SUPREME COURT OF QUEENSLAND

CITATION:	*R v PV; ex parte A-G (Qld)* [2004] QCA 494
PARTIES:	**R** **v** **PV** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 238 of 2004 DC No 766 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2004
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. Allow the appeal** **2. Answer the questions posed by the appellant as follows:** **1. (a) Unnecessary to answer** **(b) Unnecessary to answer** **(c) No** **2. No** **3. (a) Unnecessary to answer** **(b) No**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – CASE STATED AND REFERENCE OF QUESTION OF LAW – Attorney-General's appeal against granting of pre-trial applications for separate trials and for exclusion of certain evidence – respondent on trial for four counts of indecent treatment involving two complainant sisters – whether learned primary Judge applied the correct legal principles in ordering a separate trial of the charges concerning the different complainants – whether children's

mother's evidence of respondent's apology immediately after the making of the complaints was admissible as an admission against interest – whether reference involved points of law

Criminal Code 1899 (Qld), s 597A, s 668A
Evidence Act 1977 (Qld), s 130

Bunning v Cross (1978) 141 CLR 54, cited
Hoch v The Queen (1988) 165 CLR 292, cited
Pfennig v The Queen (1995) 182 CLR 461, cited
R v Lewis; ex parte Attorney-General [1991] 2 Qd R 294, cited
R v Massey [1997] 1 Qd R 404, cited
R v Noble [2000] QCA 523; CA No 99 of 2000, 22 December 2000, cited
R v O'Keefe [2000] 1 Qd R 564, cited
R v Sakail [1993] 1 Qd R 312, cited

COUNSEL: L J Clare for the appellant
B G Devereaux for the respondent

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

[1] **McMURDO P:** This is the first reference brought under s 668A *Criminal Code* for this Court to consider and give an opinion on what the appellant, the Queensland Attorney-General, contends are points of law.

[2] The respondent has been charged on indictment in the District Court with four counts of indecent treatment of a child under 12 years under his care for the time being between 1 December 2000 and 23 January 2001. The two complainants are the respondent's grand-daughters, J aged nine and S aged 11 at the relevant times. On 21 July 2004, the day the trial was first listed for hearing and before the jury was empanelled, the respondent applied to the court to separate the trials of the counts concerning J from those concerning S and to exclude evidence of a telephone conversation between the respondent and the mother of J and S. The parties apparently treated these applications as being under s 590AA *Criminal Code* and the respondent does not contend that the rulings the subject of this reference were anything other than rulings under s 590AA. The judge ruled the evidence was inadmissible and ordered that the charges concerning J be tried separately from the charge concerning S. The trial was adjourned on the application of the prosecutor until the determination of this appeal.

[3] Section 668A *Criminal Code* was introduced by s 30 *Evidence (Protection of Children) Amendment Act* 2003 (Qld) and came into operation on 5 January 2004. It relevantly provides:

> "**668A Reference by Attorney-General of pre-trial direction or ruling**
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> **(1)** The Attorney-General may refer to the Court for its consideration and opinion a point of law that has arisen in relation to a direction or ruling under section 590AA given by another court as to the conduct of a trial or pre-trial hearing."

[4] According to the Explanatory Notes, the section was enacted in part because formerly the prosecution had no remedy to challenge a pre-trial ruling that resulted in a case being discontinued and the section contains procedural steps to reflect those contained in s 669A *Criminal Code*.[1] As I have noted, the trial in this case was not discontinued but adjourned pending the outcome of this appeal.

[5] Section 669A(2) *Criminal Code* allows the Attorney-General to refer "any point of law that has arisen at the trial … to the Court for its consideration and opinion" in specified circumstances. In *R v Lewis, ex parte Attorney-General*,[2] the Attorney's reference under s 669A *Criminal Code* from a judicial ruling was unsuccessful because the ruling was made before arraignment so that the point of law had not "arisen at the trial". Macrossan CJ, Kelly SPJ agreeing, observed that a court would only express an opinion on a point of law under s 669A *Criminal Code* if it was "a point involving principle capable of some general application as opposed to rulings which are dependent upon the manner in which an assessment is made of particular factual situations which are not readily capable of wider application to other situations".[3] My earlier reference to the Explanatory Notes suggests that the legislature intended "point of law" in s 668A to have a similar meaning to those words in s 669A, with s 668A providing the Attorney-General with a right of appeal from a pre-trial ruling of law, a right not given under s 669A. The phrase "point of law" in s 668A has the same meaning as in s 669A; it refers to a point of law of general application and importance. The appellant has recognised this with the circumspection he has shown in the exercise of the power to appeal under s 668A to date. Inappropriate use of the power to appeal under s 668A, for example from an exercise of discretion where different judges could reasonably reach different conclusions on the same facts,[4] would disrupt the criminal justice system by causing delays whilst interlocutory appeals were prepared, argued and decided. It would pose a real risk to an accused person's right to an expeditious and fair trial as well as causing distress to complainants, especially child complainants, who have an interest in the finalisation of their complaints as quickly as justice permits. Used appropriately, appeals under s 668A will be brought exceptionally and only to ensure that the occasional disputed ruling on a matter of general importance, particularly one gaining wide circulation in the criminal justice system, can be promptly determined at appellate level.[5]

