SUPREME COURT OF QUEENSLAND

CITATION:	*R v Marshall* [2010] QCA 43
PARTIES:	**R** **v** **MARSHALL, Peter John** (appellant)
FILE NO/S:	CA No 73 of 2009 DC No 606 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2010
JUDGES:	McMurdo P, Keane and Chesterman JJA 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 – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted upon a guilty verdict of two counts of unlawful carnal knowledge of a complainant who was under his care, four counts of indecent treatment of a child who was under his care, one count of exposing a child to an indecent film, and one count of maintaining a sexual relationship with a child under the age of 16 years – where appellant sentenced to six years imprisonment – where complainant gave evidence by way of a tape recorded interview under s 93A of the *Evidence Act* 1977 (Qld) – where the s 93A interview contained references by the complainant to two acts of intercourse of which the appellant had been acquitted after an earlier trial – where appellant did not object to this at trial – whether evidence improperly admitted CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where appellant applied to the trial judge for an order that the complainant be called as a witness, or alternatively, that she be further cross-examined

pursuant to s 21AN of the *Evidence Act* 1977 (Qld) – where the application was refused by the trial judge – whether justice miscarried because the appellant was denied the opportunity to confront his accuser

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where complainant did not make a complaint until almost one year after the acts complained of occurred – where appellant not convicted until almost five years after the acts complained of occurred – where trial judge did not give a *Longman* direction – where trial judge did not give a *Robinson* direction – whether justice miscarried due to the failure of the trial judge to provide proper directions to the jury

Criminal Code 1899 (Qld), s 668E(1)
Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A(3), s 4A(4), s 4A(5)
Evidence Act 1977 (Qld), s 21AK, s 21AN, s 21AN(3), s 93A

Ali v The Queen (2005) 79 ALJR 662; [2005] HCA 8, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, considered
R v Burns (1999) 107 A Crim R 330; [1999] QCA 189, cited
R v Grech [1997] 2 VR 609, cited
R v Masters (1992) 26 NSWLR 450; (1992) 59 A Crim R 445, cited
R v S [1999] 2 Qd R 89; [1998] QCA 071, cited
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, applied
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, distinguished
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, applied
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, cited

COUNSEL: T F Carmody SC for the appellant
M J Copley SC for the respondent

SOLICITORS: Ryan and Bosscher for the appellant
Director of Public Prosecutions for the respondent

[1] **McMURDO P:** This appeal against conviction should be dismissed for the reasons given by Keane JA.

[2] **KEANE JA:** On 18 March 2009 the appellant was convicted upon the verdict of a jury of two counts of unlawful carnal knowledge (aggravated by the fact that the complainant was under his care), four counts of indecent treatment of a child who was under his care, one count of exposing a child to an indecent film, and one count of maintaining a sexual relationship with a child under the age of 16 years.

[3] The appellant was sentenced to an effective term of six years imprisonment.

[4] The appellant originally sought to appeal against his convictions on the ground that "the verdict of the jury is unsafe and unsatisfactory". That ground was abandoned, and in lieu thereof the following grounds of appeal were pursued by the appellant:

> "Justice miscarried because the trial was not a procedurally fair one due to an aggregate of faults and defects including:
>
> (a) admitting evidence of similar discreditable acts in respect of which the appellant was not charged or had already been acquitted;
>
> (b) not permitting further examination of the complaint on her s 93A statement under s 21[AN] *Evidence Act* or, alternatively, requiring her to appear at trial to testify before the jury in person.
>
> (c) not giving a [*Longman*] direction about the potential significance of delay between an alleged incident and complaint in a case where there is no independent corroboration.
>
> (d) the prejudice and forensic disadvantage resulting from the receipt of too many preliminary 'complaints' and allowing them all to be treated by the jury as consistent conduct or statements when assessing credit.
>
> (e) not excluding tenuously probative but highly prejudicial evidence of the seizure and reported contents of three (3) 'standard' type pornographic videos found in the appellant's possession when his premises were searched by police in June 2005 i.e. fifteen (15) months after the alleged offence period."

The course of proceedings

[5] The complainant gave evidence by way of a tape recorded interview under s 93A of the *Evidence Act* 1977 (Qld) and also by way of pre-recorded evidence under s 21AK of the *Evidence Act*. A complaint against the appellant was made to the police on 24 April 2005, and the s 93A statement was taken by investigating police, on 3 May 2005. The pre-recorded examination of the complainant under s 21AK of the *Evidence Act* occurred on 1 May 2007. On that occasion the prosecutor referred the complainant to her s 93A statement which she adopted as correct. The balance of her evidence on that occasion was given in the course of cross-examination by the appellant's then counsel.

[6] The charges against the appellant proceeded to trial on 22 October 2007. This trial was abandoned after three days because of the illness of a juror.

[7] A second trial in July 2008 resulted in the appellant being acquitted by direction of the learned trial judge of seven counts of rape and two counts of unlawful carnal knowledge. The jury were unable to reach a verdict on the balance of the charges. They were the subject of the third trial which began on 2 March 2009. This trial was abandoned because of the family circumstances of a juror but the learned judge made rulings which are relevant to the issues agitated in this Court. The fourth trial, and the one which resulted in the convictions the subject of this appeal, began on 5 March 2009.

