SUPREME COURT OF QUEENSLAND

CITATION:	*R v Riera* [2011] QCA 77
PARTIES:	**R** **v** **RIERA, Frank** (applicant)
FILE NO/S:	CA No 284 of 2010 DC No 303 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Innisfail
DELIVERED ON:	21 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2011
JUDGES:	Chesterman JA, Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for an extension of time refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant found guilty by a jury of two counts of indecent treatment of a child under the age of 16 on 30 October 2009 – where applicant now seeks an extension of time in which to appeal against conviction – where application made following significant delay – where applicant argues the delay is explained by serious depression, a change in counsel and a delay in receiving the transcript and summing up from the hearing – whether, if extension of time refused, there is a compelling demonstration of a serious injustice which can be corrected only on appeal – where applicant argues primary judge erred in allowing preliminary complaint evidence to go before the jury at trial; in allowing a support person to be present at the trial and in imposing a single sentence for both counts – whether application for an extension of time should be granted *Criminal Code* 1899 (Qld), s 668E(1), *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A, s 5(1)(h) *Evidence Act* 1977 (Qld), s 21A, s 93A *Penalties and Sentences Act* 1992 (Qld), s 188

R v AW [2005] QCA 152, cited
R v CAU [2010] QCA 46, cited
R v Kovacs [2009] 2 Qd R 51; [2008] QCA 417, cited
R v Crofts [1999] 1 Qd R 386; [1998] QCA 60, cited
R v DAQ [2008] QCA 75, followed
R v Dolan [2008] QCA 41, cited
R v Marshall [2010] QCA 43, followed

COUNSEL: A Vasta QC, with S A Malcolmson, for the applicant
M B Lehane for the respondent

SOLICITORS: Bruce K Gillan Solicitor for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA**: The application to extend time for filing a notice of appeal against conviction should be refused for the reasons given by Ann Lyons J.

[2] The applicant's submissions in relation to the reception of evidence of preliminary complaints would have been compelling had the evidence been objected to at trial. As it was evidence of what was regarded as preliminary complaints was opened and led without objection from counsel who represented the applicant at his trial. It is not possible from the record to discern whether the lack of objection was due to a failure to appreciate that the evidence could have been successfully objected to, or from a desire to allow in evidence which tended to show the complainant to be an unreliable witness because of inconsistencies in the accounts she gave of her treatment at the hands of the applicant.

[3] Because the evidence may have been allowed in by defence counsel deliberately, for a legitimate forensic purpose, it is not possible to say that the trial process was affected by any legal error.

[4] In my opinion the evidence of so called preliminary complaint was largely, if not wholly, inadmissible and the trial would have miscarried had the evidence been admitted over defence counsel's objection.

[5] Section 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) permits the tender of hearsay testimony to the extent that it is:

> "Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence … ".

Only if the hearsay testimony meets that statutory description can it be admitted. Out of court statements made by a complainant are only admissible if and to the extent that the content of the statement is "about the alleged commission of the offence" with which the accused has been charged.

[6] Statements by the complainant about the accused with respect to events or misconduct other than that which constitutes the charge on which the accused is standing trial is not admissible.

[7] The authorities referred to by Ann Lyons J, *R v AW* [2005] QCA 152 and *R v CAU* [2010] QCA 46 do not assert any different principle. Those authorities decide that the "how and when" of a preliminary complaint about the alleged commission of

the offence includes matters beyond the bare account of the offence. For example, evidence of threats made by an accused in order to prevent the making of a complaint, and the context in which the complaint was made, as well as the substance of the complaint itself, are within the ambit of s 4A. The evidence must still be "about the alleged commission of the offence" with which an accused is charged.

[8] The applicant was charged with two counts of digital penetration of the complainant's vagina and one count of masturbating in front of her while exhibiting a pornographic video.

[9] To be admissible the evidence of what the complainant said out of court had to relate to one or more of those offences. To the extent that the statements did not relate to digital penetration, or masturbation, or the playing of a pornographic video it did not come within s 4A and was inadmissible.

[10] As the analysis undertaken by Ann Lyons J shows much of the "preliminary complaint" testimony did not relate to those events and was not, therefore, about the commission of the alleged offences.

[11] That evidence was inadmissible but the applicant cannot now take the point having allowed the evidence to be led without objection when there was a legitimate basis for following that course.

[12] The application should be refused.

[13] **ANN LYONS J:** On 30 October 2009 the applicant who was then 84 years of age, was found guilty by a jury of two offences on a four count indictment which had charged four counts of indecent treatment of a child under 16 years. He was found guilty on counts 3 and 4. A nolle prosequi had previously been entered into in relation to count 2 and he was found not guilty of count 1.

