SUPREME COURT OF QUEENSLAND

CITATION:	*R v GT* [2005] QCA 478
PARTIES:	**R** **v** **GT** (appellant)
FILE NO/S:	CA No 69 of 2005 DC No 1825 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2005
JUDGES:	Williams JA, Muir and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE IS NOT SUBSTANTIAL – where the trial judge allowed the jury into the courtroom during their deliberations to play the pre-recorded video statements – where the pre-recorded statement was admitted pursuant to s 21AM of the *Evidence Act* 1977 (Qld) and included the evidence-in-chief and cross-examination of the witness – there is no general rule that video recordings made under s 21AM cannot be taken into the jury room during the deliberations CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE IS NOT SUBSTANTIAL – where the jury requested the complainant's statement be re-read to them and a further portion re-read again – where the trial judge did not give a warning about the need for care not

to give undue weight to the evidence – where the jury had available to them the extensive cross-examination of the complainant in pre-recorded video statements – whether this constituted a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where s 93A required the maker of the statement to be a child at the time of trial – where the complainant and witness had given statements to the police when 15 years old but were both 16 years old at the time of the trial – section 93A was amended between the time of the trial and the decision of this Court – where the subsequent amendment to section 93A no longer requires the maker of the statement to be a child at the time of trial – whether the trial judge erred in admitting into evidence the written statements of the complainant and a witness pursuant to s 93A of the *Evidence Act* 1977 (Qld)

STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF STATUTES – RETROSPECTIVE OPERATION – IN RESPECT OF PROCEDURE AND PRACTICE – where s 93A of the *Evidence Act* 1977 (Qld) was amended between the date of trial and the decision of this Court – where the amendment makes evidence that was wrongly admitted into evidence in the trial admissible as though it has always been admissible – held that a procedural statute is, in the absence of anything to the contrary, construed as acting retrospectively – whether, in any event, the presumption against retrospectivity has been clearly rebutted by the express provision in the *Evidence Act* 1977 (Qld)

Acts Interpretation Act 1954 (Qld), s 20
Evidence Act 1977 (Qld), s 21AM, s 93A
Justice and Other Legislation Amendment Act 2005 (Qld), s 93, s 95
Legislative Standards Act 1992 (Qld), s 4

Attorney-General (Vic) v Melbourne Corporation [1907] AC 469, cited
In re Athlumney; Ex parte Wilson [1898] 2 QB 547, considered
Maxwell v Murphy (1957) 96 CLR 261, considered
R v GR [2005] QCA 146; (2005) 153 A Crim R 94, not followed
R v H [1998] QCA 348; [1999] 2 Qd R 283, considered
R v Lanagan [2005] QCA 209; CA No 18 of 2005, 17 June 2005, considered

State of South Australia v O'Shea (1987) 163 CLR 378, cited

COUNSEL: D Sheppard for the applicant
R G Martin SC for the respondent

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

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Atkinson J and I agree with what is said therein. The legislature has seen fit to make the amendments to s 93A of the *Evidence Act* 1977 (Qld) retrospective and the courts are bound to apply the law as so enacted. It follows that, although at the time of trial evidence was wrongly admitted given the law as it then stood, the subsequent amendment of the law has the consequence that the evidence in question was deemed to be admissible at the time of trial. It follows that no error can now be established such as would result in the conviction being set aside.

[2] The appeal should be dismissed.

[3] **MUIR J:** I agree with the reasons of Atkinson J save that I express no views on the general principles applicable to retrospective legislation and as to whether those principles exhibit any deficiencies. The amendments to s 93A of the *Evidence Act* 1977 (Qld) are expressed to have retrospective application and they have.

[4] I agree that the appeal should be dismissed.