The Crown case

[8] The Crown case was that the offences of which the appellant was convicted occurred between 15 January 2004 and 1 April 2004. The appellant first met the

complainant, a female child, in 2003. He was a friend of her family. The complainant turned 12 shortly afterwards. She was allowed by her parents to accompany him on a sales trip to New South Wales and to accompany him on six successive weekend trips to a cabin on his property at Beaudesert.

[9] The complainant gave evidence of travelling to New South Wales with the appellant on a business trip of a few days' duration. She gave evidence of sexual activity such as kissing on the lips, showering together and penile and digital penetration during this trip. In relation to this evidence the appellant was not charged with any offence in relation to events said to have occurred in New South Wales.

[10] The complainant was able to particularise a number of specific incidents at the Beaudesert cabin which were the subject of the charges against the appellant and the basis for the maintaining charge. The Crown case in relation to each of the charges was particularised as follows:

Count 1: unlawful carnal knowledge
The complainant was lying in a hammock outside the appellant's house at Beaudesert when he attempted to kiss her and lie upon her. This occurred after he had shown her the video recording referred to in count 2 below. Because the hammock made this awkward they went into the lounge room. He attempted to have intercourse with her from behind while she was on her hands and knees but he achieved only partial penetration. He was not wearing a condom.

Count 2: indecent exposure to a pornographic video
The appellant showed the complainant a video of people engaged in sexual activity prior to the act of intercourse referred to in Count 1. He put the video on the television in the lounge room of his house. It showed a female sucking a penis as well as a range of other sexual activities.

Count 3: unlawful carnal knowledge
The appellant had sexual intercourse with the complainant on a mattress in the upper bedroom of the house at Beaudesert. It was morning. They heard a car pull up outside; the appellant quickly got dressed, went downstairs and set up a couch and cushions to make it look like he slept downstairs.

Counts 4 and 5: indecent dealing
An incident which took place in the "mini bedroom" where they were both lying naked. The appellant told the complainant to put his penis in her mouth; she did so. He put his tongue into her vagina. This was the first occasion on which she put his penis in her mouth.

Counts 6 and 7: indecent dealing
The complainant and appellant were swimming in a swimming hole near Beaudesert. He took his penis out of his board shorts and made her put her hand on his penis. She did not struggle against the appellant but said: "No." He then asked her to put his penis in her mouth; she did as she was told but had to stop because she kept getting mouthfuls of water. They heard other people approaching so they got out of the water and left.

Count 8: maintaining an unlawful sexual relationship by reason of the matters charged in counts 1 to 7 but not count 2
In addition the complainant gave evidence that the appellant rubbed his penis against her vagina possibly more than 10 times. On almost every weekend that she

was with him at the Beaudesert house he put his penis into her vagina. This occurred about 20 times.

[11] The complainant said that the appellant was circumcised; this evidence was not challenged. There was no basis for concluding that the complainant may have acquired this knowledge in some way consistent with the appellant's innocence.

[12] Evidence was led by the Crown from Dr Kerry Sullivan, a paediatrician, of a medical examination of the complainant's genitals on 23 May 2005. No injury was apparent. The effect of the evidence was, however, that the absence of injury was not determinative one way or the other in relation to whether the sexual contact of which the complainant gave evidence could have occurred because it might have healed in the period since early 2004 or because the extent and frequency of penetration may not have caused permanent damage to the complainant's hymen.

[13] The complainant's mother gave evidence which confirmed that the complainant had been allowed to accompany the appellant on his visit to New South Wales and on his weekend visits to Beaudesert. The appellant bought the complainant a mobile phone and a bikini. The complainant's mother said that she eventually became suspicious of the relationship between the appellant and the complainant and stopped all contact with the appellant in about April 2004.

[14] The complainant initially denied that the appellant had engaged in sexual misconduct with her. She persisted in this attitude for abut a year. During this time her relationship with her mother was tense and unhappy. The complainant said that she told her mother about the appellant's misconduct the day after the complainant was released from a mental health facility in 2005. The complainant's mother said that the complainant told her in March 2005 after the complainant had been interviewed by welfare officers that she had been sexually abused by the appellant. Ten days later the complainant told her mother that the appellant had touched her "and stuff". When asked if the appellant had sex with her the complainant said: "No, but he tried."

[15] The complainant also said that she complained to her friend. J gave evidence pursuant to s 93A of the *Evidence Act* in which she said she could not recall the complainant speaking of sexual activity with the appellant. The complainant's friend, K, gave evidence that the complainant had spoken to her of sexual activity with the appellant. There were substantial differences between the evidence relating to the complaint by the complainant and the evidence of J and K. I will refer to the detail of their differences in due course.

[16] A search of the appellant's residence pursuant to a search warrant occurred in June 2005. It revealed pornographic videos which were said to contain material generally consistent with the kind of material described by the complainant.

[17] The complainant's s 93A statement contained reference to the two acts of intercourse in respect of which the appellant had been acquitted at his second trial. No application was made to excise these passages from the evidence. Indeed the appellant's trial counsel informed the learned trial judge that he had written instructions from the appellant in that regard. And in the course of his address to the jury he made a point of referring to the earlier verdicts of acquittal.

The case for the defence

[18] The appellant did not give or call evidence at his trial. The appellant's case was put to the complainant in cross-examination. The appellant's case was that none of the

sexual contact alleged by the complainant occurred, and that on no occasion did he show her a pornographic video.