[14] The sentence imposed by the learned District Court Judge was a single sentence on both counts of 20 months' imprisonment without any particular recommendation for parole. The applicant filed his application for extension on 18 November 2010 which was more than 12 months after the date of his conviction and the date of his sentence.

[15] This is an application for an extension of time within which to file a notice of appeal.

Principles in relation to the extension of time

[16] The delay in making an application for extension of time to file a notice of appeal is relevant to the exercise of the discretionary power to grant an extension. It is clear that delay detracts from the public interest in the finality of litigation. In the decision of *R v DAQ*,[1] Justice Keane observed:

> "…where an applicant has made a deliberate decision not to appeal, and has changed his mind in that regard only after serving the bulk of his sentence, it is understandable that the discretion to allow an appeal to proceed to be exercised in favour of an applicant only where the applicant presents a compelling demonstration of a serious injustice which can be corrected only on appeal."

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1 [2008] QCA 75 at [11].

[17] Accordingly the applicant in this case should be able to point to a compelling demonstration of a serious injustice.

Has there been a serious injustice?

[18] The applicant sets out his explanation of the time delay in his affidavit. He states that from 30 October 2009 until about June 2010 he was seriously depressed and could not think clearly and logically. He then states that in mid November 2009 he was informed by his solicitor that counsel considered that there were arguable grounds of appeal but that different counsel should conduct the argument in the Court of Appeal. The applicant admits that he did not instruct his solicitor to seek other counsel at that point in time and that it was not until six months later in June 2010 that he gave instructions to his solicitor to engage other counsel. Counsel was subsequently engaged on 2 July 2010.

[19] The affidavit explains the serious delay which occurred in obtaining a copy of the judge's summing up and also a copy of the transcript of the trial. It would appear that a request for the judge's summing up was made on 6 July 2010. I accept that there were numerous phone calls made to both the State Reporting Bureau office and to the associate to the judge to expedite the transcript. The revised summing up transcript from the State Reporting Bureau was obtained on 3 August 2010. A month later a further request was made for a copy of the transcript of day 1. I accept that a number of phone calls, totalling in excess of eight were made to the State Reporting Bureau before the transcript was ultimately forwarded on 7 October 2010.

[20] An appointment was made to see counsel shortly afterwards and a notice of application for extension of time was filed within a week of conference with counsel in his chambers on 12 November 2010.

[21] Accordingly whilst I accept that there has been a long period of delay in obtaining both the transcript of the summing up and of the trial, this delay was exacerbated by the time period which had elapsed between the end of the trial and the date of the request which was a period in excess of the six months. It was therefore understandable that the matter was not given a priority within the State Reporting Bureau.

[22] I accept that the applicant, who is currently 85 years of age, did not make a deliberate decision not to appeal and has explained to some extent the delay which has occurred.

The preliminary complaint evidence

[23] It is argued that irrespective of the time delay the court should set aside the conviction because a serious injustice has occurred. It is submitted that the serious injustice occurred because all of the evidence of preliminary complaint went before the jury when it is submitted that it was inadmissible, inflammatory and highly prejudicial.

[24] The applicant argues that because this evidence of preliminary complaint was allowed to go before the jury he was not afforded a fair trial. The relevant section of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) is section 4A, which provides, (inter alia):

> "**4A Evidence of complaint generally admissible**
>
> (1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
>
> (2) Evidence of how and when any preliminary complaint was made by the complainant ***about the alleged commission of the offence*** by the defendant is admissible in evidence, regardless of when the preliminary complaint was made." (emphasis added)

[25] The applicant argues that a large body of the evidence that was led in the trial did not answer the description of the evidence set out in s 4A.

The Crown Case

[26] It is necessary at this point to summarise the Crown's case. The Crown's case was essentially that at the time of offending the applicant lived next door to the complainant's grandmother. The complainant would regularly visit the applicant and it is alleged that the mistreatment of a sexual nature took place over a long period of time at the applicant's house.

[27] The complainant was aged between six and 12 at the time and the applicant was in his sixties. In the trial the complainant gave general evidence of sexual abuse throughout that period of six years. She stated that this offending involved amongst other things showing her pornographic videos and magazines; walking around naked in front of her and masturbating in front of her. She also alleged that the applicant had wiped his penis across her face and mouth and had procured her to masturbate herself. She also alleged there was digital penetration of her vagina.