[5] **ATKINSON J**: The appellant was convicted after a trial in the District Court on nine counts of indecent treatment of a child under 16 years who was a lineal descendant, one count of unlawfully procuring a child under 16 years who is a lineal descendant to commit an indecent act, and one count of incest. He was sentenced to two years' imprisonment on counts one and three; two and half years' imprisonment on counts two, five, six, seven, eight, nine, ten and eleven; and five years and nine months' imprisonment on count twelve, the offence of incest. All of the offences occurred between 22 July 2002 and 4 August 2002. The sentences were ordered to be served concurrently.

[6] The trial commenced on 7 October 2004 with a pre-recording of the evidence of the complainant and a prosecution witness, TB, before His Honour Judge Botting. The trial before the jury was conducted before His Honour Judge Griffin between 9 and 12 November 2004.

[7] The appellant is the uncle of the complainant and the offences were alleged to have occurred while the complainant was on holidays with her grandmother and great grandmother at the appellant's home between 23 July 2002 and 3 August 2002.

[8] The appellant no longer relies on the specific grounds of appeal set out in the Notice of Appeal but has been granted leave to argue the following grounds:

1. There has been a miscarriage of justice on the basis that the jury were permitted to view tapes of the pre-recorded evidence of the complainant during the course of their deliberations in the courtroom and not in open court;

2. The trial judge erred in admitting into evidence the written statement of the complainant dated 9 June 2003 (Exhibit 1);

3. The trial judge erred in admitting into evidence the written statement of the witness TB dated 15 June 2003 (Exhibit 2); and

4. There has been a miscarriage of justice because the learned trial judge, after having Exhibit 1 re-read to the jury then a further portion again re-read to the jury, failed to warn the jury of the need to be careful not to give undue weight to that evidence.

[9] The complainant was born on 26 March 1988 and was therefore 14 years old at the time the offences took place. She gave a statement to the police on 9 June 2003 when she was 15 years old. She was 16 years old when she gave pre-recorded evidence pursuant to s 21AM of the *Evidence Act* 1977 (Qld) in October 2004 and at the trial in November 2004.

[10] When the complainant's pre-recorded evidence was given on 7 October 2004, no mention was made of the statement of 9 June 2003 and there were a number of issues from that earlier statement which remained unexplored. As a result, the learned trial judge allowed further pre-recorded evidence to be given for the purpose of defence counsel's being able to cross-examine the complainant on those matters.

[11] The statement to police was tendered at the trial pursuant to s 93A of the *Evidence Act* 1977 (Qld) and became Exhibit 1. Defence counsel initially took object to its admission on the basis of fairness but that objection was abandoned, no doubt in view of the opportunity he had to further cross-examine the complainant.

[12] In addition, a pre-recorded statement was taken from TB who is the same age as the complainant. TB stayed with the complainant for a week in October 2002. During that time the complainant told her that her uncle had been touching her, that she didn't like it and that she had asked him to stop and that he hadn't stopped.

[13] Towards the end of the Crown case, the jury sent the learned trial judge the following note:

> "Your Honour, we appreciate the following are not evidence, but our deliberations would be assisted by having copies of [the complainant's] two statements, [TB's] statement and the [complainant's mother's] statement."

[14] When his Honour asked the jury what they meant by the complainant's two statements, they referred to the copies of the transcript of the video tapes. Essentially, what the jury was seeking were copies of the transcripts of the two video tapes of the complainant's evidence, the transcript of the video tape of TB's evidence and the transcript of the evidence given in court by the complainant's mother. The learned trial judge told the jury that they were not able to have any of those transcripts in the jury room with them, although they could have any of that evidence read over to them if they wished.

[15] Defence counsel submitted that the video tapes themselves should not go into the jury room with the jury but the learned trial judge pointed out that they were able to come into the courtroom and have the video tapes played. Both counsel agreed that it was not necessary for the court to reconvene as defence counsel said "if they want

to play it they can play it while here in the presence of the bailiff and not in the presence of other members of the Court". After the jury retired, they asked to see all of the video evidence again and also to hear the transcript of the grandmother's evidence again. When they returned, the jurors clarified that they wished to see the two video tapes of the complainant's evidence. As a result of a further request by the jury to see part of Exhibit 1, the learned trial judge had his associate read the whole of Exhibit 1 to them.

