SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAJ* [2005] QCA 40
PARTIES:	**R** **v** **DAJ** (appellant)
FILE NO/S:	CA No 231 of 2004 DC No 113 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	28 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2005
JUDGES:	McMurdo P, Jerrard JA, Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Convictions on all counts set aside** **3. Retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – OTHER IRREGULARITIES – where appellant mentioned some prior drug use in cross-examination – where prosecutor then questioned him about the effect of drug use on him – where prosecutor asked question which suggested appellant had prior criminal history – where leave was not sought under s 15(3) of the *Evidence Act* 1977 (Qld) to question the appellant as to prior convictions – where defence counsel made no objection to questions – whether the trial judge erred in allowing the line of questioning to proceed CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where trial judge exercised the discretion in s 99 of the *Evidence Act 1977* (Qld) to supply the jury with the complainant's videotaped

evidence and transcripts during deliberations – where both counsel agreed to the supply of transcripts during their addresses – whether trial judge erred in not cautioning the jury as to the risks of giving that evidence disproportionate weight

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – OTHER MATTERS – where appellant scuffled with police in the jury's presence after his bail was revoked – where trial judge removed appellant for five minutes the next day to ask the jury whether they thought they could decide the case impartially after the incident – where s 617 of the *Criminal Code* requires that a trial be conducted in the presence of the accused unless his conduct renders it impracticable – whether the judge addressing the jury in the appellant's absence amounted to an error of law

Criminal Code 1899 (Qld), s 617
Evidence Act 1977 (Qld), s 15, s 93A, s 99

Jones v R (1989) 166 CLR 409, cited
Lawrence v The King [1933] AC 699, cited
R v Cornwell [1972] 2 NSWLR 1, cited
R v H [1999] 2 Qd R 283, applied
R v Stuart and Finch [1974] Qd R 297, distinguished
R v Vernell [1953] VLR 590, cited

COUNSEL: S J Hamlyn-Harris for the appellant
R G Martin SC for the respondent

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

[1] **McMURDO P:** I agree with Jerrard JA's reasons for concluding that the appeal must be allowed, the convictions set aside and a retrial ordered, subject only to the following observations.

[2] Most of the facts and issues are comprehensively set out by Jerrard JA so that my reference to them need only be brief. The learned primary judge allowed the jury to have with them in the jury room when deliberating on their verdicts both the video taped interviews given by the complainant child to police (tendered under s 93A *Evidence Act* 1977 (Qld) ("the Act")) and the transcripts of those tapes. Both prosecution and defence counsel agreed with the learned judge's suggestion that the video tapes and transcripts be provided to the jury in the jury room whilst they considered their verdicts. On one view, his Honour appears to have exercised the discretion given by s 99 of the Act (although without referring to that section) to give the jury free access to the complainant child's taped evidence and transcripts of it. The exercise of that discretion and counsels' concession was made, however,

without any reference to or discussion of the important principles in *R v H*,[1] that, ordinarily, allowing a jury to have unsupervised access to a complainant child's video taped evidence creates a danger that a jury may give undue weight to that evidence without appropriate judicial warnings and a consideration also of the complainant child's cross-examination at trial and any evidence given by the accused. *H* sets out important guidelines to minimise this risk. His Honour gave no reason for his decision that would justify displacing the ordinary position required by *H*, apparently because no-one raised the principles discussed in *H*. In these circumstances, I am satisfied that counsels' concession and the learned primary judge's exercise of discretion were not made upon a consideration of the relevant legal principles. That error was compounded by the failure of the learned trial judge to warn the jury in the terms set out in *R v H*. In a case like this which requires a jury to weigh the largely unsupported complainant child's evidence against the evidence of the accused these errors alone require that the appeal must be allowed.

