SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lanagan* [2005] QCA 209
PARTIES:	**R** v **LANAGAN, Clayton John** (appellant)
FILE NO/S:	CA No 18 of 2005 DC No 125 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	17 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2005
JUDGES:	de Jersey CJ, White and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The appeal is allowed, the conviction quashed and a retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant convicted of indecent dealing and rape of a child under the age of 16 – where prosecution case depended entirely upon the evidence of the complainant – where evidence of the complainant inconsistent in some respects with that of two other witnesses – whether verdicts were reasonably open to the jury CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR OFFENCES – where trial judge directed the jury in relation to a minor's ability to give consent firstly to an act of indecent dealing and then to rape – where jury requested redirections on a minor's capacity to consent to rape – whether jury confused in relation to the issue of

consent

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where complainant was 16 at the time of the offence – where complainant gave a statement to the police two days after the offence was committed – where complainant gave oral evidence at a preliminary hearing pursuant to s 21AK of the *Evidence Act* 1977 (Qld) after she had turned 16 – where the statement was tendered at the subsequent hearing – whether the statement was admissible under s 93A of the *Evidence Act*

Criminal Code 1899 (Qld), s 597C, 668E(1A)
Evidence Act 1977 (Qld), s 21AJ, s 21 AK, s 93A, s 93A(1)(b), s 93A(3), s 93A(5)

R v GR [2005] QCA 146; CA No 319 of 2004, 10 May 2005, applied

COUNSEL: B G Devereux for the appellant
C W Heaton for the respondent

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

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of McMurdo J. I agree with the orders proposed by His Honour, and with his reasons.

[2] **WHITE J:** I have read the reasons for decision of McMurdo J and agree with his Honour for the reasons that he gives that the appeal must be allowed because the s 93A statement was impermissibly admitted into evidence before the jury. This was because the complainant, although a child within the meaning of s 93A(5) when she made the statement, was not a child when her evidence was given since she had then turned 16. A statement is admissible under the section only if the witness is a child when giving evidence in the proceeding, *R v GR* [2005] QCA 146. Since the complainant's oral evidence was likely to have been reinforced by the consistency of her s 93A statement with her oral testimony together with details not recalled by her orally as well as certain prejudicial inadmissible material, there is no place for the application of the proviso.

[3] I agree with the further observations of his Honour that the further statement purportedly made under s 93A by one of the complainant's friends should not have been admitted into evidence.

[4] I agree with his Honour that the other two grounds of appeal based on the unreasonableness of the verdicts and the learned trial judge's directions about consent have no force.

[5] I agree with the orders proposed by his Honour.

[6] **McMURDO J:** The appellant was charged that on 4 October 2003 he committed three acts of indecent dealing and one rape on the complainant girl, a child under 16 years. He was tried in the District Court at Toowoomba in January 2005 and convicted on each count. He appeals against the convictions upon three bases. The verdicts are said to be unsafe and unsatisfactory. He complains of the directions in the summing up in relation to the question of consent, which was relevant to the rape charge. And thirdly, it is argued that a statement by the complainant, which was tendered purportedly pursuant to s 93A of the *Evidence Act* 1977 (Qld), was wrongly admitted. In my conclusion the appeal should be allowed upon that third basis, but upon that basis only.

Verdicts reasonable

[7] The prosecution case depended entirely upon the evidence of the complainant. She was examined and cross examined at a "preliminary hearing" pursuant to s 21AK of the *Evidence Act*, the video tape of which was played to the jury. She did not give oral evidence at the hearing before the jury. The jury also had evidence from the complainant in the form of an eight page statement signed by her two days after the events in question. It was read to the jury and was almost the first evidence which they received. As I will discuss, it contained some material beyond the evidence given by the complainant at the "preliminary hearing", although the complainant's oral evidence, if accepted, would have proved the prosecution case. The following summary comes from the complainant's oral evidence.