[28] There were three specific occasions which stood out in the complainant's mind and they formed the three charges which went to the jury. In relation to Count 1 the complainant was about seven years of age and wearing togs. She states that the applicant inserted a finger in her vagina. A nolle prosequi was entered prior to the commencement of the trial in relation to Count 2. With respect to Count 3 the particulars of that charge were that the complainant was about nine years old and was wearing her school uniform with a type of underwear "runners". The complainant alleges that whilst watching a pornographic video the applicant inserted a finger into her vagina. Count 4 involves an allegation that when the complainant was about ten years old around the time of the Innisfail show, the applicant masturbated in front of her whilst he watched a pornographic video.

[29] In addition to the evidence of the complainant there was also evidence of the preliminary complaint witnesses. The preliminary complaint witnesses included the complainant's mother, her brother Daniel, an older woman called Mrs Brumley and the complainant's partner, Gavin. In addition, the Crown tendered a pretext call between the applicant and the complainant. During that call the applicant made admissions to showing the complainant videos and magazines but denied inappropriately touching the complainant.

[30] At the trial the applicant was acquitted of Count 1. He was convicted on the remaining counts which involved the insertion of a finger into her vagina when she was nine years old and a count of the applicant masturbating himself in front her when she was ten years old.

[31] It is clear that the trial judge in his charge to the jury stated: "…there has been a good deal of preliminary complaint evidence in this trial, in my experience an unusual amount…". The preliminary complaint evidence given by the complainant's mother was that her daughter told her that she had seen Frank in the nude and that Frank used to show her books, videos, and dirty stuff. She also said that she found the complainant with a book depicting oral sex.

[32] The applicant argues that none of that evidence was admissible as it did not answer the description in the legislation under which it was admitted, that is that it was not a preliminary complaint about the alleged commission of the offence by the accused. Similarly, in relation to the evidence of the complainant's brother about preliminary complaint, the complainant's evidence to her brother was that she told him "Frank showed her a dirty book". The same argument is made in relation to that evidence. Similarly, the evidence of the complainant's partner Gavin was that the complainant told him "It started off as watching movies. Showing her magazines and movies and then she said that he would walk around naked in front of her. And then it just progressed to touching and then oral sex." It is also argued that this is not a preliminary complaint about the alleged commission of the offences by the accused. The evidence of the friend was that the complainant told her that the applicant "Made her give him head jobs and read sick books."

[33] The applicant's counsel argue that the legislature intended that s 4A(2) relate to evidence about the alleged commission of the offences; and that in this case there was a large body of inadmissible evidence which was admitted which should not have been. It is submitted by the applicant's counsel that the legislature did not intend that the section should provide an exception to the hearsay rule so as to allow the introduction of evidence as wide as evidence relevant to the relationship between the complainant and the defendant.

[34] In the decision of *R v AW* [2] McMurdo P discussed the ambit of s 4A in the following terms:

> "Were the statements to the mother and Ms B preliminary complainants under s 4A of the Act? The definition of 'complaint' in s 4A(6) of the Act 'includes a disclosure'. 'Disclosure' is not defined in the Act, but has the dictionary definition of 'the act of disclosing; exposure; revelation'. The dictionary definition of the verb 'disclose' includes 'to cause to appear; allow to be seen; make known; reveal: … uncover, lay open to view'. It follows that a 'disclosure' includes a revelation or disclosure after questioning, even questioning which might suggest a particular response. The legislature, in enacting s 4A, plainly intended that the jury have the full context of any preliminary complaint or disclosure so as to most accurately assess the credibility (or lack of credibility) of the complainant and the complaint. The complainant made the initial allegation to his mother and the later allegation to Ms B in response to his mother's suggestion that he would not do such a thing to himself. Nevertheless, his statements to his mother and Ms B were undoubtedly disclosures and so complaints as defined in s 4A(6) of the Act. It follows that the evidence of how and when he made those complaints (as defined to include disclosures) about the alleged

[2] [2005] QCA 152.

> commission of the offence was admissible under s 4A(2) of the Act. Of course, a court retains its discretion to exclude evidence where its probative value is slight compared to its prejudicial effect so that it would be unfair to a defendant to admit it: see s 4A(3) of the Act and s 130 *Evidence Act* 1977 (Qld)."

[35] It is clear that in that case however, the preliminary complaint related to the actual event which was the subject of the incident of rape. In the decision of *R v CAU*[3] the President however stated in very clear terms that the preliminary complaint made admissible in s 4A is broadly defined:

> "It encompasses the full complaint of sexual assault, including accompanying violence or threats of violence. In this case, the threats of violence were also relevant to the timing of the complaints. I note that there was no application to the primary judge to exclude this evidence, either because it was inadmissible or on the basis of fairness under s 130 of the *Evidence Act* and s 4A(3) of the *Criminal Law (Sexual Offences) Act*. The evidence was admissible under s 4A."