[3] One of the appellant's grounds of appeal is "that the learned trial judge erred in addressing the jury in the absence of … [the appellant] on the morning of 22nd June 2004". Jerrard JA has described in his reasons[2] the appellant's unsatisfactory behaviour at the close of the court proceedings on the evening of 21 June 2004. As a result, his counsel applied for a mistrial when the trial resumed on the morning of 22 June 2004. I agree with Jerrard JA that the appellant has not shown any miscarriage of justice arising from the refusal of that application. What followed, however, does gravely concern me. His Honour then directed, over the objection of the appellant's counsel, that the appellant be taken to the cells whilst the judge addressed the jury in the appellant's absence although in the presence of the prosecutor and the appellant's counsel. The record does not suggest that the appellant had behaved improperly in court on 22 June 2004 or that he was imminently likely to do so. In the absence of the appellant, his Honour told the jury that the appellant was not present in the dock now; that they would recall the unfortunate events of a scuffle yesterday afternoon; "that none of that really has any bearing on your deliberation in terms of what you make of the evidence and what decision you ultimately come to in terms of verdict … you should put that entirely out of your minds. It's got nothing to do with the police and you are going to have to decide whether or not you're satisfied the [appellant] is guilty or not of these offences … "; that the appellant was in the custody of the court yesterday afternoon and they "shouldn't speculate about why that was so or if there was any change in that procedure … I want to emphasise to you, nothing to do with what you have to decide and that I will be directing you to put that out of your minds and be as intellectually honest to – as possible to not allow that to influence you in any way." His Honour then asked the jury whether they felt they could not "decide the case impartially between the Crown and [the appellant]", pointing out "… the [appellant] is not here, his counsel is of course. But I wanted you to be free of any influence or pressure in indicating that or know – and if you want to discuss it amongst yourselves, what I've just raised, you're quite entitled to go out and do that. … Does any juror feel that he or she couldn't, in the light of what's happened, not proceed to decide the case impartially."

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1 [1999] 2 Qd R 283; see also *R v BAH* [2002] 5 VR 517.

2 At para [43].

[4] The jury indicated they had no difficulty in continuing with their duties. His Honour directed that the appellant "be brought up now for the rest of the trial". The trial continued in the presence of the appellant who apparently behaved unexceptionally as he had before his exclusion from the court room earlier that day. According to the transcript, the trial was conducted in the absence of the appellant for five minutes.

[5] Section 617 *Criminal Code* relevantly provides:

> "**Presence of accused**
>
> (1) Subject to this section the trial must take place in the presence of the accused person.
>
> (2) If the accused person so conducts himself or herself as to render the continuance of the proceedings in the person's presence impracticable, the court may order the person to be removed and may direct the trial to proceed in the person's absence …"

[6] Section 617 reflects the common law: it is an essential principle of the criminal law that the trial for an indictable offence (at least in cases other than a misdemeanour) ordinarily be conducted in the presence of the accused, even if legally represented; that rule is mandatory unless the violent conduct of the accused has made it impossible to continue the trial in the accused's presence: *Lawrence v The King,*[3] *R v Vernell*[4] and *R v Cornwell.*[5] A notorious Queensland example of where an accused person was rightly excluded from his trial under s 617(2) *Criminal Code* is that of Mr Stuart, reported in *R v Stuart and Finch.*[6] That case is plainly distinguishable from this. Here, whilst the appellant did create a minor disturbance in court at the end of the previous day's hearing, there is no evidence or suggestion that he was conducting himself so as to render the continuance of the proceedings in his presence impracticable when he was excluded from his trial. The terms of s 617(1) are mandatory and the appellant was not within the only potentially relevant exception contained in s 617(2). His Honour erred in law in conducting the significant dialogue with the jury summarised above in the absence of the appellant. I understand his Honour was concerned that the jury should be able to communicate their views to him frankly without any fear of the appellant who had behaved badly the previous day, but that could have been achieved by asking the jury to retire and convey to him in writing any concerns about their ability to carry out their duty. The unlawful exclusion of the appellant from the court room strikes at his constitutional democratic right to be present at his trial on these serious offences of a sexual nature. This error of law was so fundamental to the criminal trial process that it invalidated the whole trial[7] and in itself requires that the appeal be allowed, the convictions set aside and a retrial ordered.

[7] **JERRARD JA:** On 23 June 2004 DAJ was convicted by a jury on each of four counts alleging the commission of sexual offences by him against the child SH. On each count he was sentenced to four years imprisonment, to be served concurrently, and a reporting condition was imposed for a five year period after his release. Three days in custody was declared time already served. DAJ has appealed against those convictions.

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3 [1933] AC 699, 708.

4 [1953] VLR 590, 595.

5 [1972] 2 NSWLR 1.

6 [1974] Qd R 297. See also *R v Stuart* [1973] Qd R 460.

7 *R v Cornwell*, above.

