

SUPREME COURT OF QUEENSLAND

CITATION: *R v C* [2000] QCA 145

PARTIES: **THE QUEEN**
v
C
(appellant)

FILE NO: CA No 391 of 1999
DC No 209 of 1998

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 28 April 2000

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2000

JUDGES: McMurdo P, Moynihan SJA, Atkinson J
Judgment of the Court

ORDER: **Appeal against conviction dismissed.
Leave to appeal against sentence refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISCARRIAGE OF JUSTICE – WHETHER INSUFFICIENT PARTICULARITY – sexual offences against step-granddaughter between ages 6 to 11 – whether similar counts adequately particularised so discrete and specific incidents

R v K CA No 64 of 1998, 23 June 1998, considered
R v R CA No 17 of 1998 and CA No 445 of 1997, 6 May 1998, considered
R v S [2000] 1Qd R 445, considered
S v The Queen (1989) 168 CLR 266, considered

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISCARRIAGE OF JUSTICE – IMPROPER ADMISSION OF EVIDENCE – whether trial judge erred in admitting evidence of uncharged acts of indecency and an out of court statement.

R v K CA No 64 of 1998, 23 June 1998, considered

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – USE OF EVIDENCE – whether trial judge failed to give adequate directions to jury on evidence of uncharged acts, an out of court statement and absence of evidence from a witness.

Gipp v The Queen (1998) 194 CLR 106, considered

Jones v Dunkel (1959) 101 CLR 298, considered

R v McKinney (1991) 171 CLR 468, considered

R v Palmer CA No 125 of 1998, 28 July 1998, distinguished

R v Rankin [2000] QCA 54; CA No 234 of 1999, 3 March 2000, considered

R v Vonarx Court of Appeal (Vic) No 181 of 1995, 15 November 1995, considered

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – whether the delay in making the complaint or the lack of fresh complaint, corroboration or particularity made the verdict unsafe or unsatisfactory.

Criminal Code s 632

Gipp v The Queen (1998) 194 CLR 106, considered

M v The Queen (1994) 181 CLR 487, considered

Jones v The Queen (1997) 191 CLR 439, considered

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSON – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – whether sentence of five years' imprisonment with recommendation for parole after two years manifestly excessive.

AG v Tooley CA No 385 of 1996, 1 November 1996, distinguished

R v R [1998] QCA 268 CA No 152 of 1998, 24 July 1998, considered

R v Y CA No 23 of 1997, 18 April 1997, considered

COUNSEL: A Boe (*sol*) for the appellant
M J Byrne QC for the respondent

SOLICITORS: Boe & Callaghan for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The appellant was convicted after a trial in the District Court at Rockhampton on one count of unlawfully maintaining a sexual relationship with a child (count 1) and five counts of indecent dealing (counts 2 – 6). On the hearing of the appeal the appellant was granted leave to amend his notice of appeal to raise the following grounds of appeal:

1. The trial miscarried because there was insufficient particularity of counts 2 to 6.
2. The trial judge erred in admitting evidence of uncharged acts of indecency and an out of court statement.
3. Alternatively, the trial judge failed to adequately warn and direct the jury as to the limited use that could be made of that evidence.
4. Alternatively, the trial judge failed to give adequate directions as to the absence of evidence from the complainant's mother.
5. The verdicts were unsafe and unsatisfactory.

[2] The offences were alleged to have been committed between 13 August 1990 and 31 December 1994 when the complainant was between 6 and 11 years old. During that time, the complainant lived with her grandmother and her grandmother's husband first in Rockhampton and then in another central Queensland community. The only two witnesses called were the complainant's mother and the complainant who were called in that order. There was no evidence of corroboration or fresh complaint. As he was entitled to do, the appellant elected not to call or give evidence.¹

Ground 1 - Particularity

[3] The first ground of appeal asserts that there was insufficient particularity of counts 2 to 6. As Mackenzie J held in *R v S* [2000] 1 Qd R 445 at 452, there are two aspects to the need for particularity. One is to eliminate the risk of duplicity. The second is to give the accused sufficient indication of what is alleged against him or

¹ See *RPS v The Queen* [2000] HCA 3 at [28]; 74 ALJR 449 at 456.

her on the occasion when he or she is said to have committed the offence. This requirement was spelt out by Dowsett J in *R v R*:²

“In general, as a minimum requirement, it is necessary that there be sufficient particularity in the allegations to demonstrate one identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence. . . .Of course, this requirement does not exclude multiple changes of substantially similar events, provided the evidence demonstrates separate, identifiable transactions which can be related to counts on the indictment.”