[16] It appears that the jury listened and watched the videos again late on the afternoon of the first day on which they retired. There is no evidence that there was anyone else present. The appellant complains on appeal that the court should have reconvened when the jurors watched the video tapes during their deliberations. The argument was that the learned trial judge could not know what went on in the courtroom (which had become a de facto jury room) after he retired to chambers, whether all or only some of the jury watched the tapes, and to what use the jury put the video recordings. He would therefore not be in a position to identify circumstances which might require further directions; and there is a danger the bailiff was in the room with the jury during at least part of their deliberations.

[17] All of these complaints are purely speculative. There is no suggestion that there was any misunderstanding by the jury of the task which was to watch the video recordings and no requirement for any further directions to be given. There is no evidence that the bailiff was present or any suggestion that the bailiff behaved in any way other than entirely properly.

[18] There is no general rule that video recordings made under s 21AM of the *Evidence Act* 1977 (Qld) cannot be taken by the jury into the jury room for their consideration. It is settled law in Queensland that the video taped evidence of a child which is admitted under s 93A of the *Evidence Act* 1977 (Qld) should not go into the jury room during deliberations: *R v H* [1999] 2 Qd R 283 at 290. The reason for this is that video tapes admitted under s 93A contained only the evidence-in-chief of the child. Before the introduction of s 21AM of the *Evidence Act* 1977 (Qld), the cross-examination of evidence admitted under s 93A occurred *viva voce* during the trial. The transcript of the cross-examination was not available for the jury to read. It was therefore unfair to the defendant to allow the jury to review the evidence-in-chief but not the cross-examination. However that concern does not apply to a video tape of evidence admitted under s 21AM where both the evidence-in-chief and cross-examination of the complainant are contained on the pre-recorded video tape. Moreover in this case, both counsel consented to the jury having the capacity to watch the s 21AM video recordings. There is no merit in this ground of appeal.

[19] The second and third grounds of appeal are that the trial judge erred in admitting into evidence the written statements of the complainant and the witness, TB, which were given to the police in June 2003 when they were 15 years old. Section 93A of the *Evidence Act* provides that a statement made by a person who was a child "at the time of making the statement" is admissible in certain circumstances. A child is defined in subsection 5 to mean, *inter alia*, a person who is under 16 years. Both the complainant and TB were under 16 years when the statements were taken by the police. However both were 16 years old at the time of trial.

[20] At the time of trial, s 93A(1) provided that:

"(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

(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.

…

(5) In this section –

…

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."

[21] Subsequent to the trial of this matter, the Court of Appeal considered the application of s 93A in two cases. The first was *R v GR*.[1] The complainant was 17 years old at the time she gave her statement to the police and 19 at the time of trial. As she was 17 years old she could fall within paragraph (b) of the definition of the child at the time she gave her statement if she was also a special witness; however she could not fall within the definition of child at the time of trial because by then she was 19 years old. The Court by a majority held that the written statement was not admissible under s 93A because the maker of the statement must still be a child at the time of trial. McMurdo P[2] held that this was the effect of s 93A(1)(b) which used the word 'child' to describe the person who was to be available to give evidence at the trial. In agreeing, Jerrard JA said:[3]

> "I also agree with the President's construction of s 93A(1)(b) that a statement cannot be tendered under s 93A unless the maker of the statement is a child (as defined for the purpose of that section) at the time of the proceeding. The proper construction is not free from

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1 [2005] QCA 146; (2005) 153 A Crim R 94.

2 (supra) [18] – [22].

3 At [34].

> doubt; s 93A(3) describes an obligation on the party tendering the statement to, if required, call as a witness the *person* whose statement is admitted under s 93A. That would suggest that a statement could be tendered from an adult, which was given when that adult was a child; but that construction is made difficult by the requirement in s 93A(1)(b) that the *child* is available to give evidence in the proceeding. I accept the President's construction."

