant from 2010 until 2016. The child was born in August 2002. At the beginning of the time period on the indictment, the family (the mother and the appellant, the child and her brother, as well as the mother's brother) were living at house A. In about February 2014, they moved to house B, where the child's aunt was also living, with her boyfriend, as well as two other brothers of the child, and one of their girlfriends. They stayed there for about six or seven months, before most of them moved to house C.

[16] The child's mother said she could recall one time when the appellant had given the child a massage, on "our bed", at house A, when the child had "knots right near her tailbone" and he was massaging it. She said she was "in and out of the room" while this was happening, which was 15 minutes at most. She also recalled a massage happening in the lounge room.

[17] The mother also gave evidence of a practice, at house C, where either she or the appellant would regularly go into the child's bedroom, at night or in the early morning, to turn off a lava lamp in her room, agreeing that the appellant was

concerned about the lamp staying on because of the heat it generated. The child was not happy about this.

[18] The mother did recall an occasion, when they were living at house B, when the child threw her phone at her, saying "she didn't appreciate messages like that", referring to the appellant sending the child a message asking did she "want a rub". The mother saw this message on the child's phone.

[19] The child's mother was cross-examined about her relationship with her sister, the child's aunt, and the aunt's attitude to the appellant, confirming that the aunt did not like the appellant, and did not approve of their relationship as a couple. The mother agreed that the aunt had said she should not be with the appellant because he was Aboriginal. She also agreed that the aunt was unable to have children of her own, which upset her; and that she was very close to the child.

[20] In cross-examination, the child's mother agreed that a conversation had taken place on about 7 November 2015, with the aunt and the child. The aunt was complaining about the appellant going into the child's room, and when the mother spoke to the child about it, the child complained that he was turning the lamp off. During the conversation, the mother asked the child if the appellant did anything to her, and the child said no. The mother repeated that question in front of the aunt, and the child again said no. The mother than asked the child why she didn't like the appellant going into her room, and the child said "because he wakes me up when he comes in". The mother agreed that when she was asking the child these questions, she did not have any concerns or suspicions about the appellant.

[21] Although the same date was put to the child's mother (7 November 2015), it is apparent that the conversation just referred to occurred prior to the conversation referred to in paragraph [14] above.

[22] The family were living with the aunt at house C at this time. The aunt (or her husband) kicked the mother and the appellant out shortly after the child disclosed to the mother that the appellant had "touched her up". The child continued to live with the aunt, or at least returned to live with the aunt after she spoke to police on 9 November 2015.

[23] The aunt also gave evidence of a preliminary complaint by the child. She described an occasion, on 7 November 2015, on which she was driving with the child and another person (the girlfriend of one of the child's brothers), and the child started crying and told her that the appellant had touched her, describing how he had been massaging her lower back, at house A, and put his hands down under her shorts and into her underwear. Following this, the aunt and the child called the child's mother on the phone and told her. The aunt was cross-examined about her attitude to the appellant, including as to her disapproval of his relationship with the child's mother, and about the lamp and the appellant going into the room to turn it off. It was put to the aunt that she had told the child to tell the police that the appellant had touched her; that she had told the child to make it up. She denied this.

[24] There was also evidence from the aunt's husband, of an occasion on which he had seen the appellant coming out of the child's bedroom early one morning.

[25] One of the child's brothers gave evidence, of a conversation he had with the child, shortly after 7 November 2015, in which the child was upset and crying and saying

that she did not want to see the appellant again, and did not want to go back to her mum's house. He could not remember anything else about this conversation. This brother's girlfriend (who had been in the car with the child and the aunt) gave evidence of the child being upset and crying in the car, and saying that the appellant had touched her, while giving her a back massage.

[26] Lastly, the guidance officer at the child's school also gave preliminary complaint evidence, of a conversation she had with the child, earlier on the day the child spoke to the police. The guidance officer said the child told her that about two and a half years prior to this date, she was in her home, laying on her mother's bed, and the appellant was massaging her back, and she described him massaging lower and lower to the point where his fingers were touching the outside of her vagina. The guidance officer also referred to the child telling her about the appellant coming into her room, and of the occasion when he slipped $5 under her pillow.