- [4] The Court should also recognise that it is not unsurprising in cases of this nature that there will be a problem of lack of particularity.³
- [5] In this case there was no request for particulars. The evidence given by the complainant fully particularised the separate events which were said to give rise to each of the counts of indecent dealing. It can be presumed that the opening by the prosecution, which was not transcribed, gave particulars which were consistent with the evidence given by the complainant as there was no cross-examination as to any inconsistency between the opening and her evidence. The appellant also asserts under this ground of appeal that there was a “latent ambiguity” in each of these counts. However, a recitation of the circumstances of each count shows that this is not the case.
- [6] Count 2 was described by the complainant as happening when she was six years old when she was living with her grandmother and the appellant at a place near the railway at Rockhampton. It was a Friday night and her grandmother was at bingo. She was in the lounge room when her step-grandfather asked her if she wanted to play a little game. He told her to go and lie on her bed and pull down her pants. He came into her bedroom and started playing with her vagina with his finger, tickling it and licking it. Afterwards he said “don’t tell anybody, it’s our little secret”. This was the first time that anything of this nature had happened.
- [7] Count 3 occurred when the appellant took the complainant in his blue station wagon to the shops. He stopped his car a couple of blocks from where they lived near some old deserted shops which were around the corner from a “karaoke thing”. The appellant then made the complainant play with his penis using her hand and then suck his penis. This went on for about three or five minutes until he “peed in [her] mouth”. She got out of the car and spat out the urine. She got back into the car and they drove to the shop to get milk before going home. This was the only occasion on which he urinated in her mouth.
- [8] Count 4 took place after they moved to a community near Rockhampton when the complainant was about nine years old. On this occasion after tickling and licking the complainant’s vagina he for the first time inserted his finger into her vagina. She said that it hurt and the appellant said to her “you like it, don’t you?”. No one

² CA No 17 of 1998 and CA No 445 of 1997, 6 May 1998 at 24.

³ See the remarks by Lee J in *R v Knuth*, CA No 64 of 1998, 23 June 1998 at pp 12-13.

was at home when this occurred and after the incident the appellant said, “it’s our little secret”.

- [9] Count 5 related to an incident at the same place which began when the complainant was playing on the front lawn with her dog Dinah. It was daylight, going on dark, and there was no one else at home. The appellant asked the complainant to come into the shower with him where he got her to play with his penis, sucking it and playing with it using her hand. After this incident they got dressed and walked to the fish and chips shop. While walking there the appellant made the complainant hold his hand.
- [10] Count 6 was described as the last time anything happened. The complainant had a new room which was built onto the house. It was daylight and the appellant closed the blinds. She lay on her bed and the appellant played with her vagina. He then took out his erect penis and rubbed it over her vagina and said “Oh I’d better not put it in; you might get pregnant”. After the incident, the appellant told her to go and play and that it was “our little secret”.
- [11] Such incidents were discrete and specific. The events are identified with sufficient particularity. There was no possibility of latent ambiguity.⁴
- [12] The summing up made it clear to the jury the evidence which related to each indecent dealing count. There was accordingly no other event on which the jury could have returned a verdict.