[6] The respondent submits that in this case no question posed by the appellant amounts to a point of law under s 668A; the questions concern no more than either a judicial discretionary exercise or an assessment of facts.

The questions

[7] The appellant has framed the following questions, (as amended), which he contends are points of law arising from the primary judge's rulings, for this Court's consideration and opinion:

> "1(a) Where sexual allegations made by a complainant against an accused are confined in number and time frame, is evidence independent of the complainant that tends to show similar conduct by

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1 Explanatory Notes *Evidence (Protection of Children) Amendment Bill* 2003, pp 7, 20.
2 [1991] 2 Qd R 294.
3 Above, 300.
4 See *House v The King* (1936) 55 CLR 499, 507.
5 See fn 3.

> the accused upon the complainant, capable of supporting the complainant's allegations?
> (b) If so, is the evidence capable of supporting the complainant admissible against the accused notwithstanding it discloses sexual conduct against the complainant which is not the subject of any charge?
> (c) Was the trial judge correct in ruling that the evidence of the respondent's conversation with [the complainant's mother] on 24 January 2001 was inadmissible against the respondent as regards any count on the indictment?
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> 2 Did the trial judge apply the correct legal principles to decide the application for separate trials?
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> 3(a) Is the degree of similarity between the allegation charged and other allegations said to be similar fact evidence relevant to the admissibility of the similar fact evidence?
> (b) Did the trial judge apply the correct test as to the admissibility of the evidence of each complainant in the case involving the other complainant?"

The background

[8] The respondent is said to have committed the offences when J and S travelled from their home in a provincial Queensland city to holiday with relatives in an outer Brisbane suburb during the summer school vacation. The respondent also lived in Brisbane and they visited him occasionally during the holiday. Each complainant gave a police interview which was recorded and ready to be tendered at trial under s 93A *Evidence Act* 1977 (Qld). Their evidence was also pre-recorded in a preliminary hearing under s 21AK of that Act. Transcripts of their evidence and a copy of the depositions were provided to the primary judge and placed on the court file. Counts 1, 3 and 4 concerned J and count 2, S. J said that count 1 occurred when the respondent was lying on top of her in a spare room in his house; her six year old cousin was on his back; the respondent put his fingers inside her underpants and touched her on the vagina; counts 3 and 4 occurred when the respondent touched her in this way again at his home and once at the home of the complainant's aunt. In cross-examination, it was suggested that the respondent was inquiring about her "water works" because she had a kidney infection when she was younger. Count 2 turned on S's evidence that she was sitting at the respondent's computer when he came up to her and put his hand under her shorts, touching her on her genital area outside her underpants; he desisted when she told him to stop. On all four occasions the respondent was the sole adult in the house.

[9] After the girls returned from their holiday in late January 2001, their mother chastised them for some sexual talk. She may have asked them whether they had been touched. Later, J began to cry and told her mother, "[the respondent] had touched her". J said, "He put his hands inside my pants and began touching me." The mother then asked S whether the respondent had touched her. S responded affirmatively. There was no suggestion of collusion between the girls.

[10] The mother phoned the respondent's home on 23 January 2001 and had a brief conversation with him which is of no moment. She then spoke to his wife and told her: "[The respondent] has interfered with the girls." The respondent's wife said she

would phone back and she would deal with it. She telephoned the mother at 11 pm that night and said: "[The respondent] didn't deny it and that it was over and was going to be leaving." It was not contentious that the respondent was here referring to the marriage being over and that the respondent would leave the matrimonial home. The respondent's wife did not assert that the respondent made any positive admission to the allegations she put to him in their angry discussion that evening.

