SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2003] QCA 76
PARTIES:	**R** **v** **SMITH, Nathan Alexander** (appellant)
FILE NO/S:	CA No 274 of 2002 DC No 312 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2003
JUDGES:	McMurdo P, McPherson JA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Appeal against the convictions of 9 August 2002 allowed** **2. Retrial ordered** **3. Application for leave to appeal against sentence granted in part; appeal against sentence granted in part; sentence imposed on 12 August 2002 for breach of suspended sentence originally imposed on 7 November 2000 set aside** **4. Sentence imposed on 12 August 2002 for common assault confirmed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE - PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant convicted of two counts of assault occasioning bodily harm – whether learned trial judge erred in law in refusing to order separate trials CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – whether learned primary judge erred in admitting evidence which was not recorded either electronically or in writing until six months later – whether evidence complied with the provisions of the

Police Powers & Responsibilities Act 2000 (Qld)

Festa v The Queen (2001) 76 ALJR 291, applied
King v Bryant (No 2) [1956] StRQd 570, considered

Criminal Code 1899 (Qld), s 597A(1), s 567(2), s 668E(1A)
Police Powers & Responsibilities Act 2000 (Qld), s 246, s 263, s 264, s 266

COUNSEL: The appellant appeared on his own behalf
M D Symons for the respondent

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

[1] **McMURDO P:** On 9 August 2002, the appellant was convicted after a jury trial of two counts of assault occasioning bodily harm. He then immediately assaulted one of the complainants in the court room. His sentence was adjourned until 12 August 2002 when he pleaded guilty by way of ex officio indictment to a further count of common assault arising out of the court room incident. He was sentenced to nine months imprisonment for the common assault, cumulative upon an 18 month term of imprisonment for the two counts of assault occasioning bodily harm, which was in turn cumulative upon a 16 month suspended sentence activated by the subsequent convictions. He appeals against his two convictions based on the jury verdicts.

[2] The prosecution case concerns two separate attacks on two young men on The Strand in Townsville at about 7.45 pm on 21 October 2001, one following the other. Both complainants and eyewitnesses gave descriptions of the attacker, some of which described him as wearing a white shirt with "Kani" and "23". About 20 minutes after the attack the complainant in count 2 believed he saw his attacker and two companions walk towards a carpark near The Strand and phoned police. At about this time, police officer Swenson, armed with the description given by the first complainant, spoke to the appellant and his two companions in a carpark near The Strand. He wrote down a description of the appellant which included that the appellant was wearing a shirt with "Kani" and "23". The descriptions of the attacker given by eye witnesses in this and other, but not all, respects matched the description of the appellant recorded by police officer Swenson. Police officer Kitching ("Kitching") questioned the appellant about the assaults in an unrecorded conversation in November 2001 in which he heard the appellant say, "I had a short scuffle over a girl. I wouldn't call that an assault." Some months after the attack, the complainant in count 2 identified the appellant from photo boards as resembling his attacker (although other attempts at identification by photo board by both complainants were mistaken).

[3] The appellant gave evidence denying the conversation with Kitching and any involvement in the offence; he stated that both he and a companion that evening, Mr Kake, were wearing "Kani" shirts with "23" on them, although Mr Kake's shirt was greeny-grey with navy sleeves, whilst his was cream. Another of his companions that evening, Mr Jay Jobson, gave evidence that the appellant was not involved in these assaults.

[4] The appellant, who is unrepresented on this appeal, relies on a considerable number of grounds set out in his notice of appeal. He has expanded on some of those grounds in his oral submissions. He vigorously contends he has been wrongly convicted.

[5] He first submits the learned trial judge erred in law in refusing to order separate trials and that the two counts were wrongly joined. Counsel at trial conceded the charges were properly joined but applied for a separate trial, apparently under s 597A(1) *Criminal Code*, contending that prejudice would flow from a joint trial. The offences were committed on The Strand in Townsville on 21 October 2001, one after the other. Both involved an assailant, with two companions nearby, approaching a previously unknown victim after claiming that the victim had caused offence. The offences were properly joinable because the charges, as was conceded at trial, formed part of a series of offences of similar character: see s 567(2) *Criminal Code*.