Grounds 2 - 4: Evidence of uncharged acts and conversation between the complainant and her mother

- [13] The complainant gave evidence in chief that the indecent contact of the appellant was frequently repeated. This type of evidence has been held to be admissible to show evidence of sexual passion or the background of the relationship.⁵
- [14] The appellant however submitted that evidence was admitted at the trial of two other acts or events of indecency in respect of which the appellant was not charged. The first of these was that the complainant gave evidence of the appellant taking her to the house of his now deceased friend to be molested there by the friend. There was no objection to the admission of this evidence. The complainant was cross-examined as to this event and it was put to her that the appellant did not take her to his friend’s house and leave her there.
- [15] The second event was said to have occurred in February 1997 or 1998 when the complainant was staying with her grandmother and the appellant for about a week. One night when she was getting chips out of the deep fryer the appellant came up to her and put his hands on her breasts and she asserted that she elbowed him and told him that if he ever touched her again she would “kick him in the nuts”. The complainant then said that the appellant said to her mother the next day in front of her “you know your daughter said, if I ever play with her again, she’s going to kick me in the nuts”, and “my mum made me say, ‘sorry’ to him”. The complainant’s mother had given evidence earlier in the trial and was not asked about this

⁴ *S v The Queen* (1989) 168 CLR 266 at 274.

⁵ *R v Knuth* (supra) per Pincus JA and Lee J.

conversation. Defence counsel did not object to the admission of this evidence. However, it was put to the complainant that neither the event nor the conversation occurred.

- [16] The omission by defence counsel to object to the evidence of either of the two events or the conversation must be taken to be a tactical decision by counsel as he submitted that the complainant was telling an “exaggerated and graphic story”. At least in respect of the two events, there is nothing to suggest these were not included in the complainant’s statement to police. She was cross-examined in detail about other inconsistencies between her evidence at trial and her statement to police but it was not suggested that her statement did not contain these allegations or that the first mention of them was at trial. It does not seem that defence counsel was surprised by the allegations.
- [17] In the course of his summing up, the learned trial judge told the jury that there had been reference in the case to other events occurring of a sexual nature which were not the subject of any count on the indictment and that evidence of those sorts of matters had been brought merely as suggesting an improper relationship between the complainant and the appellant which put these offences into context. He reminded the jury that it was very important to realise that it was the only basis upon which those other events were allowed to be mentioned. The accused was not charged with those other matters and the jury were not asked to return a verdict with respect to any of them.
- [18] His Honour quoted from the direction referred to by the Court of Appeal of Victoria in *R v Vonarx*⁶ which was adopted by Kirby J in the High Court in *Gipp v The Queen*⁷ which directs the jury that evidence of criminal conduct other than that which is charged can be used by them only if they are satisfied that it occurred and only for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting. They should be told not to reason that the accused is the kind of person likely to commit the offence charged. His Honour also told them that, in line with that direction, the jury should be clearly instructed that evidence about sexual activity does not itself prove the offences charged and the accused can only be convicted on any count alleged against him if they are satisfied beyond reasonable doubt that the facts alleged in that count occurred. He instructed them that it was impermissible to convict the accused on the basis that, although the conduct so identified had not been proved to the requisite standard, some other conduct alleged by the victim had occurred.
- [19] While it would be more appropriate for a trial judge not simply to quote from the passage in *R v Vonarx* but to relate those directions to the facts of the case, there can be no complaint that his Honour did not put the matters with which it deals properly before the jury.⁸ Both of the events, his taking the complainant to his friend to be dealt with or his later putting his hands on the complainant’s breasts,

⁶ Court of Appeal (Vic) No 181 of 1995, 15 November 1995 at 12-13 per Winneke P, Callaway JA and Southwell A/JA.

⁷ (1998) 194 CLR 106 at 156.

⁸ See *R v Rankin* [2000] QCA 54; CA No 234 of 1999, 3 March 2000 at [22].

could be used as evidence of the relationship between the appellant and the complainant. The jury were carefully instructed that they could not use this as propensity evidence. There is no substance in any ground of appeal relating to uncharged acts of indecency.

- [20] With regard to the conversation, in addition to the matter already noted, counsel for the appellant referred to the conversation in his address to the jury. He told them that they had heard about it from the complainant but not from her mother and if it was something that was important one would have thought that it would have been raised in the Crown case. The evidence given by the complainant about the conversation followed the evidence as to the appellant's placing his hands on the complainant's breasts as follows:

"Do you remember when that was?-- Mmm, how long ago now? It would have been about two, three years ago – February.

Mmm?-- I stayed with them about a week and one night I was getting chips out of the deep fryer and he come up and he put his hands on my breasts and I elbowed him and told him if he ever touched me again I'd kick him in the nuts, and he had enough guts to go up to my mum the next day and say, "Oh, your ----

HIS HONOUR: Oh, just a moment. Just – if there was a conversation with your mother that you were not present at, she can talk about that.

