

HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

BCM

APPELLANT

AND

THE QUEEN

RESPONDENT

BCM v The Queen
[2013] HCA 48
27 November 2013
B31/2013

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

D C Shepherd with J Lodziak for the appellant (instructed by Legal Aid Queensland)

A W Moynihan QC with C M Kelly for the respondent (instructed by Director of Public Prosecutions (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

BCM v The Queen

Criminal law – Appeal – Appeal against conviction – Whether verdict unreasonable or unsupported having regard to evidence – Indecent dealing with child under 12 years – Inconsistencies in evidence of child complainant – Whether inconsistencies affected reliability – Whether inconsistencies went to essential features of complainant's account of offences.

Criminal law – Reasons – Whether Court of Appeal gave sufficient reasons – Whether Court of Appeal's reasons disclosed assessment of capacity of evidence to support verdict – Obligation to give reasons not discharged by observation that jury entitled to accept evidence of complainant.

Words and phrases – "unsafe and unsatisfactory", "verdict cannot be supported having regard to the evidence", "verdict is unreasonable".

Criminal Code (Q), ss 210, 668E(1).

1 HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. After a trial in the District Court of Queensland (Long DCJ), the appellant was convicted of two counts of unlawfully and indecently dealing with E, a child under 12 years, who was for the time being under his care¹. The jury was unable to agree on a third count of indecently dealing with E.

2 The appellant appealed unsuccessfully to the Queensland Court of Appeal (de Jersey CJ, Muir and White JJA), contending that the verdicts are "unsafe and unsatisfactory".

3 The appellant appeals by special leave granted on 6 June 2013 on two grounds. The first ground contends that the Court of Appeal failed to assess the evidence and to give adequate reasons for its conclusion that the verdicts were supported by the evidence. The second ground contends that the Court of Appeal erred in failing to conclude that the verdicts are unreasonable and unsupported by the evidence. As will appear, whatever criticisms may be made of the sufficiency of the Court of Appeal's analysis, the conclusion that the verdicts should not be set aside was correct. It follows that the appeal must be dismissed.

The factual background

4 E was six years old at the date of the offences. E viewed the appellant and his wife as her grandparents. Her stepfather is the appellant's stepson². The three offences were alleged to have occurred on the one occasion when E was having a "sleepover" at the appellant's home. They were particularised as occurring between 30 September 2008 and 1 December 2008.

5 The prosecution case was wholly dependent on E's evidence. E's first complaint was made to her mother when she was nine years old. It concerned the indecent dealings charged in the first two counts. The following day E was interviewed by Detective Enright about these offences. The interview, which took place on 26 April 2011, was video-recorded.

1 *Criminal Code* (Q), s 210(1)(a), (3) and (4).

2 According to the Court of Appeal, the appellant's stepson is E's own father. In E's interview with Detective Enright, however, E notes that her mother's husband is her stepfather. E's interview is consistent with her mother's evidence at trial that the appellant is her husband's stepfather and that she first met him in 2007, the year she married her husband.

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6 In March 2012, when E was 10 years old, she told her mother about a further indecent dealing that had occurred on the occasion of the sleepover at the appellant's home. E participated in a second interview with Detective Enright about this alleged offence.

7 The video recordings of the two interviews were in evidence at the trial³. E's evidence was pre-recorded and admitted pursuant to the provisions of ss 21AK and 21AM of the *Evidence Act 1977* (Q). She was 10 years old at the date of giving evidence.

The complaint

8 E's mother gave evidence of E's complaint. One evening at E's bedtime she had asked to talk to her mother privately. She volunteered that "Poppy touched me down there". In response to questioning, E said that the appellant had tickled her "down there". He had not tickled her anywhere else. His hand was underneath her underpants. The mother asked if this had happened at any other time and E replied "yes, it had happened again the next day when Nana ... had gone out". On this occasion E said that she told the appellant that she needed to go to the toilet because she did not want the tickling to continue. E said that these incidents had occurred on a sleepover "near Poppy's birthday - surprise birthday party". She had a nightmare and she had gone into her grandparents' bedroom for comfort. She had snuggled up to the appellant and had awoken during the night to find him touching her.