[19] It was suggested to the complainant that she was motivated to fabricate her allegations against the appellant because she wished to be allowed to live with her natural father.

The appeal

[20] It is not now disputed that the jury were entitled to consider that there was a core of recollection which was a sufficient basis to support the convictions. There was support for aspects of the complainant's evidence from her mother. The jury were entitled to regard the finding of pornographic videos at Beaudesert and the uncontradicted evidence that the appellant was circumcised as evidence supporting the complainant's account.

[21] I turn now to consider the specific points raised on appeal.

Ground (a): Uncharged acts

[22] The appellant argues that the evidence of misconduct by the appellant in New South Wales was inadmissible and should have been excluded. The evidence was admissible on two bases. First, the jury were directed to consider it by the learned trial judge, namely as evidence of "grooming" of the complainant by the appellant and as going to explain an emotional attachment on the part of the complainant to the appellant which might explain her failure to complain of his conduct earlier than she did. Secondly, it was admissible as relevant to proof of the maintaining charge.[1] In this regard it may be said that the appellant had the advantage of an unduly favourable direction to the jury by the learned trial judge in that his Honour told the jury that they could consider this evidence only for the first of these purposes.

[23] The appellant also argues under this heading that the evidence of the two acts of intercourse in respect of which the appellant had been acquitted of rape and unlawful carnal knowledge at his second trial should have been excised from the s 93A statement which went before the jury. No application to that effect was made at trial. It is not possible to say that there was an error on the part of the learned trial judge in refusing an application which was never made. And no miscarriage of justice occurred for the purposes of s 668E(1) of the *Criminal Code* 1899 (Qld). As I have noted, the appellant's trial counsel sought to take advantage of the verdicts of acquittal and the learned trial judge gave the jury a direction in which he told the jury that they could take these acquittals into account in considering the question of the appellant's guilt on the charges before them. To the extent that this evidence was strictly inadmissible, the appellant, no doubt advisedly, sought to take advantage of it.

Ground (b): the s 93A point

[24] At the outset of the third trial, the appellant applied to the learned trial judge for an order that the complainant be called as a witness to give oral evidence at trial, or alternatively, that she be further cross-examined pursuant to s 21AN of the *Evidence Act*. Section 21AN of the *Evidence Act* provides:

"**Giving of further evidence**

---

1 Cf *R v Grech* [1997] 2 VR 609 at 611; *R v S* [1998] QCA 071 at 9.

(1) This section applies if the affected child has given evidence under this subdivision for a proceeding and has been excused from further attendance as a witness at the proceeding.

(2) A party may apply to the court for an order that the child–
(a) give further evidence under this subdivision at another preliminary hearing; or
(b) attend at the proceeding to give further evidence.

(3) The court must not make the order unless satisfied that–
(a) if the child were giving evidence before a court in the ordinary way, the child could be recalled to give further evidence; and
(b) it would be in the interests of justice to make the order.

(4) The court must not make an order that the child attend at the proceeding to give further evidence unless satisfied it is not possible or not practical for the child to give the further evidence at another preliminary hearing."

[25] In support of this application it was argued that counsel who had the conduct of the pre-recorded cross-examination on behalf of the appellant had failed to question the complainant more closely about the "actual penetrative acts" alleged by the complainant. It was also said that the complainant should have been cross-examined about the circumstances in which the complainant had spent two or three days in the mentally ill ward of the Logan Hospital in early 2005.

[26] The learned trial judge rejected this application. His Honour first set out the background to the application:

"Defence counsel applies to the Court under section 21(a)(n) [sic] of the Evidence Act 1977 ('the Act') for an order that the complainant child … give further evidence in this proceeding by way of being further cross-examined on her section 93A statement of complaint made on 13 May 2005 to the investigating officer.

The primary basis of counsel's application is that the counsel who represented the accused at the pre-record hearing on 1 May 2007 was incompetent and failed to cross-examine the complainant on a number of issues within his instructions and/or which were necessary for the competent representation of the accused.

Before such an order can be made, the Court must be satisfied that if the child were giving evidence in the ordinary way the child could be recalled to give further evidence and it is in the interests of justice to make the order. See section 21(a)(n) [sic] subsection 3(a) and (b) of the Act.

It is relevant to revise the background of this proceeding and to understand its history to consider fully the application before the Court. As stated above, the complainant's section 93A statement was

provided on 13 May 2005 with respect to offences alleged to have occurred in or about January 2004, some five years ago now.

There was a committal proceeding in July 2006 where the accused was legally represented and the formal pre-recording of the complainant's evidence took place on 1 May 2007 before her Honour Judge Dick SC of this Court. At that hearing the accused was represented by counsel whom I am informed was admitted as a barrister of this Court in 2002. Counsel's cross-examination of the complainant child extended over approximately 65 pages of transcript.

Following that pre-recording there was a trial before his Honour Judge Botting of this Court on 22 October 2007 which was abandoned after three days because of some internal jury issues totally unrelated to the evidence where the accused was represented by the same counsel who appeared at the pre-record.

There was a second trial in July 2008 before his Honour Judge Martin SC of this Court where of the 10 charges before the jury the accused was found not guilty of seven, but the jury failed to agree on a number of alternative charges and/or three primary charges. At this second trial the accused was represented by different counsel from the first trial and the pre-record.