Holmes J disagreed with this construction. Her Honour held:[4]

> "… I do not think that s 93A(1)(b) requires that the witness meet the definition of "child" at the time he or she gives evidence. The reference to "the child" in sub-paragraph (b), in my view, is a reference back to the "child" as identified in sub-paragraph (a); that is, to the maker of the statement who was a child at the time it was made. If the requirement in (b) is that the witness be a child at the time of giving evidence, there seems little point in imposing in (a) the requirement that he or she be a child at the time of making the statement."

[22] The view of the majority was followed by the court in *R v Lanagan* [2005] QCA 209. The complainant was a child when she made the statement but was 16 years old by the time of trial. The relative age of complainant and the witness in this case made it indistinguishable from the facts in *R v Lanagan*. The point was not taken at the trial of this matter but that is explicable because it appears that prior to the Court's decision in *R v GR*, no judicial consideration had been given to the requirement inferentially imposed by s 93A(1)(b) that the maker of the statement must still be a child when he or she was available to give evidence in the proceeding.

[23] At the hearing of this appeal counsel for the appellant argued that the choice of words in s 93A(1)(b) meant that Parliament intended that the witness must still be a child at the time of giving evidence. Had that not been intended to be the case, s 93A(1)(b) could, he argued, have referred to the 'maker of the statement' as it did in s 93A(1)(a) rather than using the words 'child or intellectually impaired person'. Both counsel were given leave to put in further written submissions as to whether the witness statements were admissible on some alternate basis as a matter of law or in the discretion on the court. The decision was reserved.

[24] On 8 November 2005, the *Justice and Other Legislation Amendment Bill* 2005 (Qld) ("the Amendment Act") was introduced into the Queensland Parliament. It was passed on 30 November 2005 and assented to on 8 December 2005. Section 93 of the Amendment Act amended s 93A of the *Evidence Act* 1977 (Qld) in the following way:

> "**Amendment of s 93A (Statement made before proceeding by child or intellectually impaired person)**
>
> (1) Section 93A(1)(b), 'the child or intellectually impaired person' –
>
> *omit, insert –*

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4 (supra) at [40].

'the maker of the statement'.

(2) Section 93A(2) –

omit, insert –

'(2) If a statement mentioned in subsection (1) (the ***main statement***) is admissible, a related statement is also admissible as evidence if the maker of the related statement is available to give evidence in the proceeding.

'(2A) A ***related statement*** is a statement –

(a) made by someone to the maker of the main statement, in response to which the main statement was made; and

(b) contained in the document containing the main statement.

'(2B) Subsection (2) is subject to this part.'.

(3) Section 93A(5), definition *child* –

omit, insert –

'***child***, in relation to a person who made a statement under subsection (1) means –

(a) a person who was under 16 years when the statement was made, whether or not the person is under 16 years at the time of the proceeding; or

(b) a person who was 16 or 17 years when the statement was made and who, at the time of the proceeding, is a special witness.'."

[25] Section 95 provides as follows:

"**Insertion of new pt 9, div 4**

Part 9 –

Insert –

Division 4 Justice and Other Legislation Amendment Act 2005

144 Statement made before proceeding by child or intellectually impaired person

(1) To remove any doubt, it is declared that amended section 93A applies to a proceeding that starts after the commencement of this section, regardless of when the conduct giving rise to the proceeding happened.

(2) A statement admitted into evidence in a proceeding before the commencement of this section that would be

> admissible under the amended section 93A if tendered in a proceeding after the commencement is taken to have always been admissible under section 93A.
>
> (3) In this section –
>
> ***amended section 93A*** means section 93A as amended by the *Justice and Other Legislation Act 2005*.
>
> ***proceeding*** includes a committal, a preliminary hearing, a trial and any rehearing or retrial arising out of, or any appeal from, an earlier proceeding."