The first police interview

9 E was interviewed by Detective Enright on the day after she made her complaint to her mother. In the interview E said that she and her younger brother, B, had been staying overnight with the appellant and his wife. She and B slept in different rooms. They were the only children in the house. E had a nightmare in which a boy turned into a massive alien. She woke up and went into the appellant's room and he said to her "sleep with me". E got into bed next to him. The appellant's wife was asleep on the other side of the bed. E noticed that the wife had "little yellow things in her ear". When E woke it was daytime and the appellant was tickling her private parts under her underpants. This was the conduct charged in the first count.

3 *Evidence Act 1977* (Q), s 93A.

3.

10 After the initial touching E said that she had gone into the toy room. The appellant's wife had gone for a drive, taking B with her. The appellant had come into the toy room and taken E back to the bedroom. The appellant started "doing it again". He took off her underpants and tickled her private parts. This was the conduct charged in the second count. E brought the incident to an end by saying that she needed to go to the toilet. When she went to the toilet she had seen a hairy spider. This second episode of indecent dealing took place about an hour after the first. Afterwards E watched a movie on the television. The appellant's wife had returned while she was watching the movie.

11 E was able to place the incident because "a couple of days later we had Poppy's birthday".

E's further complaint

12 In March 2012 E's mother learnt that a date had been set for the pre-recording of E's evidence. She explained this to E and discussed the offences with her again. On this occasion E described a third incident which had taken place during the sleepover. It had taken place while the appellant's wife was out. The appellant lay on the bed and placed E on top of him and bounced her. Neither had any clothing covering their private parts. E had laughed and giggled. She had not told her mother about the incident because she felt bad about giggling. Her mother reassured E, saying that it was probably just nerves. E said that she had not felt "good or happy" about this incident but she had tried not to upset the appellant and she was scared. Her mother said that "Poppy had told [E] not to tell anybody".

13 E's mother informed Detective Enright of the further disclosure and E participated in a further interview with him.

The second police interview

14 In her second interview with Detective Enright E repeated her account of the first and second offences. She then went on to say that after the second incident the appellant had taken her to the bed and lain on it with her positioned on top of him. He had taken his pants off. He removed E's underpants and put her hand on his penis. His hand was on her vagina and he bounced her up and down. She pretended to laugh. The appellant's wife came home and the appellant stopped doing what he was doing. He told E not to tell anybody.

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15 Detective Enright reminded E that they had spoken about these things on the first occasion and said that there was something she had not told him on that occasion. E agreed, saying "yeah I forgot about it".

E's evidence

16 E was cross-examined on 29 March 2012. She was recalled for further cross-examination on 11 July 2012. E's account in cross-examination in March 2012 was largely consistent with the account she had given in her interviews. She said that at the time of the sleepover when these incidents occurred she, B, the appellant and the appellant's wife were the only persons in the house.

17 In her further evidence on 11 July 2012, E was uncertain about whether three foster children were also staying at her grandparents' home at the time of these incidents. It was put to E that the only time she had stayed at the appellant's house around the time of his birthday party was "a couple of weeks later". E was unable to remember. When pressed she said she was not sure about whether B was staying over at the appellant's house at the time of these incidents.

18 E's mother gave evidence that her children slept over at the appellant's house on a regular basis throughout 2006, 2007 and 2008. This had been a frequent event taking place at least once a fortnight and sometimes weekly. That E had stayed overnight at the appellant's home on only one occasion in the period October-November 2008 did not accord with the mother's recollection.

The defence case

19 The appellant gave evidence. He denied that E had been in bed with him on any occasion. He also denied that he had engaged in any sexual misconduct with her.

20 The appellant said that he and his wife had arranged to become foster carers and on 15 October 2008 had taken three children into their care. They had seen less of E and B in the period that they had the foster children staying with them. E had stayed overnight with them on only two occasions in the period covered by the indictment. The first occasion involved an excursion to Sea World. This took place on 11 and 12 October 2008. It was a treat to compensate E and B for the reduction in contact associated with the planned arrival of the foster children. On this occasion they stayed overnight in a unit. The appellant was able to date the excursion by the Sea World season ticket.

5.

21 The three foster children were living with the appellant and his wife from
15 October until late December 2008 or early January 2009.

22 The appellant's wife kept a diary in which she recorded observations of
the foster children and details of expenses required to support claims for
reimbursement from the Department. The second occasion when E stayed
overnight with the appellant and his wife was on 14 November 2008. This was
the only occasion when she stayed overnight at their home in the period covered
by the indictment. The appellant was able to place the date of this overnight stay
by an entry in his wife's diary. E had slept in the same room as the two female
foster children.