The matter was then listed for any pre-trial hearing in October 2008 with a trial review on 20 February 2009 and then listed for hearing today, 2 March 2009.

I am informed there was no application for a pre-trial hearing on any issue, nor any application foreshadowed at the trial review on 20 February 2009.

The same counsel was briefed for this current third trial who appeared on the second trial, but because of some confusion in trial dates could not appear today and hence new counsel was briefed on last Tuesday, 24 February 2009 and ultimately it was not until Sunday, 1 March that defence counsel foreshadowed to the prosecutor his current application."

[27] Having thus summarised the background, his Honour went on to state the gravamen of the complaint raised on behalf of the appellant and the response of the prosecution:

"… Defence counsel submits that previous counsel should have cross-examined the complainant child on a number of issues relative to the proposed relationship evidence of events alleged to have occurred in New South Wales and various other aspects of the complainant's evidence of offences now before the Court to attempt to highlight apparent inconsistencies in her evidence.

Defence counsel accepts that the original defence counsel put broad propositions to the complainant that certain allegations of complaint

> did not occur - see page 74 of the pre-record transcript - but there should have been much greater particularity in the propositions put to the complainant and/or she should have been cross-examined on her mental instability or earlier sexual experiences if counsel was doing a competent job.
>
> The Crown Prosecutor opposes the application primarily on the basis that original defence counsel adopted valid forensic choices in framing the questions as he did and to delve into too much particularity may be counterproductive and create real dangers for the defence by the complainant being able to underlie her complaints or evoke sympathy with the jury. Finally, because of this matter's extensive history it is not in the interests of justice to hear further evidence."

[28] The learned trial judge then made the following ruling:

> "On a review of the submissions made, I am not satisfied that it would be in the interests of justice to make the order sought for the following reasons: firstly, different counsel adopt different forensic tactics in the cross-examination of witnesses, particularly [in sensitive] matters where the complainants are children and the fact that the original counsel may not have cross-examined on issues with particularity does not necessarily mean he was incompetent or defective in his approach to the matter; secondly, and probably very pertinently, the second counsel who appeared on the second trial did not consider it necessary to make such an application and the fact that the accused was acquitted of a number of charges and the jury undecided on others would tend to indicate that the cross-examination of the complainant child was of some merit and clearly raised a doubt in the jury's mind which was beneficial to the accused; thirdly, it is now five years since the alleged events occurred, almost four years since the complainant's section 93A statement, two years and eight months since the committal proceedings and almost two years since the pre-recording hearing. In addition, there have been two previous trial hearings since that pre-recording hearing.
>
> It would seem to me to be almost oppressive to require the complainant child to be required to give further evidence now when the defence has had almost two years and two previous trial hearings to consider the matter and literally at the 11th hour decide to make the application now before the Court. I, therefore, rule accordingly."

[29] The appellant complains that, by reason of the learned trial judge's ruling, the appellant was denied the opportunity to confront his accuser. But to say that is to fail to recognise two things: first, the appellant did have that opportunity through the pre-recorded cross-examination, and secondly, s 21AK and s 21AN of the *Evidence Act* establish that the pre-recording of evidence is the norm in relation to child witnesses such as the complainant.

[30] Section 21AN(3) contemplates the possibility of departing from the norm if the child witness could be recalled under the general law and if the interests of justice

require the making of such an order. An obvious case where these conditions would be satisfied would arise where the case for the defence has not been put to the accused in the pre-recorded cross-examination.[2] In this case the defence case was put to the complainant, as was a motive for fabricating her allegations against the appellant.

[31] It is usually oppressive for a witness to be subjected to multiple cross-examinations. The terms of s 21AN make it clear that this should occur only where a case has been shown that the preponderance of the interests of justice warrant this course. The circumstance that four years had passed since the s 93A statement had been given and two years had passed since the taking of the pre-recorded evidence does not of itself warrant a conclusion that the interests of justice required the complainant to be recalled. The lapse of time might well have conduced to a deterioration in the quality of the complainant's recollection and her apparent reliability as a witness: that would be distinctly not in the interest of justice.

[32] It is also said on the appellant's behalf in this Court that the absence of cross-examination about "the actual penetrative acts" alleged against the appellant was a serious failure in the presentation of the defence case. But it could reasonably have been thought by the appellant's counsel below that, on balance, it was to the appellant's advantage to refrain from affording the complainant the opportunity to improve her vague evidence about the "penetrative acts" of the appellant. Secondly, it is said that the complainant should have been cross-examined about the second of the two counts of unlawful carnal knowledge on which the jury acquitted at the second trial. But once again this course would have courted the risk of prompting the complainant to bring to mind more detail of the allegations contained in her original s 93A statement. Thirdly, it is said that the complainant should have been cross-examined to establish that there were two bedrooms in the hotel room where she and the appellant stayed in Casino. It is apparent that the appellant's counsel was armed with a diagram of the hotel room which he could have deployed to this end. But one can readily understand the reluctance of trial counsel to risk losing the right of last addressing by tendering, or being required to tender, a document of only marginal relevance to the defence case, especially when it served to confirm that the appellant and complainant spent the night in the same room.

[33] The appellant also complains that the complainant was not cross-examined about the circumstances of her stay in the Logan Hospital's ward for mentally ill persons. To labour the point about the complainant's stay in the mentally ill ward of the Logan Hospital might well have inflamed the jury against the appellant. One can well understand the reluctance of trial counsel to court such a risk.

