SUPREME COURT OF QUEENSLAND

CITATION:	*R v Popoff (a pseudonym)* [2020] QCA 167
PARTIES:	**R** **v** **POPOFF (a pseudonym)** **(appellant)**
FILE NO/S:	CA No 256 of 2019 DC No 1555 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 4 September 2019 (Richards DCJ)
DELIVERED ON:	13 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2020
JUDGES:	Sofronoff P and Mullins JA and Bradley J
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISCONDUCT OF COUNSEL – where the appellant was found guilty by a jury of three counts of rape and three counts of indecent treatment of a child under 12, the complainant being his younger sister – where the appellant did not give evidence at trial or call any witnesses – where the prosecution case depended entirely upon the complainant's evidence and her evidence was uncorroborated – where the appellant submits his counsel's conduct of the case was so inept that it has led to a miscarriage of justice – where the appellant submits that his counsel failed to advise him as to giving and calling evidence and the importance of a sworn denial, that counsel failed to properly take a version of events from the appellant, that counsel failed to properly advise as to calling the appellant and complainant's mother as a witness, and that counsel failed to take proper instructions with respect to the change in the prosecution case as to the location of the offending – where the appellant does not make any submissions to explain how the trial may have been affected by the grounds contended by the appellant – where the respondent submits that no miscarriage attended the trial – whether the appellant's trial was affected by a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL –VERDICT

UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty by a jury of three counts of rape and three counts of indecent treatment of a child under 12, being his nine year old younger sister – where the appellant did not give evidence at trial or call any witnesses – where the prosecution case depended entirely upon the complainant's evidence and her evidence was uncorroborated – where the complainant gave evidence through a recorded statement to police – where the complainant was cross-examined by defence counsel – where there was some inconsistency between the cross-examination and the police statement as to the location of the offending – where, during cross-examination, it was put to the complainant that she had a motive to lie, being that she was living in a physically and verbally abusive household and that she wanted to get out of a beastly household – where the appellant submits that the trial miscarried on the basis that the verdicts were unreasonable or cannot be supported having regard to the evidence – whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether the verdicts of guilty of the jury were unreasonable or insupportable having regard to the evidence

R v Bevinetto [2019] 2 Qd R 320; [2018] QCA 219, cited

COUNSEL: S R Lewis for the appellant
G J Cummings for the respondent

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

[1] **SOFRONOFF P:** The appellant was found guilty by a jury of three counts of rape and three counts of indecent treatment of a child under 12. His notice of appeal against conviction raised a single ground, that the verdicts were unreasonable or cannot be supported having regard to the evidence. The appellant was given leave to amend his notice of appeal to add a further ground as follows:

> "The trial miscarried as a result of:
>
> I. The appellant's legal advisors failing to properly advise him as to the giving and calling of evidence;
>
> II. The legal advisors failed to properly advise him with respect to the importance of a sworn denial of the charges;
>
> III. The appellant's legal advisors failed to properly take a version of events from the client to allow the trial to be properly prepared;
>
> IV. The appellant's legal representative failed to properly advise him with respect to the ability to call the appellant's mother as a witness; and

V. The appellant's legal representative failed to properly take instructions with respect to the change in the prosecution case as to the location of the alleged offences."

[2] In August 2017 the complainant, to whom I will refer by the pseudonym "Bella", was nine years old. She lived at home with her sister, her mother, her mother's boyfriend and the appellant, who is her brother. According to her evidence, one night in August 2017, the appellant entered Bella's bedroom wearing only a shirt. He masturbated and put his penis near her mouth. He asked her to suck it. Then he put his penis into her mouth. This was count 1, rape.

[3] On the next night, the appellant entered Bella's bedroom naked. He pulled her out of bed and pushed her onto the floor. He took off her pyjamas and rubbed his penis up and down on her vagina. This was count 2, indecent dealing. There was a noise that startled him and he left the room. Bella put her pyjamas back on and got back into bed. The appellant returned, pulled her out of bed once more, removed her pyjamas and once again rubbed his penis against her vagina. This was count 3, indecent dealing. On the third night, he came into Bella's bedroom and again he pulled her out of bed. He took off his underpants and held her head while he put his penis into her mouth. He moved her head backwards and forwards until he ejaculated. This was count 4, rape. On the fourth night Bella hid under her bed. The appellant found her and dragged her out. He took off her pants and underwear and rubbed his penis against her vagina until he ejaculated. This was count 5, indecent dealing. He then put his penis into her mouth and told her, "Don't tell anyone, otherwise I'll do it again." This was count 6, rape.