23 The surprise party for the appellant's birthday was held on 6 November
2008.

24 The appellant's wife gave evidence which was supportive of his account.
The only occasion in October and November on which E had stayed overnight in
their home was 14 November. E had not come into their bedroom and got into
bed with them on this or any occasion. The wife had not gone out leaving the
appellant alone with the children on this occasion.

25 The wife was cross-examined about her diary-keeping. She had been
encouraged by the "foster care group" to keep a diary recording behavioural and
other information about the children. The Department had advised them to keep
records of who came and went from their home. She had done so. There was an
entry recording E's overnight stay on 14 November 2008. B did not accompany
E on this occasion.

26 The wife said that she was a light sleeper and she denied that it was
possible that E had come into the bedroom and got into the bed without her
knowledge. She confirmed that she wore earplugs in bed.

The Court of Appeal

27 The appellant appealed to the Court of Appeal under s 668E(1) of the
Criminal Code (Q)⁴. His notice of appeal filed on 23 July 2012 contained a

4 Section 668E(1) of the *Criminal Code* (Q) provides:

"The Court on any such appeal against conviction shall allow the appeal if it
is of opinion that the verdict of the jury should be set aside on the ground
that it is unreasonable, or can not be supported having regard to the
(Footnote continues on next page)

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single ground that "[t]he verdicts reached by the jury [are] unsafe and unsatisfactory". In the language of the statute, this was a challenge that the verdicts are unreasonable, or cannot be supported having regard to the evidence. In written submissions filed before the hearing of the appeal the appellant sought leave to add two further grounds. The first further ground contended that the timing of the offences was material and it was an error not to have directed the jury of the necessity to prove that the offences occurred within days of the appellant's surprise birthday party. Alternatively, the second further ground contended that it was an error not to have directed of the necessity to prove that the offences occurred within the period particularised in the indictment. The focus of the appellant's submissions on his original ground, that the verdicts are unreasonable, was on the claimed inconsistency between the verdicts and the jury's inability to agree on the third count.

28 De Jersey CJ (with whose reasons the other members of the Court agreed) dealt with the two further grounds together. His Honour appears to have accepted that proof that the offences occurred within the period particularised in the indictment was essential⁵. His Honour was satisfied that the trial judge's directions were adequate to convey this requirement⁶. His Honour did not deal separately with the contention that in the way the trial had been conducted it was necessary to prove that the offences occurred at a time within days of the surprise birthday party. The appellant does not challenge the rejection of either of these grounds.

29 De Jersey CJ dealt with the challenge to the reasonableness of the verdicts last. His Honour's analysis, which is the subject of the first of the appellant's grounds in this Court, proceeded as follows. His Honour said that there was a rational explanation for the jury's inability to reach unanimity on count three. The fact that E delayed for a further year before raising an allegation concerning events that were said to have occurred within the same short interval may have been viewed by one or more jurors as adversely affecting the reliability of that allegation. E gave an explanation for the delay, which was that she was scared,

evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

5 *R v BCM* [2012] QCA 333 at [17].

6 *R v BCM* [2012] QCA 333 at [18].

7.

and that she was embarrassed about responding inappropriately during the incident. The explanation, especially in a young witness, may well have been accepted as believable. In the result, some members of the jury may have doubted the reliability of E's account of the third incident without doubting her overall credibility⁷.

30 Next, de Jersey CJ turned to the appellant's submission that the documentary support for his evidence of the arrival of the foster children and the date of the sleepover substantially eroded E's claim. His Honour noted the prosecutor's submission that the wife's diary was not a complete and accurate record of the comings and goings to and from the appellant's house. The balance of the analysis of the reasonableness ground is contained in the concluding paragraph of his Honour's reasons⁸:

"In the end, the issue for the jury was whether, in the context of the defence evidence, they were nevertheless satisfied beyond reasonable doubt that the respective offences occurred as related by E, including within the nominated timeframe (as to which see *SKA v The Queen* (2011) 243 CLR 400, 409). Especially having regard to the consistency of E's accounts, from when she first spoke to her mother in relation to counts one and two, the jury, acting reasonably, was entitled to take that view. Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict."

The sufficiency of the Court of Appeal's analysis

31 The principles to be applied in determining a ground which challenges the sufficiency of the evidence to support a conviction are well established⁹. They are collected in *SKA v The Queen*¹⁰. Prominent in the majority's discussion in

7 *R v BCM* [2012] QCA 333 at [20].