WITNESS: Mmm, okay.

Were you present at this conversation?-- Yes.

Oh, well, if it was a conversation that took place in her presence, she is entitled to speak about it.

MR BALE: Certainly, yes?-- Ah, he walked up to my mum – I was standing there – and he said, "You know your daughter said, 'If I ever play with her again, she's going to kick me in the nuts,' and my mum made me say, "Sorry" to him.

This last occasion that you've just told us about, where he touched you on the breasts, do you recall how old you were by then?-- Ah, I would have been about 14."

The mother had not given evidence about this conversation and it was not suggested that she be recalled.

- [21] After they had retired the jury requested "Is it possible that we have the mother asked if she remembers the conversation when she was back for the holidays?" In discussion with counsel in the jury's absence about the appropriate redirections to give to the jury, the learned trial judge said:

“Well, the short answer is that we have heard all of the evidence and we’re not going to have the mother asked about that conversation. To some extent that might be explained by the fact that the mother gave her evidence first and this matter arose, I would have thought, out of something that she volunteered, rather than something she was directly asked, and the mother wasn’t recalled in respect of the matter. It is not possible to ask the mother now.”

Both counsel agreed.

- [22] When they returned, the judge told the jury that it was not possible to ask the complainant’s mother if she remembered the conversation as all the evidence in the case had been heard and the evidence would not be re-opened. He then reread the passage from the complainant’s evidence. He reminded them that the complainant’s mother gave her evidence first. His Honour told them that the mother could have been recalled as part of the Crown case to speak of that “if counsel had asked to recall her, but there was no request to recall the mother and consequently you do not have any version from the mother about that conversation.”
- [23] The conversation between the complainant and her mother could not properly be regarded as necessarily alerting the complainant’s mother to any sexual misconduct. The conversation was at best equivocal; it may not therefore have been memorable. As her response showed, in the mother’s eyes it was not an incriminating conversation. In such light the Crown submitted that it could not, despite the jury’s request, be said to constitute “an important part of the Crown case”, as was the position in *R v Palmer*⁹.
- [24] In that case, the prosecution failed to call a police officer, Stephens. According to the evidence of another police officer, the appellant admitted to Stephens he owned a bag and its contents found in a car late at night after the police had been called by a security officer because of the appellant’s suspicious behaviour. The bag contained two black balaclavas, a sliding hammer, which could be used to pull out car locks, a number of screw drivers and sets of pliers and three sets of gloves. The defence had complained about Stephens’ absence from the prosecution witness list and the failure to call him was unexplained.
- [25] In holding that a *Jones v Dunkel*¹⁰ direction was called for, the Court took into account that, “[n]o reason appears from the evidence, nor can any sensible reason be thought of, why six years after the dangers of lack of proper recording of police conversations with suspects were underlined in *McKinney* (1991) 171 CLR 468, the outmoded practice of failing to use a proper method of recording was adopted in the present case.” As the Court said, the lack of proper recording of the alleged conversation was a strong reason to expect Stephens would be called.
- [26] This, however, was an entirely different case. The mother had been called by the prosecution. The conversation is unlikely to have had any significance to her and

⁹ CA No 125 of 1998, 28 July 1998 at 5.

¹⁰ (1959) 101 CLR 298.

there was no request by the defence for her to be recalled and no duty on the Crown in these circumstances to recall her.

- [27] In such circumstances, it cannot be the case that the failure to give a *Jones v Dunkel* direction on such a point resulted in a miscarriage of justice.