[4] The prosecution case depended entirely upon Bella's evidence and her evidence was uncorroborated. The prosecution opened the case upon the footing that all of the offending had taken place in Bella's bedroom and her recorded statement to police, which was tendered, supported that allegation.

[5] She was cross-examined by the appellant's counsel, Mr Glenday. Like counsel in almost all such cases, one of the obstacles that Mr Glenday had to overcome was a jury's natural inquiry, "Why would this young girl make up such a thing?". As I have said in a previous case,[1] the law does not require that the jury be told not to ask this question. The existence or non-existence of a motive to fabricate an allegation of sexual offending is relevant to a consideration of a complainant's credit. If some motive can be shown, that can be very helpful in putting forward a defence case. Problems can arise in the handling of this issue at a trial but no problems arose in this case and it is not necessary to discuss the law concerning a complainant's motive to lie.

[6] Mr Glenday set out to explore what possible motive Bella might have had to fabricate her allegations. He cross-examined Bella upon very particular matters. The matters that he put to her must have been the result of factual instructions that he had received as part of his brief, whether in writing or orally. By this means he was able to get Bella to acknowledge the following matters:

(a) Bella had been removed from her mother's care and had lived for a period with a foster carer.

---

1 *R v Bevinetto* [2019] 2 Qd R 320; [2018] QCA 219.

(b) She was then placed back in her mother's care. She told her foster carer that she did not want to go back to live with her mother.

(c) When she was being driven by her brother and his partner, to whom I will refer as Chloe, Bella told Chloe that she did not want to go back because the appellant used to pull her hair and bang Bella's and her sister's heads together. She told Chloe that her mother would sleep all day and also disappear for days leaving Bella and her sister in the appellant's care.

(d) She told Chloe that her mother did not feed her well or give her lunch to take to school. Her mother would shout at her. Her mother's boyfriend also shouted at her and would get angry. The appellant would often get angry with her.

(e) Bella had once shown her auntie a large bruise on her arm and said that the appellant had caused it. She said that he had grabbed her and locked her in a cupboard.

(f) Bella said that the appellant had often hit her.

(g) These were the reasons why Bella and her sister did not want to live in the same house as the appellant and her mother.

(h) Bella was always thinking of ways not to live with her mother.

(i) Bella had attended a police station twice but had only made the complaints of sexual offending on the second occasion.

[7] Mr Glenday elicited this evidence by putting to her precise leading questions.

[8] He also put to Bella that none of the events that were the subject of the six counts had happened. There was the following exchange:

> "MR GLENDAY: Now, in relation to what you told the police, you told the police that [the appellant] had come into your bedroom and done certain things, didn't you?---Yes.
>
> Yeah. That's not true, is it?---No.
>
> No. He didn't come in your bedroom, did he?---No.
>
> No. And I suggest to you that you simply just made these allegations up, these things you told the police, up, haven't you, because you wanted to go back – you wanted to stay with your aunty, didn't you?
>
> MR GREEN: Well, that's---?---No.
>
> HER HONOUR: Well, there's two questions there.
>
> MR GLENDAY: Yeah.
>
> HER HONOUR: So that's hard to answer, [Bella], because there was a couple of questions all together. So we'll just get those broken down for you and re-asked one question at a time?---Yep.
>
> MR GLENDAY: I suggest to you, you've made these allegations up, haven't you?---No.

> No. And what you told the police about what [the appellant] did, that didn't happen, did it?---It did. I – sometimes I had to sleep on the lounge, and that's when he did it.
>
> When you were sleeping on the lounge; is that right?---Yes.
>
> All right. Okay. Okay. Thank you, [Bella]. Thank you, your Honour. No further questions."

[9] The re-examination was as follows:

> "MR GREEN: So, [Bella], you said, when you were being asked questions then, that sometimes something would happen when you were sleeping on the couch?---Yes.
>
> And is that something – were you saying that it's something that [the appellant] would do to you?---Yes.
>
> And so can you tell me now what it was he did to you when you were on the couch?---No.
>
> The – you were also asked whether [the appellant] had been into your bedroom?---Yeah.
>
> So do you remember being asked that?---Yes.
>
> Do you remember telling the police about the occasions that [the appellant] had been in your bedroom?---Yes.
>
> Were the things that you told the police the truth?---Yes.
>
> So do you remember occasions where [the appellant] came into your bedroom?---No.
>
> So you don't remember them now?---No."