[27] The appellant did not give or call evidence.

[28] On this appeal, the appellant essentially contends the conviction was unreasonable by reiterating his case at trial – that the incidents did not happen, and that the child lied to the police, at the urging of the aunt, who did not like the appellant and wanted her sister to leave him. He maintains his innocence of the charges. He submits the accusation, of sexual offending by him, was made "through jealousy and evil adult liars to break up a relationship because [the aunt] didn't have enough family time with [her sister's kids, and] because she can't have any of her own due to medical complications". He submits this Court should "revoke" all the evidence apart from the evidence given by the child's mother, which was truthful.

[29] As is commonly the case in matters of this kind, the jury were told, by each of the Crown prosecutor and defence counsel in their addresses, and the learned trial judge in his summing up, that the case turned on the child's evidence, that is, whether the jury accepted the child's evidence as truthful and reliable. There was considerable emphasis at the trial, in the cross-examination of the child and her aunt in particular, as well as in the closing addresses, on the allegation that the aunt had put the child up to fabricating allegations of sexual abuse against the appellant. The appellant's case in this respect was clearly articulated by the learned trial judge in the summing up, both in the context of an appropriate direction about motive to lie, and in summarising the competing arguments. The jury were also appropriately instructed about how they could use the evidence of what the child had told other people, before she spoke to the police.

[30] The jury retired at about 12.30 pm on 29 August 2019. In the course of their deliberations, the jury asked a question as to the meaning of "beyond reasonable doubt" and questions clearly directed to count 2 (touching the bottom). They returned verdicts of guilty at 3.24 pm that day.

[31] It is clear from their verdicts that the jury accepted the child's evidence as truthful and reliable; and rejected the defence case that she had been encouraged by the aunt to make up the allegations. The jury was entitled to do so. Having accepted the child as a truthful witness, it was reasonably open to the jury, on the basis of her evidence, to conclude beyond reasonable doubt that the appellant was guilty of each count. In so far as count 1 is concerned, objectively, touching the child on her vagina was indecent. In relation to count 2, although touching the child on the bottom might be equivocal, in all the circumstances of this case (including the

incident the subject of count 1, and the evidence of other behaviour by the appellant towards the child, including the text messages), it was open to the jury to conclude the touching had a sexual connotation to it and was therefore indecent. At trial, as on this appeal, the appellant's argument was that the incidents simply did not happen. It was not contended, in the contrary event that the jury did accept the child's evidence, that the incidents, or either of them, happened, that the elements of the offences were not established by her evidence.

[32] The matters the appellant agitates on this appeal were fully ventilated at the trial. He contends that, when all those matters are considered, the jury should have had a reasonable doubt, and found him not guilty. This Court's task is to perform an independent examination of the whole of the evidence, to determine whether it was reasonably open to the jury to conclude beyond reasonable doubt that the appellant was guilty of committing the offences. Having done that, I am satisfied that it was, and so would dismiss the appeal against the convictions.

[33] In relation to the sentence, the appellant said he did not contend the head sentences were excessive, but was seeking to be released earlier than ordered by the sentencing judge, to enable him to get back into the community, to his partner, and return to work. The appellant's sentence of 18 months imprisonment on count 1 was ordered to be suspended after serving nine months. Requiring the appellant to serve half the term before release is an unremarkable outcome, following a trial. However, by suspending the sentence, the learned sentencing judge gave the appellant the fairly considerable benefit of a certain release date after nine months. The alternative was to leave s 184 of the *Corrective Services Act* 2006 to operate according to its terms, with the result that the appellant would be eligible for parole after serving nine months, which would not have guaranteed his release on a particular day. I can see no reason to conclude that the sentence imposed, including as to the period to serve before suspension, was anything other than just and reasonable.

[34] There is, however, an error in the verdict and judgment record which should be corrected. It is apparent from the sentencing remarks that the sentence imposed on count 2 on the indictment was 10 months imprisonment.[5] The verdict and judgment record incorrectly records the sentence on count 2 as nine months imprisonment.

[35] I would dismiss the appeal against conviction; refuse leave to appeal the sentence; but direct that the verdict and judgment recorded be amended, to correct the sentence imposed on count 2.

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5 AR 179.