The explanatory notes to the Act say with regard to these amendments:

> "the *Evidence Act* 1973 [sic] is amended to restore the accepted interpretation of section 93A (which deals with the admissibility of a child's statement) that applied until the recent Court of Appeal decision in *R v GR* [2005] QCA 146, 10 May 2005;"

[26] Parliament has the power to pass retrospective legislation of this type.[5] However, where it affects substantive rights rather than matters of procedure it is presumed not to have a retrospective effect. It has been said that it will not apply retrospectively unless the intention for it to so apply appears with reasonable certainty.[6] This presumption was expressed by Dixon CJ in *Maxwell v Murphy*[7] as:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events."

[27] The rule against retrospectively taking away a right or imposing a liability is a basic human right imposed or at least recognised by the common law. In my view, given the greater recognition given to human rights by both international and national law over the past fifty years, "reasonable certainty" may no longer be considered a sufficiently clear statement of the test. The presumption against retrospectivity can only be displaced in legislation by express provision or words of plain intendment.[8]

[28] If there is any ambiguity about the construction, the interpretation should be favoured which avoids retrospective operation of the statute. In *In re Athlumney; Ex parte Wilson*,[9] Wright J said:

> "Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is

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5 *Rodway v The Queen* (1990) 169 CLR 515 at 518.

6 *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

7 (supra) at 267.

8 *Attorney-General for Victoria v Melbourne Corporation* [1907] AC 469 at 475; *State of South Australia v O'Shea* (1987) 163 CLR 378 at 416.

9 [1898] 2 QB 547 at 551-552.

expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

[29] This common law presumption is enshrined in s 20 of the *Acts Interpretation Act* 1954 (Qld) which provides that:

"(2) The repeal or amendment of an Act does not –

(a) …

(b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or

(c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or

(d) affect a penalty incurred in relation to an offence arising under the Act; or

(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).

(3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened."

[30] This is consistent with what are referred to in s 4 of the *Legislative Standards Act* 1992 (Qld) as "fundamental legislative principles" which "are the principles relating to the legislation that underlie a parliamentary democracy based on the rule of law." One of those principles is that legislation should "not adversely affect rights and liberties … retrospectively".[10]

[31] However a merely procedural statute is, in the absence of an indication to the contrary, construed as acting retrospectively. Matters of admissibility of evidence are usually, although not invariably, treated as procedural[11] and should be treated so in this case. In any event, any presumption against retrospectivity has been clearly rebutted by s 95 of the Amendment Act.

[32] In this case it appears that the words used in s 93A before it was amended did not in fact reflect the true legislative intention.

[33] As the legislation no longer provides that the maker of the statement must be a child at the time of trial and as that legislation is retrospective in effect, the second and third grounds of appeal can not be successful.

[34] The fourth ground of appeal was a complaint that after the learned trial judge had Exhibit 1 re-read to the jury and at their request a further portion re-read, the learned trial judge failed to warn the jury of the need to be careful not to give undue weight to that evidence. The jurors after retiring had asked for a copy of the complainant's statement to the police which the learned judge had quite properly refused to give

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10 *Legislative Standards Act* 1992 (Qld) s 4(3)(g).

11 *Nicholas v The Queen* (1998) 193 CLR 173 at 198.

them. They then asked if they could hear the police statement relating to the events referred to in counts 10, 11 and 12 and with the concurrence of counsel, the whole of Exhibit 1 was read to the jury. The speaker then asked for a repetition of the part that dealt with whether or not there was actual penetration or attempted penetration on the incest count. That was repeated to the jury. No objection was taken from either counsel on the manner in which His Honour dealt with that request from the jury. Given that they had available for their view the extensive cross-examination of the complainant on the two video tapes, it is unsurprising that anything further was required. This ground of appeal is also without merit.

[35] The appeal against conviction should be dismissed.