[8] Each count alleged an offence committed at Mackay between 30 June 2001 and 31 December 2001, when SH was a child under 12. Count 1, which charged DAJ with having wilfully exposed SH to an indecent photograph, was based on evidence that he had showed her an indecent photograph in a magazine. Count 2, which alleged that he had unlawfully procured SH to commit an indecent act, was based on evidence from her that on the same date as count 1 he had, when both were naked, requested her to touch and suck his penis, which she had done with her lips. Count 3, charging that he had unlawfully and indecently dealt with her, was based on evidence that on that same occasion he had licked SH in the area of her genitalia; and count 4, alleging a similar offence, was based on evidence that on that same occasion he had rubbed his groin area against hers, an activity the complainant child described as "humping".

Ground of appeal

[9] The grounds of appeal argued were firstly that the trial was unfair, because of prejudicial questioning of the appellant by the Crown Prosecutor and the learned trial judge during his evidence in cross-examination, and the prejudicial effect of events which followed at the end of the first day of the trial.

[10] The second ground was a complaint that the learned judge had erred in allowing video recordings and transcripts of interviews conducted between the complainant and the police on 22 March 2002 and 12 February 2003, admitted into evidence under s 93A of the *Evidence Act* 1977 (Qld), to go into the jury room with the jury during their deliberation. The appellant's counsel submitted that that had occurred in contravention of the general directions of this court in *R v H* [1999] 2 Qd R 283, particularly at 290 and 291 in the judgment of the President.

Background matters

[11] SH was born on 2 November 1994. In 2001 she lived with her mother and elder sister M. Her mother suffered from epilepsy and had difficulty in coping with SH, who was then in grade 2. SH was friendly with a boy named S who lived nearby with his mother V. V and S lived in a dwelling that contained two flats; the other flat was occupied by a Mr M, and his son J, then attending grade 7, and his youngest child, his daughter B.

[12] In September 2001 DAJ commenced living in that other flat with M, J, and B. M was DAJ's father, with whom DAJ had only had prior telephone contact, and with whom he had never previously lived. J and B were his younger step-brother and step-sister. DAJ was then 25. On his evidence, he began living in that flat on 7 September 2001, and his father and step-siblings moved out on 28 September 2001. DAJ remained living there by himself for another 15 days. His evidence suggested that the offences alleged against him, if they occurred as alleged, happened on 6 October 2001, during the period in which he lived in that flat by himself. That generally accorded with the evidence led by the Crown as to when the offences happened.

The preliminary complaints

[13] The first complaint about offences having occurred was made by SH to her grandmother, with whom SH was by then living, in March 2002. It happened when SH and her grandmother were visiting SH's mother and sister M. They were

watching television and SH told her grandmother (who was then 80) that she had been kissed "like that", informing her grandmother in response to questions that the kisses were by a "big boy", over at "V's place", although not in V's unit but "at the other flat"; and that SH had gone into that other flat because "he took me there". She told her grandmother that she had taken her pants off because "he told me to". After hearing that from SH, her grandmother contacted the police some two or three weeks later, and an interview was held on 22 March 2002 between SH and a police officer with training in interviewing children. In perhaps November 2002 SH added some further details to the complaint when speaking to her grandmother, again at her mother's residence, and when she told her grandmother that "he had licked me". Later, perhaps in February 2003, she also told her grandmother that that person had licked "the stuff that come out of him too". The grandmother contacted the police and a further interview was held between SH and the same police officer as before on 12 February 2003. The grandmother's recollection of the first complaint made to her included that SH said that it happened at "this boy's flat", and then that it was supposed to have occurred in "this boy's father's flat". That complaint appeared to be a complaint of misconduct by a boy older and bigger than SH, and living in his father's home.

[14] In the interview on 22 March 2002 SH at first said that a woman and her son lived next door to V, but later said it was a teenage boy "and a dad and just a teenage girl". She identified the boy as being called J. When reminded of the complaint that she had made to her grandmother she said that J's brother had kissed her, and that he was aged 25.

[15] She described that brother as having black hair and a beard. In answer to questions she described a man having come into V's premises when V was asleep in the bathroom, kissed SH on her lips, and invited her next door to J's place. In there he took her to J's dad's bedroom, and showed her what she called "rude books", which had photographs of a woman with either one or both breasts exposed.

[16] After inquiring of the police officer whether she would get a "reward for saying things", she said that that man had told her to pull down her pants, and pull down his, when both were on the bed, and that he had then "got on top of me … and he humped me with his long thing onto mine". She further said that he "just humped into me", and that he "humped me onto his long thing onto my bottom, into my rude one". After that he gave her and S lunch. She also said in answer to further questions that J had done the same thing "a lot of times." She described J as a very bad boy, who "done it" to her "sister too … a long time ago."