Ground 5 – Unsafe and unsatisfactory

- [28] The test of whether a verdict is unsafe or unsatisfactory,¹¹ is whether this Court thinks that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.¹² The four features relied on by the appellant in this case were the lack of particularity, the absence of corroboration, the absence of fresh complaint and the delay in making a complaint.
- [29] The question of particularity has already been dealt with. There was adequate explanation for the lack of fresh complaint, corroboration and for the delay in making the complaint.
- [30] In his summing up, the learned trial judge told the jury that the Crown case rested wholly on the complainant's evidence. He referred to the question of corroboration and fresh complaint. After explaining carefully the nature of corroboration, his Honour told the jury that there was no corroboration evidence in this case and he said it was therefore appropriate to warn them of the hazards of convicting the appellant on the uncorroborated evidence of the complainant. His Honour told them that these events happened "a long time ago where even normal human experience is that memories can encounter difficulty, particularly reaching back into the years of early childhood." He then said it was appropriate to warn them that they should only convict the appellant if they had scrutinised the evidence very carefully but were nevertheless satisfied of its truthfulness and accuracy.
- [31] Since the amendment of s 632 of the *Criminal Code* in 1997 a judge is no longer required by any rule of law or practice to warn the jury that it is unsafe to convict an accused on the uncorroborated evidence of a witness.
- [32] His Honour carefully explained the law relating to fresh complaint and then properly directed the jury on the failure to make a fresh complaint and what conclusions they were entitled to draw from that. His Honour also gave thorough and easily understandable directions to the jury about the difficulties the defence faced because of the delay in the making of the complaint.
- [33] It is hardly surprising that the complainant did not immediately complain nor that the offences were not corroborated. It is in the nature of these offences that they will often be committed in secret by a person who holds sway over the complainant whether because of age or authority or both. The complainant will often be aware that to make a complaint will be to disrupt the family situation in which he or she lives and hurt those the complainant loves. All of those circumstances applied in this case.

¹¹ Note this is not the statutory test as set out in the *Criminal Code* s 668E(1); *Gipp v The Queen* (supra) at 147-150 per Kirby J.

¹² *M v The Queen* (1994) 181 CLR 487 at 493, cf *McHugh J* at 523; *Jones v The Queen* (1997) 191 CLR 439 at 450.

- [34] Given the trial judge's careful directions and the evidence before the jury, it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused. Furthermore the jury had the advantage of seeing and hearing the complainant's evidence. The evidence is not such as to raise any reasonable doubt in this Court as to the guilt of the accused.

Sentence

- [35] The appellant also seeks leave to appeal against sentence. He was sentenced to five years imprisonment on count 1; one year imprisonment on count 2 and two and a half years imprisonment on counts 3-6 with a recommendation for consideration for parole after two years. The appellant was 68 years old at the time of sentencing. He had a minor criminal history with no similar offences.
- [36] The learned trial judge properly took into account the circumstances of the offences, the fact that the conduct occurred when the complainant was aged between 6 and 10 years, that the complainant was treated as a means of sexual gratification with very harmful effects on her, that the appellant was in a position of trust, as head of the household, that he had not demonstrated any remorse¹³ and, on the other hand, that he had no similar convictions, would suffer breakdown of friendships and relationships and would, due to his age, find prison particularly hard.
- [37] The sentences imposed are within the range demonstrated in comparable cases such as *R v R*¹⁴ where a sentence of five and a half years was imposed for the offence of maintaining an unlawful sexual relationship. The conduct included R's digital penetration of the vagina, oral sex with ejaculation into the complainant's mouth, vaginal intercourse, urination by the complainant into the applicant's mouth at his insistence and showing the complainant a pornographic movie featuring bestiality. R had no criminal convictions, had engaged in a sexual relationship with a girl between the ages of 8 and 13 years and had shown no remorse. He was a boyfriend of the complainant's mother and a father figure to the complainant.
- [38] In *R v Y*¹⁵ a sentence of five years imprisonment was confirmed on a conviction of maintaining a sexual relationship with the appellant's step-daughter when the girl was aged 8 to 14 years. There were 32 particularised counts and the complainant suffered clear ongoing adverse consequences. Unlike this case, Y had pleaded guilty and shown remorse for his actions. As the Court of Appeal there pointed out, previous good character is not necessarily a matter which should weigh heavily when it comes to the question of sentencing for such an offence as previous good character is not uncommon.
- [39] Accordingly the appeal against conviction should be dismissed and leave to appeal against sentence refused.

¹³ cf *A-G v Tooley* CA No 385 of 1996, 1 November 1996.

¹⁴ CA No 152 of 1998, 24 July 1998.

¹⁵ CA No 23 of 1997, 18 April 1997.