[11] The respondent telephoned the girls' mother the next morning on 24 January 2001. The mother's evidence was as follows:

> "I can't remember [the respondent's] exact words, but he rang me to apologise for what he had done. I began crying. He then kept on telling me to give him two weeks, he just wanted two weeks. He then said that is all he needs to get some money to get [his wife] set up. He told me [he wanted] to speak to [the complainants' father] face-to-face. I told him he must be stupid as [the father] would probably kill him. He then said [the father] could have everything that is under the house, including his tools. [The respondent] started talking about some family business he wanted to set up that would involve the whole family and that he would give me a job. I told him that no amount of money would make up for what he did to my girls. He then said something about [the father] wouldn't have to kill him because he would do it himself beforehand. I then told him I had to go."

The ruling that the evidence was inadmissible

[12] In ruling that the mother's evidence[6] was inadmissible, the learned primary judge stated that it was unfortunate that the mother was unable to remember the respondent's exact words or any more detail, adding:

> "… bearing in mind that we're dealing with a person who has heard serious allegations, and been confronted by his wife about those allegations which are of a sexual nature involving young children, has not so far as the Crown can prove made any admissions when confronted with these allegations, but is then told to leave the matrimonial home, in those circumstances, it seems to me that it is dangerous to rely upon his conduct of the things that he said to the witness … the following morning.
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> … [T]here is certainly no unequivocal admission made by him in the material that is before me and it seems to me, with respect, it is hard to construe anything which can amount to an admission of any of the acts charged. I therefore think the evidence is not admissible."

[13] The fact that a witness cannot remember the exact words of a conversation does not render the evidence inadmissible: *R v Noble*;[7] it is, however, relevant to the reliability, accuracy and weight to be given to the evidence and it may open promising avenues for cross-examination. His Honour was right to note that the respondent's statements to the complainants' mother were not admissions to specific charges. An admission against interest which is not a direct admission of an offence

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6 Set out in para [11] of these reasons.

7 [2000] QCA 523; [2002] 1 Qd R 432.

charged may nevertheless be relevant and admissible: *R v Sakail*[8] and *R v Massey*.[9] The respondent's statements to the girls' mother were a general apology for "what he had done". The prosecution evidence does not make clear exactly what this was and the learned primary judge was understandably concerned about the uncertainty as to the conduct for which the respondent was apologising. Because the complainants' allegations that he interfered with them were put to him the night before, in context the only rational inference is that the respondent was apologising for some sort of shameful conduct of his towards the girls, as a result of which he offered property and economic incentives to their parents and about which he felt so ashamed that he threatened to kill himself. This is not a case where there is any rational possibility on the present evidence that the respondent was, for example, joking,[10] or merely responding to his wife's stated intention to leave him, making the admissions ambiguous and therefore irrelevant and inadmissible.[11] Although his statements to the girls' mother were not admissions to the specific offences charged, in context they were capable of being found to be an unambiguous and unequivocal apology for and admission to interfering sexually with the complainants. The conversation was, on the present evidence, relevant as an admission against interest and therefore admissible in law.[12] Whilst not a confession to any particular count, it was relevant evidence on each count because the jury could treat it as an admission of an inappropriate relationship with each complainant and as generally supporting their complaints of what would otherwise be unlikely conduct on the part of a grandfather towards his grand-daughters. The jury would have to be given the usual careful directions as to the use to be made of the evidence: that it was not an admission to or direct evidence of any charge, and that even if they accepted and used it as the prosecution suggested, they must still be satisfied beyond reasonable doubt of the elements of each count charged before convicting on that count. The learned primary judge erred in law in ruling that the evidence was inadmissible.

[14] A judge nevertheless has a discretion to exclude relevant admissible evidence if it is unfair to the respondent to admit it: s 130 *Evidence Act* 1977 (Qld). The power is only used where the probative value of the evidence is small compared to its capacity to prejudice a fair trial so that the evidence is excluded only when the interests of justice demand: *Bunning v Cross*.[13] The learned judge here did not exclude this significant prosecution evidence in the exercise of this discretion but ruled that it was not capable of amounting to an admission against interest and was therefore irrelevant and inadmissible in law.

[15] Of course, any pre-trial ruling on evidence of this nature is necessarily provisional. Witnesses sometimes do not give evidence at trial to match the promise of their pre-trial statements; when that happens the pre-trial ruling may have to be re-visited. But assuming the evidence at trial is at least as helpful to the prosecution as that placed before the primary judge, then his Honour erred in law in ruling that the evidence was inadmissible.

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8 [1993] 1 Qd R 312, 316-317.

9 [1997] 1 Qd R 404, 410-412.

10 Cf *R v Khalil* (1987) 44 SASR 23.

11 See *Cross on Evidence*; Aust ed, para [33735], p 33309.

12 *R v Williams* [1987] 2 Qd R 777, 780.