[6] The evidence of the second complainant was admissible in the trial of the first complainant because the second complainant's evidence was that the person who assaulted the first complainant was the same person who assaulted him; his description of the assailant was therefore relevant and admissible on both counts. It follows that evidence as to the identification of the assailant in count one was also relevant to the identification of the assailant in count two. The trials should have been heard together and no significant prejudice resulted from a joint trial. The exercise of the discretion in refusing to order separate trials did not miscarry and nor has there been any miscarriage of justice as a result; it was the sensible outcome. There is nothing in this ground of appeal.

[7] The appellant next contends that the learned primary judge erred when he allowed evidence to be given of the statement: "I had a bit of a scuffle over a girl. You wouldn't call it an assault" because this was not an admission against interest and was irrelevant. His Honour rightly rejected that contention. If the jury was satisfied the statement was both made and true, the evidence was capable of being an admission against interest to the effect that the appellant had been involved in some violent behaviour that day. That was a further circumstantial fact capable of supporting the prosecution case.

[8] The appellant alternatively contends the learned primary judge erred in admitting evidence of that statement which was not recorded either electronically or in writing until over six months later; it did not comply with the *Police Powers & Responsibilities Act* 2000 (Qld) ("the Act"). The relevant sections provide:

> "**246** (1) This Part applies to a person (**"relevant person"**) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.
>
> (2) However this Part does not apply to a person only if the police officer is exercising any of the following powers –
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> (a) power conferred under any Act or law to detain the person for a search;
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> (b) power conferred under any Act to require the person to give information or answer questions.
>
> …

263 (1) This section applies to the questioning of a relevant person.[1]
(2) The questioning must, if practicable, be electronically recorded.
Examples for subsection (2)-
1. It may be impracticable to electronically record a confession or admission of a murderer who telephones police about the murder and immediately confesses to it when a police officer arrives at the scene of the murder.
2. It may be impracticable to electronically record a confession or admission of someone who has committed an armed hold-up, is apprehended after pursuit, and makes a confession or admission immediately after being apprehended.
3. Electronically recording a confession or admission may be impracticable because the confession or admission is made to a police officer when it is not reasonably practicable to use recording facilities.
(3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 264.
(4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.

Requirements for written record of confession or admission
264 (1) This section applies if a record of a confession or admission is written.
(2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).
(3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.
(4) As soon as practicable after making the record –
(a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and
(b) the person must be given a copy of the record.
(5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.
(6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.
(7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading; and anything else done to comply with this section."
…
Admissibility of records of questioning etc
266 (1) Despite sections 263 and 264, the court may admit a record of questioning or a record of a confession or admission (the

[1] See s 246 and Sch 4 definition "relevant person" (e) of the Act.

> **"record"**) in evidence even though the courts considers this division has not been complied with or there is not enough evidence of compliance.
> (2) However, the court may admit the record only if, having regard to the nature of and the reasons for the non-compliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

[9] This contention was raised by the appellant's counsel at the commencement of the trial. No evidence was called on a *voir dire* although Kitching's statement was handed to the judge. In that statement, Kitching said that he and police officer Paff went to Lot 2, Woodstock Road, Giru and executed a search warrant on Jay Jobson. The appellant was also present. Police took possession of two pairs of black shorts with red stripes down the sides. The police officers then transported the appellant to the Giru police station in relation to this and other matters where Kitching had a short conversation with him in the presence of police officer Paff. Kitching said, "Nathan, I also need to speak to you about two assaults at The Strand in Townsville that occurred on the night of 21 October this year. Do you know what I'm talking about?" The appellant replied, "No. What assault?" Kitching said, "Mate, two people were assaulted on The Strand near the basketball courts there and you and your mates were located by police shortly afterwards and fitted the description of the person responsible." The appellant said, "I had a bit of a scuffle over a girl. You wouldn't call it an assault." Kitching then invited the appellant to take part in a record of interview but the appellant declined.

[10] Kitching's statement makes clear that the appellant was a "relevant person" under s 263 of the Act and that he was being questioned by a police officer when he made the alleged admission. The conversation was not recorded electronically; it was only recorded in written form many months later. In his evidence at trial, Kitching subsequently agreed that at the time of the questioning he had a field tape recorder available for use. His Honour does not seem to have taken cognisance of s 263(3) of the Act which ordinarily only allows evidence of an admission to a police officer during questioning to be received if it is electronically recorded[2] or, as soon as reasonably practicable afterwards, is recorded in writing[3] and is read to the person in the language used by the person during the questioning and the person is given a copy of the record.[4] As the conversation occurred at the police station and Kitching was in possession of a field tape recorder, it was obviously practicable for him to have either electronically recorded the conversation or made a written record of it, and to have otherwise complied with s 264 of the Act but neither course was adopted. Section 263(3) of the Act rendered Kitching's evidence of his conversation with the appellant inadmissible.