[34] Next, the appellant complains that the s 93A statement contained evidence of the two acts of unlawful carnal knowledge of which the appellant had been acquitted. No application was made to have this evidence excised from the s 93A statement. And the learned trial judge gave the jury the following direction:

> "Now, I direct you as a matter of law - so this is very important for you to note - that the evidence you have heard in the complainant's 93A statement relevant to those two counts of unlawful carnal knowledge against the accused which were before the Court on the

---

[2] Cf *R v Burns* (1999) 107 A Crim R 330 at 336 – 337 [36]; *R v Masters* (1992) 59 A Crim R 445 at 473.

> previous occasion and of which he was acquitted cannot be used by you for the purpose of challenging or diminishing the benefit to the accused of such acquittal. That is, you cannot conclude well I think that the jury was wrong in coming to that conclusion - you can't think that at all - but you can take that evidence into account when you are assessing the complainant's credibility and reliability with respect to the charges presently before the Court for your determination. So do you understand that?"

[35] The learned trial judge also directed the jury that they could not rely upon the exposure of the complainant to indecent video tapes – the sexual activity which allegedly occurred on the trip to New South Wales – in order to find count 8 (the maintaining count) proved.

[36] The aspects of the conduct of the defence case about which the appellant now complains reflect forensic judgments which could reasonably have been made by his Counsel at trial. In *TKWJ v The Queen* Gaudron J said:[3]

> "… whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on [the] basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.
>
> One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test."

[37] If one looks at the conduct of the trial objectively, one can well understand that a judgment could reasonably have been made by the appellant's Counsel that the appellant would be advantaged in the ways I have mentioned by refraining from the course of action which it is now said should have been taken.

[38] While the arguments advanced by the appellant under this heading were substantially to the effect that the learned trial judge erred in the exercise of the discretion conferred on him by s 21AN(3) of the *Evidence Act* having regard to the circumstances of the case, on occasions during the course of the hearing in this Court, Senior Counsel for the appellant flirted with the contention that a statement otherwise admissible by virtue of s 93A of the *Evidence Act* is rendered inadmissible by the specific provisions of s 21AK of the *Evidence Act.* This argument was to the effect that the totality of a complainant's evidence must be given on the occasion of the pre-recording contemplated by s 21AK of the *Evidence Act*.

[39] There is no occasion to deal with this argument in this case because, as I have mentioned, the complainant's s 93A statement became evidence, quite

---

[3] (2002) 212 CLR 124 at 133 [26] – [27] (footnotes omitted). See also per McHugh J at (2002) 212 CLR 124 at 149 [79]; *Ali v The Queen* (2005) 79 ALJR 662 at 664 [7] – [9], 665 – 666 [18] – [25], 677 [98] – [99].

uncontroversially, in the course of her evidence-in-chief at the pre-recording of her evidence under s 21AK.

Ground (c): the preliminary complaints point

[40] The learned trial judge's directions to the jury provide a convenient summary of the evidence relating to the complaints made by the complainant. First, there was the conversation with the complainant's friend, K. This conversation was said to have taken place in January 2005. In this regard his Honour said:

> "… That conversation, according to the complainant's evidence, was in the following terms.
>
> Page 23 of the record of interview, in her statement. The police officer asked her, 'Okay. So you told [K].' Answer, 'Yeah. Okay. Where were you when you told [K]? At her house, we don't really talk to her now, mum never really liked her that much. Was all this happening? No, with - it was over. It was over? Yeah. Then why did you tell [K]? Well, she sort of found something in my wallet. She found something in your wallet? Yeah. What did she find? A condom. Okay. So did she ask you about things, did she? Ah yes, she asked me why I had it. Mmm. And that's when it sort of came out. What did you tell her? Well, I said to her, 'If you' - I said, like, 'Have you ever had it forced on you and that?' and I think she said - I can't remember what she said, and yeah, then she said - understood and, yeah. Did you tell her who it was?' Answer, 'Yeah. Who did you say? Mmm, Pete, because she knew him. Okay. Did you talk to her about having sex or did you talk to her about other stuff? Mmm. She just used to ask me. Like she asked me. Mmm, yeah. About what exactly? Because I said to her 'Have you ever had it forced on you?' and then, yeah, she sort of - I think she was asking me or something. I don't know what I was telling her though. I see. Did you talk to her about anything else, like places it happened and how often it happened?' Answer, 'I can't remember. Okay. Well, that's [K]. So you talked to [K] at her house? Yeah. After she found a condom? Mmm.
>
> Now, that was the complainant's evidence of complaint to [K]. The witness [K's] version of what occurred is in the following terms, day 4, page 64. 'Well then, if we can go to January 2005.' This was [K's] examination-in-chief. 'Well then, if we can go to January 2005. Did you have a conversation with [the complainant] in relation to a condom?' Answer, 'Yes, one day.' So if you could just explain first of all for us all where you were when that conversation took place. Answer, 'I was in bed. She came in and woke me up. Mmm. She sat down on the side of the bed and pulled a condom out of her wallet. Okay. Whose house' Answer, 'My house. So you were telling us you came up, pulled the condom out of the wallet and what did you say? I asked her where she got it from. Mmm, and what did she say? She told me that she'd gotten it at sex education at school.' 'Okay. And was there any further conversation about that?' 'Yes, there was. We had a talk about sex.' 'Okay. So as best you can remember, I know it's a long time ago, what were the words she used and the words you used?' '[The complainant] told me that she had previously had sex

> with somebody and then asked me if I had ever had sex with anyone that I hadn't wanted to, that I didn't want to, sorry.' 'Okay. Now, after you were asked that what did you say?' Answer, 'Yes.' 'Did you ask [the complainant] any more questions about what she had said?' Answer, 'No.' All right. So that was the witness [K's] examination-in-chief."