[17] That account said nothing about her touching the man's penis, or any fellatio or cunnilingus. It described either simulated or attempted, if not actual, intercourse. It also attributed a great deal more of the same behaviour to J.

[18] In the interview on 12 February 2003, conducted when SH was in grade 4, SH began by inquiring whether "do we get to listen to it", referring to the tape being made, and recalled that she had previously told police about "the man", whom her grandmother thought was called Michael. She recalled previously having identified a photograph at the school, as the man who had come into V's place and kissed her. That photo identification apparently occurred in July 2002, when SH identified a photograph of DAJ from a photo board containing 12. At other stages in that

second interview she said that what she had to do was pick a man "that looks like him"; she also asked "did I pick the right one?"

[19] In answer to questions, she gave an account of the events in the flat with the man, which included those beginning in V's flat, with both herself and S lying on top of the man at his invitation, and the man kissing each of them on the lips, and then asking them if they would both like to come into the other flat. This had occurred in V's unit, when V was asleep. S did not want to go to that other flat, but SH and the man did go. In there he showed her the rude book, as she had earlier described, and, when in "his Dad's room … on the bed", showed her his "big thingy". She explained that that was his "dick", and that the man wanted her to lick it. He told her to take her own clothes off which she did, and she then licked his penis. She also described his licking her on "the bottom", and that the events ended when S knocked on the door. Both SH and the man then got dressed, and then went out and had dinner, and she and S played around in the garden.

[20] On that account there was a clear complaint of fellatio and what appears to have been cunnilingus; there was no description given then of any simulated or attempted intercourse. She added on that day, in answer to questions, that the same thing had happened to her once with J, but that all he had done was "kiss me". She then added that she had licked J's penis, that he had said to her to lick it, and he had "licked mine". She then went a little further and said that she had lain on top of J, and that his "dick" was "on" her bottom. That interview resulted in clear enough accusations against each of J and a man who must have been in a sibling relationship with J, but the offences or conduct alleged against that brother were different from those described in the first interview.

Evidence of the trial

[21] At the trial SH gave evidence-in-chief which was relatively innocuous, in that she was simply led by the Crown Prosecutor (without objection) to say that something had happened in that other flat about which she had told the police. In cross-examination more details were extracted, in which she said that the man had told her to take her clothes off and she had, and that the man had wanted her to "hump" him on the bed, and that she did. She described that as occurring when both were naked and when she got on top of him; she said she went up and down, but in answer to questions did not describe having felt the sensation of any penetration.

[22] She said quite clearly that she could not recall that she had done anything to that man's penis, and had neither any recall of having licked it or of having told the police that she had. Nor did she recall ever having told the police that she had licked J's penis. That remained the position regarding J even after she was shown a transcript of the interview and read parts of it, but she said that she could now recall licking the man's penis. She referred to him as "Michael". She could not recall any metal or shiny object on the end of that person's penis.

[23] V gave evidence, and the jury could conclude from her evidence and that of DAJ that they had become attracted to each other in 2001, and remained friends. Her evidence supported the prosecution case to the extent that she recalled a day when J's brother, DAJ, had made lunch for the two children, and when V herself was sitting down in the bathroom. What she explained was that she had struck her head in the bathroom, and had had to sit down for quite some time to recover. Her evidence was that SH had told her that same day that SH and S had both stayed

outside the unit when DAJ was preparing lunch for them, although V could recall hearing DAJ reprimand S for coming inside after being told by DAJ to remain outside while the food was being prepared.

DAJ's evidence

[24] The evidence given by DAJ described his arriving to stay with his father, and attempts to live a life with that man and his family. He asserted that there was only one occasion on which SH had ever come into that unit when he was there living by himself. On that occasion she was with S, and stayed perhaps 10 minutes. Nothing untoward occurred. She had entered the unit during the preceding three weeks, when his own father and step-siblings were living there, but he was never alone in that unit himself in that three week period.