[10] The appellant submits that Bella's "denial" that anything had happened in the bedroom and that some things had happened in the lounge room ought to have raised a reasonable doubt about the appellant's guilt.

[11] The matters going to an explanation for fabrication that Mr Glenday established in cross-examination were relied upon by him in his closing address to the jury. He submitted:

> "So, ladies and gentlemen, you simply can't be satisfied beyond a reasonable doubt that she was telling the truth, due to the surrounding backgrounds and circumstances that she was living in before she made this complaint. She was getting hit. She was getting shouted at by the defendant and her mother. Her mother wasn't caring for her properly. I think those reasons in theirself [*sic*] are enough to make you think she may have made these allegations up, so – to prevent going back to her mother's house and living there. And don't forget she didn't tell the police officer anything about the sexual abuse, as I said, on the first occasion when she goes to the police."

[12] Bella's reference to offending in the lounge was also the subject of a submission to the jury, as follows:

> "So she says "on the lounge". Ladies and gentlemen, if it had occurred on the lounge, that would have been a very easy thing to remember for her. But she doesn't remember it. She doesn't say anything to the police about it. And that's because it didn't happen at all. She was getting her story confused at that particular point about what she was making up. Was it the bedroom? Was it the lounge? And she says the lounge. And then, after I finished my questioning, the prosecutor, who was Mr Green, re-examined her in an attempt to get more evidence or shore up the Crown case after that."

[13] While Bella's evidence about the appellant's physical and verbal cruelty to her would naturally support a strong desire on her part to live elsewhere, it was not the only kind of cruelty that she imputed to him. There was also the cruelty manifested by the sexual assaults that she said that he had perpetrated. It was for the jury to decide whether they accepted her evidence in that respect. Because the evidence of the appellant's non-sexual physical and other abuse of his young sister was given in response to defence counsel's leading questions, the jury would have been entitled to conclude that the appellant had done at least that much. However, the value of this evidence to the defence was that it showed a motive to fabricate a story: to get out of a beastly house. It constituted a good basis upon which to invite the jury to have a doubt; but it was not so strong as to require a jury to have a doubt. The seeming contradiction that Mr Glenday managed to extract from Bella in the final part of his cross-examination also furnished the basis of a sound argument upon which to attack Bella's credit but, like the other issue, it did not mean that the jury would be irrational to convict.

[14] In both instances there were also good reasons why a jury could be satisfied that Bella's evidence about the appellant's indecent treatment of her and about his raping her was true. She had maintained a consistent course of evidence until the last moment. Even then, her answer about events on the couch could rationally be read as a reference to other, uncharged, offences. That became apparent in the first questions in re-examination. She was then invited to reassert, and did reassert, the truth of her complaints to police.

[15] I do not accept that Bella's evidence lacked credibility so that it should have raised a reasonable doubt. While acknowledging the legitimacy of the defence arguments based upon the matters that have been discussed, there are also good arguments the other way. I do not regard them as raising any real doubt about the appellant's guilt.

[16] I would reject the first ground of appeal.

[17] The appellant also complains that his solicitor's and his counsel's conduct of the case was so inept that it has led to a miscarriage of justice. In aid of that ground the appellant has relied upon an affidavit that he has sworn[2] and an affidavit of his solicitor, Ms Megan Bowie, which exhibits certain documents.[3]

---

2 Sworn on 19 March 2020 and filed on 27 March 2020.

3 Sworn on 12 March 2020 and filed on 18 March 2020.

[18] In his affidavit the appellant says that he attended a conference with his solicitor and barrister before the trial, during which he provided verbal responses to the allegations against him. He says that he told his lawyers that he did not spend time alone with Bella, that he was "not alone with the complainant at any of the relevant times", that he "played XBox and watched television when [he] was at home with the complainant" and that his mother or another resident of the family home "were also present at home with the complainant at the relevant times".

[19] He says that he was not asked to provide a written statement or "sign instructions about whether I had been alone in the living room with the complainant".