[41] The next complaint was made to J. In this regard the learned trial judge said:

> "Secondly, we had the conversation with [J] which was contained in the statement that she gave and before we give you that statement, the complainant gave her version of what she told [J] and that was at page 24 of the record of interview that she had, statement. She was asked, 'Okay, anyone else told you?' 'I told my best mate [J].' 'Who?' '[J].' '[J]. Sorry, what's her last name?' '[J].' 'Where did you tell her?' 'Mmm well I went over to visit her one day and she was in her [indistinct] and I told her about it. Well yeah, I told her about it and then she said that I should tell mum and, yeah, and never - I didn't 'cause every time that I thought of it I used to self-harm, that's why I was at the mental health ward.' 'Okay, so [K] first, [J]. And then - and then is that when you went to the mental health after that?'
>
> So, that was the complainant's version. [J's] version was as follows: She said, 'Did she talk about any guys who didn't go to the school?' You might remember this in the audio visual statement that you saw. 'No, okay. So, you're talking about just school age boys?-- Yes.' 'Okay. Did she talk to you about anything else?-- Not really.' 'Okay. Do you know why you're here today and to talk to me?-- Because [the complainant] said something.' '[The complainant] said something - what do you - who told you that [the complainant] said something?' Answer, 'Nan said that [the complainant] made a complaint to the police about some person.' 'Do you know what that complaint's about?-- Someone did something [to the complainant] or something like that.' 'Okay. Do you live with your grandmother, do you?-- Yes.' 'Okay. What actually happened was I rang your grandmother and I asked her can I speak to you?-- Okay.' 'And I explained to her the situation obviously that I received a complaint and I need to speak to you because [the complainant's] apparently told something?-- Okay.' 'Do you know if [the complainant's] ever mentioned a person by the name of [the appellant] to you?' Answer, 'No.'
>
> So, they were the two versions there of the complaint."

[42] The third complaint was to the complainant's mother. His Honour summarised the evidence in this regard:

> "The complainant told her mother certain things and that appears at page 26 of her statement of complaint. 'Did you tell anyone at the Logan Hospital about what happened?' That was the introduction question. 'No.' 'Okay. So you told your mum after your release from the hospital?-- Yes.' 'What did you tell your mum?-- Just what was happening. Like she's actually yelled at me to get it out and yes then it - like-----' - then it was all indistinct from then.

> 'Were you at the hospital when she - when you told her or were you at home?-- I was at home.' 'Okay. That was only just a couple of weeks ago?' Answer, 'Yes, not last week but the week before.' 'Okay. Do you know what day of the week that was you were released?-- Friday or Thursday.' 'So, you were out on Thursday?-- Well, maybe on - I went in on Tuesday and mmm came out on the Thursday.' 'So, you were in like 72 hours, 3 days?-- Yes, pretty much. Two nights and three days, pretty much.' 'Yes, okay. That's when you told mum. Did you tell mum about who was doing this?' Answer, 'Yes, I told him - I told her like, yes, the next day before school.' 'Mmm, yes?-- Mmm, yes.' 'So, you told mum the next day before school?-- Yes, in the morning because I had to walk to the train station because my bike at school.'
>
> And the mother's version was in the following terms, page 24: She said, 'I asked [the complainant] if [the appellant] had sexually abused her and she said, yes. And was [sic] [the complainant] at this particular point?' Answer, 'Really upset. She was crying a lot, badly.' 'And were you able to get any more?-- No, that was her big – that was big enough for her. I couldn't get any more out of her.' 'So, after that incident at the child safety office obviously you taker [sic] her home?' Answer, 'Yes.' 'Now, did the conversation in relation to [the appellant], doing things to her come up again?-- Yes, it did.' 'If you could just explain to us what was that?-- About a week to 10 days later I was getting my daughters ready for school. It's always hectic. [The complainant] was being difficult and cheeky and just surly so I sort of snapped and yelled at her and said, 'Look if you're going to be a bitch all the time we need to talk about what happened' and [the complainant] said to me, 'You don't care. Why should I tell you?' And I said, 'Well, I do care.' She said to me, 'It started in New Year's, mum.' And I said, 'What started in New Year's, [the complainant]?' And she said, '[The appellant] was touching me and stuff.' 'Did you - and at that - at this stage how's [the complainant's] when she's talking to you?-- Very very upset.' 'And how were you?-- I was upset as well and just trying to hold it in, be the mum.' 'Did you ask her any other questions after that - you told us that?-- Yes, I did. I asked her - sorry, I asked [the complainant] if he touched her down there and I pointed to my privates and she nodded her head and said yes. I also asked her did he have sex with her and she said, no, but he tried."