8 *R v BCM* [2012] QCA 333 at [24].

9 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; [1994] HCA 63; *MFA v The Queen* (2002) 213 CLR 606 at 622-624 [52]-[59] per McHugh, Gummow and Kirby JJ; [2002] HCA 53.

10 (2011) 243 CLR 400 at 405-406 [11]-[14] per French CJ, Gummow and Kiefel JJ; [2011] HCA 13.

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SKA of the application of those principles is the requirement that the appellate court's reasons disclose its assessment of the capacity of the evidence to support the verdict¹¹. In this case, the obligation was not discharged by observing that the jury was entitled to accept E's evidence and act upon it.

32 It is not in the interests of justice to remit the proceeding to the Court of Appeal for it to determine afresh the challenge to the reasonableness of the verdicts. This was a short trial that lasted not more than two days and in which the evidence was in short compass. The success of the appellant's second ground requires him to establish that the verdicts are unreasonable or cannot be supported by the evidence. We now turn to that ground.

The appellant's submissions

33 There are three strands to the appellant's second ground, which in combination are said not to allow the conclusion of guilt beyond reasonable doubt for each offence. First, the appellant relies on four inconsistencies in E's evidence that call into question her reliability:

- (i) E's mother said that E claimed to have woken during the night to find the appellant touching her. E told Detective Enright that she had woken up in daytime to find the appellant touching her.
- (ii) E told Detective Enright that when she was first indecently touched by the appellant, both he and his wife were in the bed. In cross-examination she stated that only the appellant was present.
- (iii) E told Detective Enright that she was watching a movie when the appellant's wife came home. In cross-examination E said that the appellant's wife had come home while the appellant was indecently dealing with her.
- (iv) In the first interview Detective Enright asked E if the appellant had said anything to her and E answered, "um, no". In cross-examination E said that the appellant had said to her "don't tell this to anyone". E said that at the time she made her first statement to Detective Enright she remembered that the appellant had told her not to tell anyone that this happened.

11 (2011) 243 CLR 400 at 409 [22]-[24] per French CJ, Gummow and Kiefel JJ.

34 The second strand of the unreasonableness argument arises out of E's delay in complaining about the third incident and her explanations for that delay. The appellant suggests that E's account that she was embarrassed to tell her mother about the incident because she had giggled in response to it cannot be reconciled with her account to Detective Enright that she had forgotten the incident at the time of her first interview with him. In cross-examination E gave an account that she was scared as the reason for delaying so long in telling her mother about the third incident. The appellant submits that this answer was suggestive of the deliberate withholding of information at the time of the first interview with Detective Enright.

35 The third strand is at the forefront of the appellant's submissions in this Court. He submits that E's initial account given to Detective Enright cannot stand with compelling evidence led in the defence case. In her interview E identified the date of the offences by saying that the surprise birthday party was held "a couple of days later". This would put the offences as occurring around the third or fourth of November 2008. The wife's diary did not record an overnight stay by E before 14 November 2008. Throughout the period 15 October to 1 December 2008 the three foster children were all living in the appellant's home. Yet E maintained that she and B were the only children at the appellant's home at the time of the offences. It was not possible that E had woken from a nightmare alone in the bedroom as she described. The two female foster children were sleeping in the same room as E on the one occasion during the period covered by the indictment in which E slept at the appellant's home.

Discussion

36 The jury must have rejected the appellant's denials of wrongdoing and his wife's evidence that it was not possible that E had got into the matrimonial bed without her knowledge. Nonetheless, the diary contained a record of comings and goings to and from the home in the period 15 October to 1 December and did not record an overnight stay by E before 14 November 2008. This pointed firmly against the offences occurring before the appellant's surprise birthday party. In circumstances in which the prosecutor opened the Crown case by saying "[E] said the offences happened shortly before the [appellant's] surprise birthday party", was it open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt?

37 Defence counsel in his closing submissions put that E had repeatedly described the offences as happening "a short time before the surprise birthday party". This was to overstate the position. It is necessary to relate E's accounts respecting the date of the offences in some detail to demonstrate why that is so.

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38 E's mother's evidence was that E said the incidents occurred at a time "near Poppy's birthday" (emphasis added). This is the first account given by E of the offences. In her first interview with Detective Enright, E gave this account of the timing of the incidents:

"E: I think it was the year [unintelligible] it was near Poppy's birthday.

Enright: And, and tell me why you think it was near Poppy's birthday.