[11] Section 266 of the Act allows a record of questioning to be admitted despite non-compliance with the Act where the court is satisfied "in the special circumstances of the case, admission of the evidence would be in the interests of justice". Here, however, it was not sought to tender any written record but rather Kitching was

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2 Section 263(4) of the Act.
3 Section 264(3) of the Act.
4 Section 264(4) of the Act.

permitted to give oral evidence of the conversation. The discretion conferred by s 266 was therefore of no assistance to the respondent but in any case there were no circumstances, special or otherwise, which suggested the admission of a written record of Kitching's evidence would be in the interests of justice. To allow in such evidence here would be to ignore the safeguards for those the subject of police investigation and questioning provided by Ch 7 of the Act and to risk a return to an earlier less accountable period when police evidence of verbal admissions was regularly challenged in the courts as fabricated, often with justification. Kitching's evidence was wrongly admitted.

[12] The respondent contends that, nevertheless, the conviction may be upheld because the admission of this evidence has caused no substantial miscarriage of justice.[5] In the circumstances here, where the evidence was finely balanced and turned on an identification based on pieces of circumstantial evidence, I am far from satisfied that a reasonable jury properly instructed would inevitably have convicted the appellant if that evidence had not been admitted: *Festa v The Queen*.[6] It follows that the appeal must be allowed and it becomes unnecessary to consider the numerous other grounds of appeal raised by the appellant.

[13] A retrial must be ordered on these counts.

[14] Although the appellant withdrew his application for leave to appeal against the sentences imposed on 12 August 2002, it is possible that the appellant's convictions on these two offences were relevant to his Honour's determination that there had been no good cause shown for not activating the remainder of the suspended sentence imposed in the Townsville District Court on 7 November 2000. I would therefore also set aside his Honour's order requiring the appellant to serve the 16 months of the suspended sentence imposed in the Townsville District Court on 7 November 2000. The applicant has abandoned his application for leave to appeal against sentence as to the nine month term of imprisonment imposed for common assault arising out of the court room incident. That sentence, which was plainly justified in all the circumstances, must stand.

[15] I would make the following orders:

(a) Appeal against the convictions of 9 August 2002 allowed.

(b) Retrial ordered.

(c) Application for leave to appeal against sentence granted in part; appeal against sentence granted in part; sentence imposed on 12 August 2002 for breach of suspended sentence originally imposed on 7 November 2000 set aside.

(d) Sentence imposed on 12 August 2002 for common assault confirmed.

[16] **McPHERSON JA:** The facts and the statutory provisions relevant to this appeal are set out in the reasons of the President. Because of the general importance of the matter, I will, however, give my own reasons concerning the admissibility of the critical admission made by the appellant.

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5 Section 668E(1A), *Criminal Code*.

6 (2001) 76 ALJR 291.

[17] Division 5 of Part 3 of Chapter 7 of the *Police Powers and Responsibilities Act 2000* deals essentially with three matters that are of concern here. Section 263 is directed to ensuring that police questioning is recorded. The section applies to the questioning of a "relevant person", an expression defined for the purposes of Part 3 in s 246 of the Act. Given that predicate, s 263(2) requires that the questioning must "if practicable" be electronically recorded. Section 263(3), which is the pivotal provision, then goes on to say that if during the questioning a confession or admission is made to a police officer, it is admissible in evidence "only" if it is recorded as required by s 263(4) or s 264. Section 263(4) is evidently designed to ensure that, if the confession or admission is electronically recorded, the whole of the questioning is recorded rather than only the confession or admission. It is not necessary to pursue this aspect of the matter here because neither the questioning nor the admission relied on by the prosecution at trial was electronically recorded in this instance.

[18] Section 264 states the requirement for written records of confessions or admissions: s 264(1), and requires that the written record must comply with the provisions of ss 264(3) to 264(7). By s 264(3), a police officer must make a written record in English of things said by or to a relevant person during questioning, and that written record must be made while questioning that person "or as soon as reasonably practicable thereafter". In addition, by s 264(4), and as soon as practicable after making the record: (a) the record must be read to the person, and (b) that person must be given a copy of the record. Before reading it, an explanation, complying with the responsibilities code, must by s 264(5) be given of the procedure to be followed to comply with s 264, and an opportunity provided to draw attention to any error in or omission which it is claimed was made in the written record: see s 264(6). In addition an electronic recording must be made of that reading and of everything said during the reading or anything else done to comply with the section: s 263(7).