[8] The complainant said that on 4 October 2003, she and a girlfriend, who was 17 at the time, were picked up by a man, S, and taken to his house. They thought they were being taken there to baby sit S's young children. On the way to the house, with S's assistance they purchased some alcohol which they intended to drink afterwards. When they arrived at the house, the appellant, another man and a woman were present, but there were no children. That man and woman left soon afterwards, but not before the complainant and her friend started drinking. S invited the complainant's friend to his bedroom and she went with him. The complainant followed them after a few minutes and as she walked into the room, her friend walked out. S began kissing the complainant and rubbing her back and she pushed him away. She ran back to the lounge room and told her friend she wanted to go home, who encouraged her to stay. They had another drink and the complainant felt dizzy and went outside where she says she passed out. She then recalled that the appellant picked her up and carried her into the house, down a hallway to a bedroom. He put her on the floor and began to kiss her and put his hand under her pants towards her vagina, but she pushed him away. That was the subject of one count. She said that she must have then passed out again as her next memory was that she was lying in the same place with her pants partly removed and with the appellant putting fingers into her vagina. She pulled him away. That was the subject of the rape offence. She said the appellant then pulled out his penis and put her hand on it and she pulled her hand away. That was the subject of a further count of indecent dealing. And then she thought she passed out again before she realised "he was sort of licking my vagina", when she said that she then "jumped up", left the bedroom and the house. When she came back inside soon after, she saw the man and woman who had been there earlier. According to her evidence, the appellant was still in the bedroom when she left it. The friend was very intoxicated and at one stage vomited. The complainant called a group of friends who came in a taxi and took her and her friend to a house of one of that group. According to one

of that group, the complainant then "said that she didn't know if anything had happened because she was drunk".

[9] On the following day she was examined by a doctor at the local hospital. The complainant said to the doctor that:

> "she'd gone with a friend to baby sit for somebody, but when they got there, there were no children there and they had – were given some alcohol and oral sex was performed on her and digital penetration as well, but she ran off when intercourse was suggested."

That complaint corresponded with her oral evidence. The doctor's medical examination did not prove or disprove the claims.

[10] The man and woman were each called in the prosecution case. The woman was acquainted with S. She recalled being at his house early in the evening when S arrived with the complainant and her friend. She saw the girls starting to drink the alcohol they had with them. She and her partner left about 15 minutes later. They returned after approximately two hours to find the appellant at the front door. The appellant told her that the two girls had had an argument. Occasionally the complainant would emerge from the hallway and then return. She appeared upset. For most of this time the appellant was in the kitchen or lounge. About half an hour later S emerged from the hallway saying that the complainant's friend had been sick. She said that that girl looked extremely drunk and the complainant was drunk, but when pressed said that the complainant looked sober. Her partner gave evidence which was broadly consistent with hers. He said that the appellant was not out of their sight except "maybe to go to the toilet … but he wouldn't have disappeared for more than 5 minutes at a time if he did disappear."

[11] It is unnecessary to mention the other evidence in discussing the submission that the verdicts were not open to the jury. It is submitted that there were a number of unsatisfactory features of the complainant's evidence at least when read with the evidence of the man and woman as to what they saw when they returned to the house and what happened before the complainant left it.

[12] The complainant's version was that she passed out on several occasions. Yet at the same time she denied that she had been intoxicated, claiming that she had had only two drinks. But the jury could have thought that her denial in that respect was untrue but came from a sense of embarrassment. That denial, even taken with the other criticisms of her evidence, does not provide a significant ground for challenging these verdicts.

[13] Her version was inconsistent in some respects with those of the man and woman in their description of where people were when they returned to the house. According to the complainant's version, she rushed from the bedroom where the offences had taken place leaving the appellant in that room, and she did not see the man and the woman until she had been outside the house and came back inside. But according to their evidence, when they arrived at the house, the appellant was in the lounge or kitchen area and by himself, before she subsequently emerged from the hallway and then returned to the bedroom area. But the jury were not bound to accept their account. They might have thought that the couple were simply mistaken, or were in

some way affected by the woman's association with S in that they were defensive of the conduct of S and the appellant.