[25] DAJ gave an account of the events of another day, on a date he fixed as being 6 October 2001, which did establish that there was at least the opportunity for him to deal with SH without observation from any other adult. His account was that he had been visiting V in her unit, and had been there for approximately four hours, when SH entered V's unit around midday. DAJ and S were each lying down on a child's fold-out sofa watching a video, and SH went to lie down and join them. DAJ's evidence was that he got up, sat at that table, and while the two children S and SH were playing, V tripped over a toy dog in the bathroom and "bumped her head and smashed her ribs and all that". DAJ went into the bathroom to help her, but she said he should not worry, and she would just sit there and would then be all right.

[26] DAJ explained that he complied with that suggestion, but when the video finished he asked V whether she wanted him to look after the children's lunch. She was still sitting on the bathroom floor with her head between her knees. V said she would not mind DAJ doing that, and she asked SH and S to go to his unit for lunch. He told both children to wait outside, and entered his flat to prepare a rice and vegetable dish. S followed him in and was told to remain outside, but after that child protested, S was allowed to watch the meal being prepared. It was put onto plates and taken outside the flat. SH did not enter it. After the meal was completed DAJ took the dishes back inside then returned to V's flat, by which stage V had gotten herself up and was sitting in the lounge. That account of the day V was incapacitated in the bathroom was not put to SH in cross-examination.

[27] V's evidence had described herself falling over a toy dog in the bathroom, hitting two ribs on the bath and the back of her head against the wall, and then sitting for some time with her head between her knees. She also described DAJ volunteering to get the children's lunch while she was sitting there. SH's evidence at the trial differed from her account in the interviews, in that at the trial she said V was drunk when inert or not moving when in either the bathroom or toilet, on that day when she said DAJ had sexually abused her. The jury was certainly entitled to be satisfied on the evidence that SH had accurately described an occasion when DAJ had unsupervised access to her, and when V was immobile for some period, whatever the cause.

Prejudicial matters introduced by DAJ

[28] DAJ's evidence in chief included details volunteered by him, not necessarily relevant to his defence of the charges, and which were likely to have adversely impressed the jury against him. These included that his father and his two step-

siblings left the unit because "during an altercation between me and my father he was hospitalised and – well, he was in fear of his safety and … they took off". DAJ explained that the altercation was because he had been unimpressed with his father's treatment towards the other children in the unit, and because his father had said things about DAJ's mother which DAJ resented. At another stage of his evidence-in-chief he declined to refer to his father by that title, but spoke of "Stephen", "the father", and "the adult". He added that V and S had come in help to "clean that blood up" after his father and step-siblings had left.

[29] He gave evidence that he had the underside of his penis pierced on or about 16 May 1999, but he could not recall the exact date because, he explained, "due to various substance abuse at the time". He had caused that hole to be gradually increased until it was sufficiently large in September and October 2001 for him to have a small ring with a ball approximately three or four millimetres wide affixed there. He removed it in April 2002. In his opinion a person looking at the end of his penis would have been able to see it, but not necessarily if DAJ was standing in front of that person with his penis hanging down. His counsel had produced photographs of the penis in its present state to the learned trial judge, who had thought the photographs insufficiently probative to be admitted, since all they showed was that at some stage there had been a hole in that part of the penis. While the Crown tested DAJ's evidence as to when this body jewellery had been added, it did not challenge his claim that he had done that at some stage.

Cross-examination about prejudicial matters

[30] DAJ had introduced the topic of his relationship with his father in evidence-in-chief, and the fact of prior substance abuse. Both topics were more likely to impress the jury unfavourably than favourably, and need not have been referred to by DAJ. The prosecutor quite properly probed DAJ's evidence that he had not been alone in the unit in the three weeks in which he lived there with his father and step-siblings, and that led to the suggestion from the prosecutor that the situation with his father had ended very badly. DAJ responded with the perhaps callous observation that it had not ended badly for DAJ; although as the prosecutor then pointed out, from his father's point of view his father was hospitalised, and he and his family had left the unit. DAJ's evidence undoubtedly provoked the question that contained those comments, but he was then somewhat unnecessarily cross-examined about whether he had inquired for how long his father was in hospital, or had visited him. The prosecutor then established that DAJ had "flogged" his father. Although there was no objection to that part of the cross-examination, some parts were unnecessary and it was all prejudicial.

[31] He was cross-examined, quite properly, about his relationship with V, and the fact that she would on occasions become intoxicated. The prosecutor established that they continued to have a sound relationship after he had left the unit, that she had no visible injuries on the day she fell over, and that if she bought a carton of beer she would perhaps have 10 of the 30 cans it held, and DAJ would drink the remainder. Nearly all would be drunk between them in the one drinking session, which would begin before S was put to bed by her. His evidence was that she did not begin drinking alcohol before midday, and had not been intoxicated when she fell in the bathroom.

