CITATION:	*Foster v The Queen* [2021] NTCCA 8
PARTIES:	FOSTER, Darren James v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 14 of 2020 (21924957)
DELIVERED:	19 November 2021
HEARING DATE:	10 June 2021
JUDGMENT OF:	Grant CJ, Kelly and Brownhill JJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Unreasonable verdict

Appellant found guilty of indecent assault and sexual intercourse without consent following trial by jury – Whether verdicts unreasonable and not supported by evidence at trial – The purported inconsistencies, discrepancies and other inadequacies identified by the appellant did not lead to a satisfaction that the jury, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt – Appeal dismissed.

BCM v The Queen (2013) 303 ALR 387, *BM v R* [2017] NSWCCA 133, *FN v The Queen* [2021] NTCCA 5, *GAX v The Queen* (2017) 344 ALR 489, *Kassab (a pseudonym) v R* [2021] NSWCCA 46, *Libke v The Queen* (2017) 230 CLR 559, *Lynch v The Queen* [2020] NTCCA 6, *M v The Queen* (1994)

181 CLR 487, *Pell v The Queen* (2020) 268 CLR 123, *PW v The Queen* [2020] NTCCA 1, *R v M, WJ* [2004] SASC 345, *R v Murphy* (1985) 4 NSWLR 42, *RA v R* [2020] NSWCCA 356, *RC v R; R v RC* [2020] NSWCCA 76, *SKA v The Queen* (2011) 243 CLR 400, *Tyrell v The Queen* [2019] VSCA 52, *Willcocks v The Queen* [2021] NTCCA 6, referred to.

REPRESENTATION:

Counsel:

Appellant:	JCA Tippett QC
Respondent:	V Engel with D Jones

Solicitors:

Appellant:	Maleys Barristers & Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	11

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Foster v The Queen [2021] NTCCA 8
No. CA 14 of 2020 (21924957)

BETWEEN:

DARREN JAMES FOSTER
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY and BROWNHILL JJ

REASONS FOR JUDGMENT
(Delivered 19 November 2021)

THE COURT:

[1] This is an appeal against conviction. On 13 August 2020, the appellant was found guilty following a trial by jury of one count of indecent assault on a child under the age of 16 and one count of having sexual intercourse without consent with the same child. On 10 December 2020, a single Judge granted an extension of time within which to make application for leave to appeal and leave to appeal. The sole ground of appeal is that the verdicts of guilty are unreasonable and cannot be supported by the evidence.[1]

1 Although the appellant did not file a Notice of Appeal following the grant of leave to appeal, the Appellant's Outline of Argument on Appeal contends 'that the verdicts of guilty are unreasonable and cannot be supported by the evidence or in the alternative are unsafe and unsatisfactory'.

Principles

[2] The principles to be applied in appeals of this nature are well established and set out by this Court in *PW v The Queen* in the following terms (citations omitted):

> In *M v The Queen*, Mason CJ, Deane, Dawson and Toohey JJ said that the test for an unsafe or unsatisfactory verdict was whether the court thought that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The majority emphasised, however, that it was not the function of the court to answer that question merely by examining the transcript of evidence and the exhibits. Their Honours said that:
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> > *"... in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."*
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> The plurality explained the application of the test as follows:
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> > *"In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks "credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even 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."*
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> Gaudron J agreed with the majority formulation of the test, as did Brennan J, although Brennan J said that the question as to whether it was "open to the jury" to be satisfied of guilt beyond reasonable doubt was to be resolved by asking whether the jury was "upon the whole of the evidence ... bound to have a reasonable doubt" or whether "the

jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused".

In *Libke v The Queen*, Hayne J (citing the passage from the majority judgment in *M v The Queen* referred to above) said:

> *But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.* [2]

[3] In *Pell v The Queen*, the High Court confirmed that the statement from *Libke* extracted above was consistent with what was said by the majority in *M v The Queen*, and does not impose any stricter test.[3]

Consideration

[4] The appellant contends that the complainant's evidence contained discrepancies, displayed inaccuracies, and otherwise lacked probative force that should lead this Court to conclude, after making full allowance for the advantages enjoyed by the jury, that there is a significant possibility that the appellant is an innocent person.[4] The determination of that contention involves a two stage process. The first stage involves determining whether each of the discrepancies and inaccuracies asserted by the appellant were in fact present in the evidence. The second stage involves determining whether such discrepancies and inaccuracies as there were, when taken either

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2 *PW v The Queen* [2020] NTCCA 1, [107]-[108] per Kelly J and Riley AJ. See also *SKA v The Queen* [2011] HCA 13; 243 CLR 400, [11]-[14]; *GAX v The Queen* [2017] HCA 25; 344 ALR 489, [25]; *Lynch v The Queen* [2020] NTCCA 6; *FN v The Queen* [2021] NTCCA 5; *Willcocks v The Queen* [2021] NTCCA 6.