[43] The differences between the complainant's evidence as to her complaints and the evidence of the persons to whom she said she complained are readily apparent.

[44] The learned trial judge directed the jury as to the use which they might make of the evidence of these complaints. His Honour said:

> "As you have heard from the Prosecutor, and I repeated [sic] it to you because it is my duty to direct you on it as a matter of law, they do not in any way constitute proof of what actually happened or proof of the commission of any of the offences. They are not confirmatory of the facts on which the charges are based.

> They are preliminary complaints before the official complaint was made to the police officer, which, as week now [sic], was made in early May 2005. So, you do not accept that what was said in those complaints must be true because those complaints were made to those people concerned. The evidence of preliminary complaint only goes to your assessment of the plaintiff's credibility and nothing more. It is not evidence of the facts complained of. It is evidence which you are entitled to take into account in determining whether the complainant is telling the truth or not about the complaint in question. In this instance, the complainants.
>
> The fact that a complainant made complaints to anyone before the official complaint is not evidence of the truth of that complaint. That is merely evidence that you take into account in assessing her credibility on all of the evidence on point. So remember that. Not evidence of the fact itself. Relevant only to the complainant's credibility as a witness and any consistency between the complaint or complaints and the complainant's evidence is something you may take into account as relevant to her credibility as a witness. The question is entirely one for you to consider and to make up your own minds after taking into account all of the other evidence on point.
>
> Obviously, you take into account also any inconsistency between the complaints she made and the official complaint. I repeat to you, in other words it is evidence of what was said on those occasions may, depending on the view that you take, bolster the complainant's credit because of consistency but it does not independently prove anything.
>
> Likewise, any inconsistencies between those accounts which she gave to those three persons and the complainant's evidence may cause you to have doubts about the complainant's credibility or reliability. Where the consistencies or inconsistencies impact upon the reliability of the complainant is a matter for you.
>
> Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable and the inconsistencies are a matter for you to consider in the course of your deliberations but the mere existence of inconsistencies does not necessarily mean that you must reject the evidence. So, what you make of them is entirely a matter for you."

[45] No further or other direction was sought by the appellant's counsel at trial.

[46] It is now said on the appellant's behalf that "the probative value" of the complaint evidence was so "slight" that it should have been excluded under s 4A(3) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld). There was no application by the appellant's counsel to that effect. The course taken by counsel is readily understandable as a reasonable judgment as to where the balance of forensic advantage lay.[4]

---

[4] Cf *TKWJ v The Queen* (2002) 212 CLR 124 at 133 [26] – [27].

[47] The vagueness of the complainant's evidence and, importantly, the inconsistencies with the evidence of the other witnesses, could reasonably have been regarded as a substantial forensic advantage to the appellant. These aspects of the evidence afforded the defence a real forensic opportunity to attack the complainant's reliability as a witness. It is, therefore, hardly surprising that the Counsel who represented the appellant at his second and fourth trials did not seek to have this evidence excluded.

Ground (d): the *Longman* direction point

[48] The contention put on behalf of the appellant is that the jury should have been given a direction in conformity with the decision of the High Court in *Longman v The Queen*.[5] That decision is to the effect that delay attending the prosecution of the charges against an accused may be such that the accused is disadvantaged in terms of the loss of means of testing the truth of the complainant's allegations, or of confirming his denial of them, so that:

> "it would be dangerous to convict [the accused] on that evidence [of the complainant] alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."[6]

[49] It is necessary to note at the outset of the discussion under this heading the terms of s 4A(4) and (5) of the *Criminal Law (Sexual Offences) Act* 1978. They are as follows:

> "(4) If a defendant is tried by a jury [in relation to a sexual offence], the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice."

[50] On the appellant's behalf it is said that the jury should have been warned of a danger of convicting the appellant. The need for such a warning is said to have arisen, not because the complainant's delay in making a complaint made her less reliable, but because the appellant's ability properly to mount a defence was adversely affected by the delay.

[51] It is convenient here, as it was in *R v Tichowitsch*,[7] to discuss the issues which arise in relation to the application of *Longman v The Queen* together with those which arise in relation to *Robinson v The Queen*.[8]

[52] The appellant's counsel at the trial argued that a *Robinson* direction was necessary by reason of the fact that the complainant's delay in complaining meant that the opportunity for an earlier and more informative medical examination was lost, the

---

5 (1989) 168 CLR 79 at 91.
6 (1989) 168 CLR 79 at 91.
7 [2007] 2 Qd R 462 at 482 [59].
8 (1999) 197 CLR 162.

fact of the complainant's admission to a mental health facility, and that fact that, for a year, the complainant had denied that the appellant had sexually abused her.

[53] I have already noted that this is not a case of word against word. And it should also be noted that the complainant's evidence against the appellant did not stand entirely alone. This case is distinguished from *Robinson v The Queen* where the unsupported testimony of the complainant was the only evidence inculpating the accused gave rise to a perceptible risk of injustice. In that case, not only was the evidence of the complainant unsupported by any other evidence, but the circumstances of the case were such as objectively to cast doubt on the reliability of the complainant's evidence. In this case the appellant, a mature man, had undisputed opportunities to be alone with a young woman. There was, regrettably, nothing inherently improbable in the complainant's allegations. She knew details of the appellant's anatomy which was consistent only with an intimate association of the kind of which she gave evidence. Her association with the appellant was ended by the complainant's mother, and the complainant's conduct thereafter reflected a disturbed state of mind which was, at least, not inconsistent with a reaction to sexual abuse.