[14] There was an absence of a complaint on the night in question. But, as mentioned, there was a clear complaint to the doctor on the following day in terms consistent with the complainant's evidence.

[15] There was some tension between her oral evidence and the statement which was tendered, in relation to the sequence in which the four acts were said to have occurred. And as was submitted for the appellant, any objective features, such as her distress, were equally consistent with other matters such as the treatment she had received from S, her intoxication and her predicament of being in this place whilst her friend was engaged in sexual activities with S, as such features were with the guilt of the appellant.

[16] Ultimately, however, it was open to the jury to accept the substance of her evidence, and in particular her evidence which proved the commission of these offences. That version was not affected by any inherent improbability. To the extent that it was inconsistent with the evidence of the man and woman who arrived at the house, the jury were entitled to prefer the complainant's evidence. The verdicts were reasonably open and this first ground of appeal fails.

Directions about consent

[17] The appellant now complains that the trial miscarried as a result of directions given about the issue of consent, which were relevant to the rape charge. In relation to the counts of indecent dealing, consent was not an available defence. With respect to those counts the judge directed the jury as follows:

> "In relation to the matter of consent, I direct you that, in law, a girl under the age of 16 years cannot consent to an assault. In an appropriate case she may in fact permit a male to touch her body. In an appropriate case she may even be curious, she may be consenting. In an appropriate case she may even be enjoying it. But in the eyes of the law she is incapable of consenting. The complainant, of course, in her evidence, made it perfectly clear that she said that those acts occurred and she certainly wasn't consenting to any of them.
>
> The law is there, you might think, for very obvious reasons. It's for the protection of children sometimes against themselves, the protection of children at a vulnerable stage of their development. So, accordingly, the complainant, in law, was not capable of consenting. Therefore, if the accused touched the complainant in any of the ways alleged, even if she had permitted a touching which she said she didn't, but if the accused did so touch, the law regards that touching as if it were a touching without her consent and thus, as constituting an assault, and is therefore a dealing with."

[18] When instructing the jury on the rape charge, the learned trial judge said:

> "The elements in relation to that, the word 'rape' has had the definition for centuries that if a male has carnal knowledge of a female without her consent that means, as you understand it, penile penetration of the female vagina."

After reading the definition of rape, the trial judge continued:

> "In other words, digital penetration, the finger actually penetrating the complainant's vagina. The complainant said that did happen and the Crown must also prove beyond reasonable doubt that the complainant did not consent, and she said, you might think in the strongest terms, that she was not consenting."

[19] The jury retired just after 1 pm and at 2.50 pm the judge received a note with the question "could you define consent in relation to (the rape charge). Is it possible for a minor under 16 to give consent?"

The judge redirected as follows:

> "I can understand how the differing charges here might not be entirely clear on these matters. Now, you go to the charges, and counts 1, 2 and 4 is indecent dealing with a child under 16 years and in those counts it is with a child under 16 and indecent dealing.
>
> So, when the Crown brings a charge such as that it is a charge that says consent is not an issue because in law, a child under 16 on that charge, cannot consent. But when the charge is brought in count 3, whether it's called 'rape' by the extended definition or 'indecent assault' the Crown is bringing a charge in which an element is non-consent and although the complainant, in counts 1, 2 and 4 said that she was not consenting, it wouldn't have mattered if she was consenting because consent or non-consent is not an element in counts 1, 2 and 4.
>
> But in count 3, the Crown has to prove beyond reasonable doubt that the complainant was not consenting. A minor under 16, the fact that the complainant is a minor and under 16 does not affect the issue in that count, of non-consent.
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> For a 15-year-old, on a count of rape or indecent assault, such person, for the purposes of that count, can consent. The Crown has to prove beyond reasonable doubt that the complainant did not consent, and age has no relevance in relation to count 3."