[32] It was obviously appropriate for the prosecution to establish what DAJ said was the relationship between himself and V, since it was relevant to the jury's assessment of the evidence V gave and which largely supported DAJ. Her consumption of alcohol was relevant to her capacity to protect SH on 6 October 2001, and to overhear from the bathroom or lounge events occurring within the adjoining flat, but only if she was drinking alcohol before or while SH was in the flat; and SH did say in evidence that V was drunk. That was not challenged in cross-examination.

[33] The prosecution also established in cross-examination of DAJ that to his knowledge, V was a user of cannabis, although he was emphatic that while she had described to him being a user, and while she used it to his knowledge after he had stopped living in the adjoining flat, he swore she did not consume any in the period in which he lived next door. That evidence also had some relevance to her capacity to be alert and protective of SH, and S, but only if she had used cannabis on the relevant day. That was not established by cross-examining DAJ, and V was not asked about it.

[34] DAJ was also cross-examined about his own consumption of non-prescribed drugs. The prosecutor had cross-examined him, again quite properly, about his having possessed when arrested, a "picture magazine" and an internet directory, each of which depicted naked women. His explanation for possession of the magazine was that he was primarily interested in crossword puzzles in it, that "we can win money at"; he said that that was the main reason for purchasing it because "I wanted the money to buy drugs with". After that answer and after cross-examination about other topics, leading to cross-examination about his knowledge of V's consumption of cannabis, the prosecutor cross-examined DAJ about his prior drug use. That use was established to be of "illicit" drugs. He was asked whether that use had affected DAJ's ability to control his impulses, to which he responded that he "can get sort of violent", and that "it may have reduced my ability to control my temper". The latter answer was given in reply to the question:

> "Well is it fair to say that your drug use has reduced your ability to control your impulses, would you agree with that statement?"

[35] The only specific "illicit" drug which DAJ had admitted in earlier cross-examination that he had consumed, in the five weeks he lived in Mr M's flat, was a small quantity of amphetamine, which he said he bought after pawning his mobile phone on the day he put his father in hospital, and used that same day. He said the purchase occurred after he had attempted to visit his father in hospital. He was confident in evidence that the "drug use" about which he was later cross-examined had only affected his ability to control his temper, adding that "I've done some stupid things too"; he agreed with the suggestion then put that:

> "It goes without saying that you say it hasn't affected your ability to control, for example, sexual impulses or sexual urges."

[36] The prosecutor did not get the Court's permission, pursuant to s 15(3) of the *Evidence Act* 1977 (Qld), before asking DAJ those questions about his prior use of illicit drugs. Section 15(2) of that Act provides that where in a criminal proceeding a person charged gives evidence, the person shall not be asked any questions tending to show that the person has committed any offence other than that with which the person is then charged, or is of bad character, other than in certain specified situations, and only with the court's permission. None of the specified

situations existed. Those questions were all asked after DAJ had described the one admitted occasion of amphetamine use, and after he had denied being a cannabis user.

[37] Both the questions and answers in that portion of cross-examination were prejudicial, in that each assumed some reasonable degree of earlier prior use of drugs which could affect behaviour, and with no suggestion that any had been lawfully prescribed. The cross-examination asked other questions which expressed scepticism of the claim that that drug consumption had not affected DAJ's capacity to control his sexual impulses, but without suggesting to the jury any grounds upon which that scepticism could be based, other than the assumption that DAJ had both consumed drugs prior to the alleged abuse of SH, and that the abuse had actually occurred. Although no objection was taken to that cross-examination, it was objectionable and the required leave had not been given. The questions reflected assumptions prejudicial to DAJ and not established by the evidence, particularly that he had consumed any drugs that day.

[38] The learned trial judge did not give the jurors any specific directions about any use they might make of the evidence that DAJ had used drugs in the past, and were not warned that there was no evidence of his having taken any drugs on the day he was alleged to have abused SH, or close enough to that date to be still affecting him. Nor were the jurors given any directions about the absence of evidence that V had been affected by drugs on that date. The learned judge did direct the jury that, regarding the evidence of DAJ's drug taking and drinking, they should not decide the case according to any prejudice, and the judge reminded the jurors of the submission that while they might think DAJ was a violent person, they would not think that that was the sort of person who would be involved in the type of behaviour alleged against him. I respectfully consider that those directions were inadequate to remedy the errors that had happened.