13 (1978) 141 CLR 54, Barwick CJ, 64-65, Stephen and Aickin JJ, 74; see also *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 249-252.

[16] Question 1(c) raises a matter of law which frequently arises in the many cases in the criminal justice system concerning the commission of sexual offences against children and constitutes a "point of law" under s 668A. It follows from my reasons that the answer to question 1(c) is "no". It is not possible for this Court to answer the questions framed as 1(a) and 1(b) because the answers to each of those questions will always depend on the unique facts of a particular case and, in any case, I do not apprehend that the questions arise from his Honour's ruling.

The ruling as to separate trials

[17] The learned primary judge approached his decision in the application for separate trials in this way. His Honour noted that neither J nor S was present when the offences were said to have been committed against the other and expressed grave doubts as to whether evidence of one complainant as to the count or counts concerning her would be admissible on the trial of the count or counts concerning the other complainant as similar fact or propensity evidence. His Honour next accepted, for the purpose of the application, that such evidence would be admissible at least to negative the possibility of an accidental sexual touching by the respondent during innocent play time, but stated that the risk remained that the jury would place too much significance on it so that its prejudicial effect would outweigh its probative value. His Honour concluded that because the evidence of one complainant was not admissible in the trial of the other, the trials could not be joined and granted the respondent's application for separate trials.

[18] The charges concerning both J and S occurred over the same time period; the same familial relationship existed between each complainant and the respondent; the alleged touching was of the vagina, (although in S's case through clothing), and it allegedly occurred in Brisbane houses where the respondent was the sole responsible adult. Section 567(2) *Criminal Code* would ordinarily appear to permit joinder of counts in such circumstances because the charges form part of a series of offences of the same or similar character. But because of the special potentiality for prejudice in trials of sexual offences[14] the charges can only be joined if the acts constituting the charge or charges involving one complainant would be admissible on the trial of the charge or charges concerning the other complainant: *Hoch v The Queen*.[15] The evidence of each complainant would be admissible on the trial of the offence or offences concerning the other only if there was no reasonable view of the evidence other than as supporting an inference that the respondent was guilty of the offence or offences charged: *Pfennig v The Queen*.[16] In other words, the evidence will only be admissible if, when considered with the whole of the prosecution evidence, (assumed as truthful and reliable), it is reasonably capable of excluding all innocent hypotheses: *R v O'Keefe*.[17]

[19] It follows that in determining an application for separate trials under s 597A *Criminal Code*, a judge must first determine the question whether the evidence on the charge or charges concerning one complainant is admissible on the charge or charges concerning the other. Instead of applying the test in *Pfennig* as explained in *O'Keefe*, the learned primary judge here conducted a loose and unhelpful balancing test, weighing the prejudicial against the probative effect of the evidence, a test

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14 *De Jesus v The Queen* (1986) 68 ALR 1.
15 (1988) 165 CLR 292.
16 (1995) 182 CLR 461, Mason CJ, Deane and Dawson JJ, 482-483.
17 [2000] 1 Qd R 564, 573.

specifically eschewed in *Pfennig*[18] unless carried out by considering the apposite legal principles. His Honour did not consider the correct legal principles in determining the threshold question as to the admissibility of the evidence of each complainant on the charge or charges concerning the other; this was an error of law; his subsequent order in determining the application for separate trials was infected by this error in law.

[20] Questions 3(b) and 2, like question 1(c), raise matters of law which frequently arise in the many cases of this type within the criminal justice system and constitute a "point of law" under s 668A. It follows that the answer to both question 3(b) and question 2 is "no".

[21] I also note that because of the answer this Court has given to question 1(c), which has the effect that the evidence of the complainants' mother is admissible in respect of the trials of the counts concerning both J and S, the issue of separate trials under s 597A *Criminal Code* may have to be reconsidered in any case to take into account this changed circumstance.

[22] It is unnecessary to answer question 3(a) because I do not understand the question arises from his Honour's ruling.

The answers

[23] I would allow the appeal and answer the questions posed by the appellant as follows:

1(a) Unnecessary to answer.

1(b) Unnecessary to answer.

1(c) No.

2 No.

3(a) Unnecessary to answer.

3(b) No.

[24] **McPHERSON JA:** I agree with the answers the President proposes to give to the questions presented on this reference. I also agree with the reasons her Honour has given for answering them in that way.

[25] **MULLINS J:** I also agree with the answers the President proposes to give to the questions on this reference for the reasons given by her Honour.

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[18] Above, 483.