[19] Section 266 is directed to the admissibility of records of questioning. It provides in s 266(1) that, despite the provisions of ss 263 and 264, the court may admit a record of questioning or a record of a confession or admission even though the court considers that Division 5 has not been complied with or there is not enough evidence of compliance: s 266(1). However, the record may be admitted only if, "having regard to the nature of and the reasons for the non-compliance and any other relevant matters", the court is satisfied "in the special circumstances of the case" admission of the evidence "would be in the interests of justice".

[20] On turning to the evidence adduced at the trial in this case, the following matters emerge. Detective Sergeant Kitching said that on 6 November 2001, which was some 16 days after the assaults on 21 October 2001, he went to the place where the appellant was living at Woodstock Road, Giru. He saw the appellant there and after conducting a search in which items of clothing were seized, he transported the appellant to the Giru police station. At the police station he said he wanted to speak to him in relation to the two assaults at The Strand on 21 October. He asked the appellant "Do you know what I am talking about?". The appellant's reply was "No. What assault?" To that Det Sgt Kitching responded by saying "Mate, there were two persons assaulted at The Strand near the basketball courts there. You and your mates were located by police a short time afterwards and your description fitted that of the person responsible". The appellant said "I had a short scuffle over a girl. I wouldn't call that an assault". Kitching then said, "Nathan, I want to conduct an

interview with you in relation to that matter". The appellant, however, declined to participate in such an interview.

[21] There are facilities at the police station for interviewing persons electronically. It also appears from the cross-examination of the detective that at the time in question he had available to him a field tape recorder by means of which he could have, but did not, record the conversation which took place between him and the appellant. He appears to have been working on the assumption that Division 5 of Part 3 would not take effect until he started formally questioning the appellant. The appellant said, however, that he would not participate in an interview on the subject. The question is whether this assumption (which may perhaps have been shared by the learned judge at the trial) is correct. Section 246(1) provides that the provisions of Part 3 of the Act apply to a "relevant person" if the person "is in the company of a police officer for the purpose of being questioned about his or her involvement in the commission of an indictable offence". When the conversation took place, the appellant was certainly "in the company of" Det Sgt Kitching who was intending to question him about his involvement in the two assaults on 21 October 2001. That being so there is little doubt that at the relevant time he was in Kitching's company for that purpose. Section 246(1) therefore applied to the appellant making him a relevant person. No submission to the contrary was advanced either at the trial or before this Court.

[22] The provisions of Part 3 of Chapter 7 therefore extended to the appellant on this occasion. The real issue is, however, whether Division 5 operated at that stage of the police investigation. By s 263(1), the provisions of s 263 apply to the "questioning" of a relevant person. The problem here is to determine whether "the questioning" of the appellant as a relevant person had then begun. For that purpose, it is necessary to look again at what was said by Kitching. If he had done no more than identify himself and the occasion or incident about which he wished to interview the appellant, there would, I think, be little doubt that the questioning could not be said to have begun. However, he also asked the appellant "Do you know what I am talking about?". This was a question, and it was what led the appellant to respond by asking "What assault?"; and then, after being informed of evidence which the police had about his description, to make the admission on which the prosecution relied at the trial. Its particular relevance was not only that it could be a considered an implied admission that he was present at the place and date specified by Kitching but also that it volunteered the further information that the assault or "scuffle" was, as he said, "over a girl". In the circumstances, it provided evidence that could be used to show that he was, or might have been, the perpetrator of the offence of assault.

[23] In my opinion, it was when the question was asked "Do you know what I am talking about?" that the questioning began. Some leeway must be allowed to the police to identify themselves, the person to whom they were speaking, and the subject of their inquiry; but on this occasion matters went further than that, and a question was asked which led to a potentially incriminating admission by the appellant. The "questioning" related to a matter that was relevant to the appellant's guilt, and not to some other and quite unrelated matter.