[20] No complaint was made at the trial of any of these directions, and no complaint is now made of the redirection. The submission is that notwithstanding the redirection, the jury must have been confused and there is a danger that the appellant was convicted of rape without the jury understanding the necessary element of non-consent. That submission cannot be accepted. It appears from the note from the jury that they were then confused in relation to the issue of consent. They could not have been confused following the redirection.

Section 93A statement

[21] The third ground is that the complainant's statement was wrongly admitted. The purported basis for its tender was s 93A of the *Evidence Act*, which provides, in part, as follows:

> "**93A Statement made before proceeding by child or intellectually impaired person**
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> (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if –
>
> (a) the maker of the statement was a child or an intellectually impaired person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
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> (b) the child or intellectually impaired person is available to give evidence in the proceeding.
>
> …
>
> (3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.
>
> …
>
> (4) In the application of subsection (3) to a criminal proceeding – "party" means the prosecution or the person charged in the proceeding.
>
> …
>
> "child" means –
>
> (a) a child who is under 16 years; or
>
> (b) a child who is 16 or 17 years and who is a special witness."

[22] There were two arguments foreshadowed by the appellant's outline as to why this statement was not admissible consistently with the terms of the section. The first was that in this case the complainant was not available to give evidence in the proceeding, so that the condition prescribed by paragraph 93A(1)(b) was not satisfied. This involves a contention that the hearing which took place before the jury was a different "proceeding" from the preliminary hearing at which the complainant was examined and cross-examined. At least in the present case, that cannot be accepted. At the commencement of the so called preliminary hearing, the indictment was presented as was required by s 21AJ of the *Evidence Act*. But further the appellant was then arraigned before the complainant began her evidence. According to s 597C of the *Criminal Code* 1899 (Qld), the trial was then deemed to begin. At least in this case, the proceeding in which the complainant did give evidence was one and the same as that in which the statement was tendered.

Further, s 93A(1)(b) must be read with s 93A(3) which obliges the party tendering the statement to call the maker of the statement as a witness if required to do so. In the present case there was no such requirement by the appellant. The availability of the person to give evidence in the proceeding, as prescribed by s 93A(1) is an availability if required under s 93A(3).

[23] However, the statement was inadmissible upon the alternative basis advanced by the appellant which is conceded by the prosecution. It is that although the complainant was a "child" (as defined in s 93A(5)) when she made the statement, she was not a child when her evidence was given, either by her oral evidence or by the tender of the statement. She had then turned 16.[1] This follows from *R v GR* [2005] QCA 146 which held that a statement is admissible under the section only if the witness is a child when giving evidence in the proceeding.[2]

[24] The prosecution tendered another statement purportedly under s 93A, which was made by one of the group of the complainant's friends who looked after her after the events at S's house. For the same reason this statement should not have been admitted. It is unnecessary to discuss the contents of that statement because the admission of the complainant's statement itself caused the trial to miscarry.

[25] The prosecution case was able to be proved by the complainant's oral evidence without recourse to the statement. In some respects, however, the statement went further than the oral evidence and it included a deal of inadmissible and prejudicial material. It contained evidence of certain things having been said by the appellant during the course of the commission of the offences, which were not within the complainant's oral testimony. And it contained details of the condition of the complainant's friend and of the conduct of S, which should not have been admitted in any form and which were likely to have had a prejudicial impact.

[26] In this case, where the prosecution case depended entirely upon the complainant's evidence, it cannot be said that there was no substantial miscarriage of justice from the admission of this statement. It was read to the jury almost at the commencement of the hearing and in the jury's mind it must have tended to support her oral evidence. The proviso in s 668E(1A) can have no operation in these circumstances.

[27] The appeal must be allowed, the conviction quashed and a retrial ordered.

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1 And she was not a "special witness".

2 At [22] and [34].