3 *Pell v The Queen* (2020) 268 CLR 123, [44]-[45]. See also *Tyrell v The Queen* [2019] VSCA 52 at [70].

4 Appellant's Outline of Argument on Appeal, [6].

individually or in combination, go to the essential features of the complainant's account of the offences;[5] and, if so, whether they necessarily give rise to reasonable doubt or whether they 'were explicable in a manner that did not provide a basis for them to reflect on [the complainant's] credit'.[6]

[5] The offences were alleged to have been committed by the appellant at his home during a sleepover which the complainant ('TG') had with the appellant's daughter ('AF'). TG and AF were school friends who were 12 and 11 years of age respectively at the time. By way of broad summary, TG's evidence was that she and AF had fallen asleep watching television in the 'end bedroom', which was the appellant's bedroom. She woke early in the morning and found that the appellant was lying next to her and hugging her. She went to the toilet, and when she returned the appellant directed her to lie next to him in the double bed closest to the television. He then reached down into her shorts and underwear and started rubbing and touching her vagina with his finger. TG said that the touching extended to 'where the lips of her vagina met on the inside'. The appellant stopped and moved away when AF began to wake up. Against that background, counsel for the appellant identified a number of matters in TG's evidence which were said to undermine the reliability of her account.

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5 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *BCM v The Queen* [2013] HCA 48; 303 ALR 387.

6 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *R v M, WJ* [2004] SASC 345.

[6] First, counsel for the appellant submitted that prior to the child forensic interview ('CFI') with police on 14 June 2019, TG had not made any allegations of penetration, despite having spoken to five other people at various earlier times. Counsel for the appellant contended that 'TG's credit and reliability was significantly impugned on that issue' which was 'obviously of central importance to the outcome of the trial'.[7] Counsel for the respondent countered that TG's account in the CFI to the effect that the appellant had stroked her on the inside of her vagina, was not the first time this allegation had been made. That account was consistent with her description of 'fingering' made in a complaint to a friend at an earlier time.

[7] Second, counsel for the appellant pointed to the fact that during cross-examination, TG said for the first time that AF had asked TG why she and her father were lying next to each other. Counsel for the appellant contended that this had 'all the hallmarks of bolster'; and that such a conversation, if it had taken place, would have been striking enough to have been remembered and related to police in the CFI.[8] Counsel for the respondent countered that the first time anyone had asked TG about this was in cross-examination. During the CFI, TG was asked to describe in detail what the appellant had done. The focus was always on what had been done to her and on the time during which it had occurred. The conversation with AF took place later in the day – a time period that TG was not specifically

7 Appellant's Outline of Argument on Appeal, [10].

8 Appellant's Outline of Argument on Appeal, [11].

asked about in the CFI. There is also something implausible in the proposition that a 12-year-old complainant would purposefully fabricate evidence of this type with the intention of bolstering her other evidence, in the understanding that it would give that other evidence a level of credibility which it would not otherwise enjoy.

[8] Third, counsel for the appellant was critical of TG for mentioning that the appellant was smoking 'weed' and characterised it as an attempt to blacken the character of the appellant. However, as counsel for the respondent pointed out, this detail was contained in a complaint which had been made by TG relatively shortly after the incident occurred and well prior to trial; it was clearly not raised by TG during the course of her evidence for the purpose of depicting the appellant in a poor light.

[9] Fourth, counsel for the appellant submitted that the brazen circumstances of the offending described by TG gave rise to a reasonable doubt in and of itself. That submission was made in tandem with the contention that TG was having 'personal difficulties' at the time the allegations were made, which was also apt to cast doubt on her credibility. The first proposition must be rejected. It is now well-recognised, if not notorious, that it is common for child sexual assaults to occur in the family home and/or in brazen circumstances. The second proposition is also not such as to give rise to reasonable doubt divorced from a general assessment of TG's credibility. TG was cross-examined in relation to those 'troubles', and it was put to her that she had made up the allegations against the appellant.

As counsel for the respondent submitted, the 'troubles' in question were that she was being bullied at school, and it might seem unlikely that she would fabricate an account which would potentially expose her to more bullying. In any event, it is not open to draw conclusions about the possibility of false complaint based on stereotypical expectations or generalisations about behaviour.[9] The assessment of TG's credibility, having regard to the matters put to her in cross-examination, was a matter properly within the province of the jury in the application of its collective wisdom and common sense.