Other suspects

[39] DAJ's evidence, which in that regard echoed evidence given by V, was that he had observed SH in the company of at least two other adult male persons outside the flat on different occasions. The purpose of that evidence was apparently to suggest that if SH had been sexually abused by an adult male, as she said, it was by a person other than DAJ. V had sworn to having drawn SH's mother's attention to the fact that SH had been in the company of an adult male and carrying a bag of lollies, on one occasion. V described one of the men with whom she had seen SH walking as a person with black hair and a black beard, the description SH first gave to the police of the male who she said had abused her, and a description which it was difficult to apply to DAJ. At the relevant time he appeared to have had short, albeit darkish hair if not black; and the stubble of a beard. The man DAJ said he saw SH walking with was also described by DAJ as black-bearded and black-haired.

[40] In the course of the cross-examination about those asserted occasions, and DAJ's contention that perhaps some other male had abused the child, he was cross-examined about the assertion that he had had his penis pierced on 16 May 1999. When cross-examined about the date and address, he volunteered that he was a genius, which claim he based on prior psychiatric evaluations. That self description was unlikely to endear him to the jury. Nor was his detailed evidence about the device he said was then attached to his penis in September and October 2001. That

was evidence of behaviour which many would consider unusual. In any event, his contention that other men may have abused her led to a question in the following terms:

> "All right. And are you saying that you're the sort of fellow that, notwithstanding that you'd been in trouble before, you wouldn't engage in this sort of behaviour? - - No".

[41] That question was unfair in two ways. The only evidence that DAJ had been "in trouble" before was his own description of his having done "some stupid things" when affected by drugs in the past. That is different from the implication that he had been punished for breaking the law on prior occasions, which implication arose from the question asked. Further, DAJ was saying that he had not committed the offences charged, and not saying that while he had prior convictions for offences, he had no prior convictions for offences of that sort. That was another implication which the question suggested. The prosecutor had not obtained any leave pursuant to s 15(3) of the *Evidence Act* 1977 (Qld) to cross-examine DAJ as to whether he had any prior convictions, which he did. He had a relatively extensive record in Victoria, and more recently in Queensland, but not for committing sexual offences. He could really only accept, as he did, the proposition put to him that he had been in trouble before, but was not the sort of fellow who would sexually abuse a child.

[42] That question was accordingly unnecessary and unfair, and also asked without the requisite leave. In my opinion it would not have been a proper exercise of the learned judge's discretion to grant leave to ask DAJ any questions reflecting the fact of his having a series of earlier convictions, although not for sexual offences; or about his prior use of drugs, and their effect on him, as he had earlier sworn to one only occasion of illicit usage, eight days before the occasion of the alleged abuse. It follows that DAJ's trial was not conducted in accordance with the *Evidence Act* provisions, although no objection was taken to that at the time. The Crown case was strong but not overwhelming, and those errors could only have worked adversely to DAJ. In combination they would have helped deprive him of an opportunity or chance of acquittal. They accordingly produce a miscarriage of justice, and I would allow his appeal on that ground.

DAJ's conduct in the trial

[43] The appellant pressed, as part of it the facts relied on in support of that ground of appeal, the following events. The learned trial judge had asked some questions of DAJ, and DAJ had become somewhat agitated when answering them. The learned judge briefly adjourned the court, and DAJ went outside to have a cigarette and calm down. He did not return promptly to the court room when so requested by the Bailiff, and delayed instead for some minutes. This (and an earlier occasion of similar conduct) provoked the learned trial judge into revoking DAJ's bail, and when the court subsequently adjourned that evening, a contre temps occurred between DAJ and a young police officer taking DAJ into custody. The jurors, who had not left the court, saw DAJ lose his temper and use foul language, and also saw the arresting officer somehow fall to the floor. The learned judge inquired, when the court resumed next morning, whether any of the jurors felt at all unable to return an impartial verdict as a result of those events, after having directed the jury at some length on their irrelevance to the charges. When the jurors indicated they were not affected, the judge declined a request to discharge the jury.

[44] No complaint is made about the manner in which the learned judge was then conducting and controlling the trial proceedings. Instead, his counsel on the appeal seeks to add that event to the matters which he says justify a finding of unfairness to DAJ in the conduct of the trial. I consider that argument untenable, because DAJ cannot be seen to advantage himself by his own ill-tempered conduct in the jury's presence. No error was shown by the learned judge in insisting on maintaining control of the proceedings and of what occurred in the court room.