[54] As was said in *R v Tichowitsch*,[9] the fact that a complainant in a case of sexual assault is a child whose evidence is uncorroborated does not of itself warrant the giving of a "dangerous to convict" direction. Such a direction may be warranted by additional factors which give rise to a risk of a miscarriage of justice perceptible to the judge, but not the jury. In this case the complainant's evidence was of particular events of sexual misconduct which occurred in circumstances where the appellant had a ready opportunity to commit those acts of abuse and where her familiarity with details of the appellant's anatomy was not said to be explicable otherwise than by virtue of intimate contact of the kind denied by the appellant.[10] The points on which the appellant relies are matters the significance of which would have been apparent to the jury. The jury did not need a warning from the trial judge beyond that which they were given to alert them to that significance.[11]

[55] As to the need for a *Longman* direction, it is far from clear that the appellant was likely to have been prejudiced by any loss of evidence resulting from the delay which occurred in this case. The appellant was not prevented by the lapse of time or memory from obtaining evidence of the physical layout of locations where the incidents in question were said to have occurred. And there is no reason to believe that the appellant was no longer in a position to prove, should he have chosen to do so, when X-rated videos found by police – which offer some support for the complainant's evidence – were acquired by him. And whether the appellant was prejudiced by the delay in having the complainant medically examined is a matter of speculation bearing in mind the evidence of Dr Sullivan that the absence of damage to the complainant's hymen might be explained by the circumstance of the penetration which the complainant alleged.

Ground (e): the finding of the pornographic videos

[56] This ground of appeal was abandoned at the hearing of the appeal.

Conclusion and order

[57] In my respectful opinion, none of the grounds of appeal is made out.

---

9 [2007] 2 Qd R 462 at 486 [68].

10 Cf *Tully v The Queen* (2006) 230 CLR 234.

11 *R v Tichowitsch* [2007] 2 Qd R 462 at 484 [65], 486 [68] and 488 [69].

[58] The appeal should be dismissed.

[59] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by Keane JA, but wish to add a comment of my own.

[60] Mr Carmody SC who appeared for the appellant argued that the complainant's statement given pursuant to s 93A of the Evidence Act 1977 ("Act") was not admissible. His submission was that the evidence of a child, such as the complainant, was to be taken pursuant to s 21AK of the Act so that, on the occasion described by that section, the child would be fully examined in chief and then cross-examined. The videotape of the testimony would be presented at trial.

[61] The submission was made apparently as an adjunct to the appellant's complaint that the trial judge had not permitted further cross-examination of the complainant pursuant to s 21AN of the Act.

[62] The submission cannot succeed. The plain terms of the sections are against it. Section 93A provides 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 … at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
>
> (b) the maker of the statement is available to give evidence in the proceeding."

Section 21AK provides that an affected child's evidence must be taken and videotaped at a hearing presided over by a judicial officer and that the videotape recording must be presented to the court at the trial.

[63] There is nothing in s 21AK which affects the operation of s 93A. The taking of the evidence which must be videotaped pursuant to s 21AK can obviously be the reception of a statement which meets the requirements of s 93A. Section 21AK allows for reception of evidence otherwise admissible e.g. pursuant to s 93A.

[64] That was done in this case. The complainant was called and asked to identify her s 93A statement which she then adopted as her evidence-in-chief. The cross-examination followed. This course of events is not mandated by s 21AK. A complainant child might be examined in the ordinary way if the prosecutor chooses that course. But the alternative is also available.

[65] This is not to say that everything contained in such a statement is admissible. Assertions within a statement which are irrelevant, or otherwise inadmissible, or objectionable pursuant to the discretionary power of a judge to exclude material the prejudicial effect of which outweighs its probative value, are not made admissible by s 93A.

[66] That section does away with the right of an accused person to object to the reception of the statement on the ground that it is hearsay, a statement tendered for the truth of its contents made by a witness out of court. It does not, as I understand it, overcome any other basis for objection to the contents of the statement.

[67] But, as Keane JA has pointed out, in this case the appellant made no objection to the contents of the complainant's s 93A statement. He might have done so: it contained references to the appellant's conduct which led to the two charges of rape of which he was acquitted. That evidence could not properly be led against the appellant.

[68] It was, we were told, impossible to expunge the references to those offences from the complainant's statement without rendering the remainder of it unintelligible. Prosecutor and accused therefore agreed that the statement would go into evidence on the basis that the trial judge would direct as he did, and the accused's counsel was free to take as much forensic advantage from the acquittals as he could.

[69] That was a legitimate approach for the appellant's counsel to take. It may well have worked to his advantage. The fact that it did not provides no ground for the appellant now to complain that the s 93A statement contained irrelevancies.

[70] The appellant may have taken a different course and maintained his objection to the reception of the irrelevant, and therefore inadmissible, evidence. If that meant the s 93A statement could not be tendered then the result would, I expect, have been that the complainant would have been required to give her evidence pursuant to s 21AK.

[71] The point that things might have turned out differently had the appellant adopted a different tactic is of no consequence. The legitimate tactic in fact adopted by the appellant's trial counsel did not deprive the appellant of a "chance of acquittal that was fairly open".