[10] Fifth and finally, counsel for the appellant focused heavily on the evidence of AF and the fact that it was 'diametrically opposed' to the evidence of TG in crucial respects. As described above, TG's evidence was that she and AF had fallen asleep in the end bedroom which the appellant usually occupied. TG's evidence was also that there were three beds in the room in which they had fallen asleep. Conversely, AF said that they fell asleep in her bedroom, and that there was only one bed in that room. She said that she went to sleep after the appellant had gone to sleep, and that she had checked the appellant was sleeping before she went to bed. She locked the door to the bedroom to keep the family dog out. She said that she stayed awake using her iPad until about 2.00 am, after TG had gone to sleep. She checked the time before she went to sleep. Then, in the morning she woke up before everyone else. She had set her alarm for either 4.00 am or 6.00 am, she could not remember

9 *RC v R; R v RC* [2020] NSWCCA 76, [147], [153], [161]; *Kassab (a pseudonym) v R* [2021] NSWCCA 46, [256].

which. She went to the kitchen, ate something and then went back to her room. TG was still asleep and she waited until TG woke up. She and TG then made pancakes while the appellant remained sleeping in his room. She said that TG did not leave the bedroom at all from the time of her arrival until she awoke the following morning.

[11] Counsel for the respondent submitted that it was plainly open to the jury to reject AF's evidence on the basis that it lacked credibility for a number of reasons. It was supposed to be a normal weekend where nothing special happened, but over a year later AF was able to relate in great detail the time she went to sleep and woke up, that the appellant was still in his room when she and TG woke up, and other details. AF's assertion that she did not go to sleep until 2.00 am, but had set her alarm to wake up at 4.00 am, or possibly 6.00 am, was improbable. Similarly, it was implausible to suggest that TG remained in the bedroom from the time of her arrival at AF's house, and did not leave it to eat, drink or use the toilet until the following morning.

[12] Counsel for the respondent submitted that the jury's assessment of the evidence of AF and TG turned on an assessment of their respective credibilities; and that this was a classic matter in which the jury, who saw the two witnesses give evidence, had the advantage. That submission should be accepted. Both counsel at trial agreed in their closing submissions to the jury that if the jury accepted the evidence of AF, or if they considered that it gave rise to a reasonable doubt, they should bring in a verdict of not guilty. The jury was directed by the trial judge that if they did not accept AF's

evidence, they should simply put it to one side and consider the evidence of TG. That was an entirely appropriate direction in the circumstances.

[13] Counsel for the appellant also sought to draw attention to what was said to be TG's inaccurate recollection of certain peripheral details, including the layout of the house and the positioning of furniture within the house. We do not consider that there was any material discrepancy between the diagrams depicting the layout of the house drawn by TG and AF, and to the extent that there were any inaccuracies in TG's description of peripheral matters, they were not such as to adversely affect her credit[10].

[14] In advancing the submission about the disparity between the evidence given by TG and AF, counsel for the appellant sought to criticise the conduct of the prosecutor in disparaging AF's evidence in the closing address on the ground that AF had a motive to protect her father, without having put it to her in cross-examination that she had a motive to lie. Counsel for the appellant contended that the jury was never given the opportunity to assess that assertion by the prosecutor by observing AF's demeanour when that position was put to her fairly and squarely.

[15] That submission must be considered in light of the fact that the case was conducted on the basis that AF's evidence was not accepted by the Crown. The Crown made application, and was granted leave, to cross-examine AF as a witness whose evidence was unfavourable to the Crown case. That AF's

10 *RA v R* [2020] NSWCCA 356, [40].

evidence was in fact unfavourable to the Crown case would have been readily apparent to the jury. It was open to the prosecutor to probe the reliability of AF's account in cross-examination without putting it to her that she was lying; not least because the notion that she was deliberately giving false evidence was only one of the possibilities available to explain why a jury might regard such testimony as unreliable.[11] Moreover, defence counsel made a forensic decision at trial not to question AF about a motive to lie, and the fact that the prosecution also chose not to would, if anything, have been to the benefit of the defence.

[16] Counsel for the appellant contended not only that the motive to lie should have been put to AF in cross-examination, but also that the trial judge should have directed the jury that they had to be satisfied beyond reasonable doubt that AF had a motive to lie. That submission was made in reliance on *R v Murphy*.[12] That case is not authority for any such proposition. It is authority only for the proposition that where motive to commit the offence is an essential element of the Crown case against an accused, the jury should be directed that they must be satisfied that the motive asserted by the Crown has been proved beyond reasonable doubt. The case has nothing to say about the assessment of a witness's evidence. The idea that a jury should be told that they must be satisfied beyond reasonable doubt that a witness has a motive to lie before they can reject that witness's evidence is contrary to

11 *BM v R* [2017] NSWCCA 133, [49].

12 *R v Murphy* (1985) 4 NSWLR 42

established practice and common sense. The jury was perfectly entitled to take into account the fact that AF was the appellant's daughter in assessing her evidence, without need for any particular direction in that respect.

[17] For these reasons, this is not a case in which upon the whole of the evidence, the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.

Orders

[18] The appeal is dismissed.

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