[24] Once the questioning was entered upon, as in my opinion at that point it was, it was incumbent on Sgt Kitching to comply with s 263(2) by electronically recording the questioning "if practicable". It is perhaps arguable that at the precise moment at

which the questioning began it would not have been "practicable" in the circumstances to record what was being said on the field tape recorder or other electronic facilities that were available to Kitching. If that is so, he should not have asked the question he did. However that may be, it did not prevent compliance with the provisions of s 264, notably s 264(3). Even if a written record was not made of the things being said by or to the appellant during that questioning, it could, as s 264(3) requires, have been made "as soon as reasonably practicable thereafter". In that event, s 263(4)(a) would have required that it be read to the appellant.

[25] Given the appellant's unco-operative attitude, it might have been difficult to comply with that requirement; but the same cannot be said of s 263(4)(b). The appellant could have been given a copy of the record of the things said to or by him if they had been recorded "as soon as practicable thereafter", even if some of the other requirements of s 264 might not have been so easy to comply with. In fact, however, Det Sgt Kitching did not record what had been said until 16 May 2002, which was some six months or more after the conversation or questioning had taken place on 6 November 2001. It was then recorded in the statement in form QP 125E which he prepared as a witness for the proceedings that were taken against the appellant by summons issued on 1 February 2002. The appellant was presumably supplied with a copy of that statement dated 16 May 2002 at that or some other but unspecified later date.

[26] It is evident that it would have been possible for s 264(3) to have been complied with soon after the conversation on 6 November 2001, and certainly well before the statement was prepared and signed on 16 May 2002. There is nothing to suggest that Mr Kitching was incapacitated from doing so, or anything else to suggest it was not "practicable" for him to have done so earlier. In my opinion, therefore, there was a plain breach of or non-compliance with the requirements of s 264(3) and s 264(4), as well as s 263(2) of the Act.

[27] Under s 266(1) it was nevertheless open to the court to exercise a discretion to admit in evidence "a record of questioning" or "a record of a confession or admission" even though it considered that Division 5 had not been complied with or there was not enough evidence of compliance. The word "record" in this context is not defined, but it is not easy to equate it with Kitching's unrecorded recollection of the conversation at any time before to 16 May 2002, when he first wrote it down in his witness statement. After that date, there was a "record" in the form of the witness statement which he prepared for the proceedings against the appellant. However, it was not that "record" or written statement that the trial judge was asked to admit in evidence at the trial. Instead, it was Kitching's oral evidence based on his recollection of the conversation that was tendered and admitted. He may in fact have refreshed his memory by reading his statement again before giving evidence at the trial on 7 August 2002. He did not, however, ask for leave to do so at the trial, but gave his evidence of the conversation as something he was able to do of his own unaided and independent recollection. It was something he was not questioned about. According to the decision in *King v Bryant (No 2)* [1956] St R Qd 570, he was not obliged to seek leave to refresh his memory in that way. Doing so would not in any event have made his statement or "record" of the conversation admissible unless defence counsel had chosen to make it so by cross-examining him and then tendering it, which it was hardly likely he would have wished to do.

[28] The result is that his Honour had no power or discretion under s 266 to admit, or for that matter to reject, the evidence of Det Sgt Kitching. It was not "a record of questioning" or "a record of confession or admission" that was tendered at the trial, but Kitching's independent recollection of what had been said to him in the course of the conversation on 21 October 2001. In consequence, s 266 did not apply so as to authorise the court to admit the evidence if it was not otherwise admissible under the Division. Even though it was not a "record" of the questioning or the confession or admission, was it otherwise not admissible? That inquiry must in my opinion be answered in the affirmative. Section 263(3) renders a confession or admission admissible in evidence in a proceeding against the person making it *only* if it is recorded as required by s 263(4) (electronically) or s 264 (in writing). The confession or admission here was, for the reasons I have given, not recorded as required by s 264(4) and by force of s 263(3), was not admissible in evidence at the appellant's trial. Under s 266(1), the judge had no power or discretion to admit.

[29] At a trial in which the identity of the appellant as the perpetrator of the assaults was in issue and the eye-witness identification evidence was by no means free of difficulties, I would not regard it as a proper exercise of discretion to conclude that the wrongful admission of the appellant's statement to Kitching did not result in a miscarriage of justice in terms of s 668E of the Code.

[30] I agree with the orders proposed by the President for disposing of this appeal.

[31] **MULLINS J:** I agree with the reasons for judgment of each of the President and McPherson JA. I also agree with the orders proposed by the President.