[20] He says that his lawyers told him that he could give evidence but they advised him against doing so because, in their opinion, the Crown would not prove its case. He was not advised about the "advantages of providing a sworn denial" or about the "disadvantages of providing a sworn denial". He was not advised that he had a right to call other evidence or that he had a right to call his mother as a witness.

[21] Ms Bowie's affidavit exhibits a signed document headed "Proceeding to Trial (Not Guilty) Instructions". Paragraph 7 states:

> "I understand and it has been explained to me that if I plead not guilty, I may be required to give evidence as a witness in my proceedings, and, if I am required to do so, I may be subject to cross-examination by the Prosecution."

[22] A handwritten file note by the appellant's solicitor who attended the trial contains the note:

> "RG [Mr Glenday]: whether to give evidence discussed. pros and cons. confirmed inst. not to give evidence"

[23] The appellant's outline of argument asserts that things were not done by his solicitor and barrister but he omits to identify how any of those failures, if they are failures, led to a miscarriage of justice. In particular, in relation to his claim about the inadequacy of the advice he received about giving evidence the appellant has failed to swear that, had he been given adequate advice about the "advantages" and the "disadvantages" of giving evidence, he would have chosen to give evidence. It is not necessary, therefore, to consider the significance of the solicitor's note that the "pros and cons" of giving evidence were discussed with him.

[24] The same fatal defect arises also in the case of the asserted failure of the appellant's legal representatives to obtain an "adequate version of events" from him. One may put to one side the many things helpful to the defence case that Mr Glenday elicited by the use of questions that were manifestly based upon detailed factual instructions given by the appellant. The appellant does not now say what "version of events" he might have given if asked and how such a version might have affected the trial. In the absence of such evidence the point goes nowhere.

[25] The same defect arises, yet again, in relation to the asserted failure to call the appellant's mother as a witness. Whether she could have helped and how she could have helped is not explained. This lack of essential evidence is the more puzzling in the context of an allegation that the failure to call her as a witness constituted legal incompetence of such a gravity that it resulted in a miscarriage of justice. Moreover, what is known about her, from the appellant's instructions that are

inherent in Mr Glenday's cross-examination, points powerfully to a likelihood that this absentee and negligent mother could not have assisted the appellant's defence in any way.

[26] Finally, in relation to the final particular of this ground of appeal, the claimed failure to take instructions about Bella's evidence about offences committed against her in the lounge room, the appellant is once more silent. He does not reveal what he might helpfully had said to his lawyers if they had asked him.

[27] These omissions are utterly fatal to this ground of appeal and, in the absence of this essential evidence, the ground of appeal is simply inarguable.

[28] Further, the evidence led on this appeal puts paid to this ground. In evidence given at the hearing of this appeal Mr Glenday denied telling the appellant that he did not need to give evidence because there was a reasonable doubt. I accept that evidence. In his own evidence, the appellant accepted that he was advised that nothing could be gained by his giving evidence and that, accepting that advice, he chose not to give evidence. Mr Lewis of counsel, who appeared for the appellant, accepted that his client understood that he had a choice whether or not to give evidence and that he chose not to do so. Mr Glenday's evidence, which I accept, was that he had a number of conferences with his client. He advised the appellant that in his, Mr Glenday's, opinion the appellant would struggle to express himself and his defence being simply that he did not do it, there would little to gain from him giving evidence.

[29] The appellant was properly advised upon the basis of adequate instructions.

[30] It is unsatisfactory for serious allegations of negligence against legal practitioners to be made in open court, imputing to them responsibility for a wrongful conviction, when there is no proper basis. If the allegations in the present case had been made in a pleading in a civil case they would have been struck out as frivolous and vexatious. In future, when such allegations are made in a notice of appeal against legal practitioners, they should be supported by adequate particulars, including the facts that link the alleged instances of incompetence to actual outcomes at the trial to demonstrate an arguable case of miscarriage of justice. If an appellant fails to do so, the Director of Prosecutions should regard it as incumbent upon him to press for necessary particulars and for supporting evidence. A failure to furnish an adequate basis upon which to maintain such allegations should be raised with the Court at an interlocutory stage of the proceedings so that, if a proper case is not shown to exist, appropriate orders can be made for the future conduct of the proceeding.

[31] I would dismiss the appeal.

[32] **MULLINS JA:** I agree with the President.

[33] **BRADLEY J:** I also agree with the President.