E: 'Cause a couple of days later we had Poppy's birthday and um, yeah –".

39 In cross-examination, which took place some 11 months after the first interview, E was asked:

"Q. Okay. So, I think I've got to try and understand this, because it's a bit hard. You say that Poppy touched you just before his birthday, or was it just after his birthday, which one, do you remember or not? If you don't remember, by the way, you just tell me?

A. After."

40 E was recalled for further cross-examination more than three months after giving this evidence. On this occasion the cross-examiner put these questions to her:

"Q. Now, do you remember giving evidence previously in this courthouse about the things that you say Poppy did to you?

A. Yes.

Q. Now, do you remember giving evidence previously that those things happened a few days before his birthday party?

A. Yes.

Q. And is that still the case? Do you remember these things happening a few days before his birthday party?

A. Yes."

41 The second question put to E on the resumed hearing wrongly asserted that she had said in evidence on the first occasion that these events occurred before the appellant's surprise birthday party. It was objectionable. In the event, no objection was taken and the cross-examiner obtained E's assent to the proposition.

42 E's answers in the balance of the cross-examination at the resumed hearing revealed uncertainty respecting the timing of events and the presence or absence of the foster children:

"Q. And do you remember giving evidence previously about the foster children that came to live with Poppy?

A. Yes.

...

Q. Now, when you say these things happened that your Poppy did to you, do you remember if the foster children were living there then?

A. I'm not sure.

Q. Can you remember them being there on the day that you say these things happened?

A. Not sure.

Q. Okay. Do you remember the first time that you met those foster children?

A. Yes.

Q. And could it have been the case that that happened before Poppy's birthday party?

A. I'm not sure.

...

Q. Well, you say – you've told us previously that you remember these things happening before his birthday party; is that right?

A. Yes.

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12.

...

Q. [E], what I want to suggest to you – and it's okay if you can't remember, you can say that, but what I want to suggest to you is that the only time around Poppy's birthday party that you stayed over their house was a couple of weeks later, not beforehand at all. Does that sound right to you? Or is it the case, [E], that you definitely remember staying over Poppy's house before his birthday party?

A. Can't remember."

43 As earlier noted, the prosecution case was opened on the basis that E's evidence placed the offences as having occurred shortly before the appellant's surprise birthday party. In circumstances in which E's evidence had been pre-recorded this is surprising: it was known that E had given differing accounts of the timing of the sleepover in relation to the birthday party. It remains that the appellant was under no misapprehension as to the case he was to answer. In closing submissions the prosecutor did not tie the prosecution case to proof that the offences occurred before the surprise birthday party. She submitted that E had been uncertain about the timing of the sleepover and about whether the foster children had been present.

44 E's willingness to agree with the proposition that the sleepover had been before the appellant's surprise birthday party is to be assessed taking into account that she was an 10 year old child describing an incident that occurred when she was six years old. E was consistent in associating the offences with a sleepover that had taken place near the appellant's surprise birthday party. The defence case acknowledged that E had had a sleepover some eight days after the party. This was within the period particularised in the indictment.

45 The fact that E said B had been present with her on the occasion of the sleepover and that she did not recall the foster children being there at the time were matters to be taken into account in assessing her reliability. However, they were not matters that were critical to the acceptance of her evidence of the offences. The Court of Appeal was right to treat as believable E's explanation that she had not told her mother about the third incident because she was embarrassed about telling her how she had reacted to the assault and because she felt scared. The suggestion that E deliberately withheld information about the incident in her interview with Detective Enright was one that the cross-examiner chose not to put to her.

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13.

46 The four inconsistencies in E's accounts are to be considered in light of her age at the date of the offences, the interval between the offending and her first interview with Detective Enright, and the further interval between the interview and her evidence. On the essential features of her account of the offences E was consistent. She had woken from a nightmare in which a boy turned into a massive alien. She had gone into the appellant's room and got into bed with him. The appellant had indecently touched her as she lay in bed next to him. Sometime not long after this first incident, the appellant had sought her out and taken her back into the bedroom, where he had indecently touched her in the same way. She had extricated herself from the situation by saying that she needed to go to the toilet. When she went into the toilet she had seen a hairy spider. E was also consistent in her account that when she got into bed next to the appellant, his wife was asleep on the other side of the bed. It was open to consider that her recollection of the wife's earplugs was a damning detail.

47 None of the criticisms of E's evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict. It follows that the appeal must be dismissed.