Section 93A

[45] DAJ's success on his first ground of appeal means that it is unnecessary to consider in any detail the other ground of appeal, since if he succeeded on that ground the appropriate order would be for a retrial, rather than a verdict of acquittal.[8] That ground complained of the fact that the two videotaped interviews with SH had been supplied to the jury, who would have been able to play and replay those in the jury room if they chose. The jurors were also provided with transcripts of those interviews, the latter course being followed after a request from the appellant's counsel at the trial that the jurors be provided with the transcript during his submission to them.

[46] It does appear that both counsel agreed to the transcripts being provided during their respective addresses, and each counsel had reason to assume a forensic advantage from doing that. The learned trial judge specifically exercised the discretion given by s 99 of the *Evidence Act*, to supply the jury with the videos. However, the judge did not comply with the requirement in the judgment of the President and Jones J in *R v H*, namely that the judge warn the jury that because they were hearing the evidence in chief of the complainant repeated a second time, and well after all the other evidence, they should guard against the risk of giving that evidence disproportionate weight simply for that reason. Nor did the judge specifically remind the jurors of what emerged in the examination and re-examination of the complainant. If on a retrial of the charges the trial judge is again asked to depart from the general rule laid down in *R v H*,[9] that videotaped evidence tendered under s 93A not be permitted to go into the jury room during the juror's deliberations, it would obviously be advisable that that trial judge comply with the further requirement stipulated in that decision. These remarks should not be understood as endorsing the appellant's complaint that a miscarriage of justice necessarily occurred by reason of a procedure followed with the consent of his very experienced counsel.

[47] I would order that the appeal be allowed and the convictions set aside on all four counts, and order a retrial on those counts.

[48] **MACKENZIE J:** I agree with Jerrard JA's comprehensive analysis of the facts and issues in this appeal and with the order he proposes. There are only two matters upon which I wish to comment.

[49] The first is that the appellant, for reasons that are not clearly apparent, himself gratuitously introduced evidence likely to prejudice the jury's perception of him. Had the ambit of the evidence not expanded beyond that, any prejudice to his case would have been his own responsibility and an argument that he had suffered a

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8 See *Jones v R* (1989) 166 CLR 409 at 411

9 [1999] 2 Qd R 283

miscarriage of justice because that evidence had been introduced would have been unattractive. The expansion of the ambit and effect of the evidence in the ways described by Jerrard JA converts the case into one where a new trial should be granted for the reasons he gives.

[50] The second is that the incident which occurred, after the court had adjourned for the day but in the presence of at least some jurors, after the appellant's bail had been revoked and while he was being taken into custody was, once again, his own responsibility. Standing alone, it would not have provided a compelling case for discharge of the jury. The learned trial judge subsequently took the proper step of directing the jury that what had happened should not reflect on the appellant and of asking them whether any felt that their impartiality had been compromised.

[51] In her reasons, the President raises the issue of whether giving the directions and making inquiries of the jury while the appellant was excluded from the court, although his counsel was present, was such a fundamental flaw as to entitle the appellant to a new trial. The circumstances in which proceedings may be conducted in the absence of an accused person are very limited (s 617 *Criminal Code*). While the procedure adopted by the learned trial judge, the morning after the incident happened, had its genesis in misbehaviour by the appellant, after the court had adjourned but before the jury had dispersed, it is difficult to conclude that continuation of the proceedings in his presence at the time when the directions and inquiries were embarked on was impracticable. This is emphasised by the fact that immediately before that time he was present in court without incident, and after the directions to the jury were given and the inquiries of the members had been made and answered, the appellant was re-admitted to the court and the trial proceeded without incident in his presence.

[52] Since a new trial is to be ordered for other reasons and since the question, having been adverted to first during the hearing of the appeal, was not directly raised by a ground of appeal or fully argued, I prefer to leave it to be finally decided after full argument if and when a like situation occurs in future. However the procedure suggested by the President with a view to avoiding the problem is one method of avoiding the problem that has occurred on this occasion. It accommodates both s 617 and what seems to have induced the learned trial judge to adopt the course he took, a concern that the jury not be placed in a situation where members may feel under pressure if required to express their individual attitudes publicly in the presence of the accused.

[53] I agree with the orders proposed by Jerrard JA.