[36] The definition of preliminary complaint as set out in s 4A(6) is as follows:

> "(6) In this section--
> ***complaint*** includes a disclosure.
> ***preliminary complaint*** means any complaint other than--
> (a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or
> (b) a complaint made after the complaint mentioned in paragraph (a)."

[37] Given the very broad definition which has been given to the term 'preliminary complaint' it may well be the case that the complainant's disclosure to a number of people about sexual abuse is in fact admissible under s 4A as was the case in *R v CAU*. However that may be, it is clear that in the applicant's trial the very senior counsel who appeared did not object to the admission of the evidence. This was because there were inconsistencies in the allegations that the complainant made to those various people. Indeed it would seem that there was some escalation in the nature of the allegations that were made to various people.

[38] Indeed in his address to the jury, counsel for the applicant argued as follows:[4]

> "... it is a completely moving feast riddled with inconsistency and whichever way you come at it .... how could you possibly determine whether that obvious indicator of unreliability and the inconsistency on the very things that they're trying to actually put up there to charge us with, how could you really resolve the question of whether this is a product of, 'Oh, it' just a lapse of time. She's telling the truth but it's a lapse of time,' as opposed to a product of a completely unreliable mind whether it happened or not. In my respectful submission you can't."

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3 [2010] QCA 46.

4 Transcript 30 October 2009 p 56 ll 12-28.

And later:[5]

> "And it is not until the era of turmoil that her adult life appeared to have endured that we're presented with some wholly new picture. I make the mistake I've called it a picture.
>
> … It's multiple pictures that keep on changing. For not once was there a – here a consistent account given by any of those to whom she disclosed of the detail. There was variability and holding back. There was inconsistencies between what she said to the police, what she said at the committal proceedings, and finally what she said here."

[39] It was clearly therefore an obvious strategy that the admissibility of those complaints would not be objected to by counsel but rather that counsel would rely heavily on those inconsistencies in his address to the jury. Therefore as this evidence was not objected to it is now not open to the applicant to contend that there was a wrong decision on any question of law in terms of s 668E(1) of the *Criminal Code* 1899 (Qld) (the Code).

[40] In the decisions of *R v Kovacs*[6]and *R v Marshall*[7] the court held that there was no miscarriage of justice when counsel failed to object to the evidence because of a forensic decision which had been taken by counsel. In the *R v Marshall* trial, counsel for the appellant made no objection to the contents of the complainant's s 93A statement when he might have done so. It was clear that the evidence could not properly be led against that appellant. It was also clear in that case that it was difficult to take out the inadmissible references from the statement and therefore it was agreed between the prosecutor and counsel for the accused that the statement would go into evidence on the basis that the trial judge would make a direction in relation to it and that the "…accused's counsel was free to take as much forensic advantage from the acquittals as he could." Chesterman J continued:

> "[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'."

[41] In my view the applicant cannot now complain about a legitimate tactical decision which was made for good reason during the course of the trial. I am not satisfied that a serious injustice has occurred in this regard.

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5 Transcript 30 October 2009 p 63 ll 37-43.
6 [2008] QCA 417.
7 [2010] QCA 43.

[42] A further ground is argued namely that the trial judge impermissibly permitted a support person to be in attendance.

The trial judge's order in relation to a support person

[43] At the commencement of trial the Crown Prosecutor made an application for a support person to be present at the time the complainant gave her evidence. The relevant provisions are contained in Division 4 of the *Evidence Act* 1977 (Qld). Section 21A deals with special witnesses and provides as follows:

> **"21A Evidence of special witnesses**
> (1) In this section –
> …
> ***special witness*** means—
> (a) a child under 16 years; or
> (b) a person who, in the court's opinion—
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
> (ii) would be likely to suffer severe emotional trauma; or
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
> if required to give evidence in accordance with the usual rules and practice of the court; or
> (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a member of a criminal organisation.
> …
> (2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions—
> …
> (d) that a person approved by the court be present while the special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;
> (e) that a video-taped recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video-taped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;"

[44] The prosecution submitted that the complainant would be likely to fulfil the criteria in s 21A(b)(ii) as a person who would be "likely to suffer severe emotional trauma." It is argued that there should have been some evidentiary basis upon which the trial judge formed that opinion and that the court cannot infer that from the nature of the evidence. As there was no material placed before the court for such an opinion it is argued that the trial judge was in error in categorising the complainant as a special witness.

[45] Pursuant to s 5(1)(h) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld), the trial judge had a wide discretion. That section provides that the judge need not exclude from a room in which a complainant is giving evidence at trial:

> "(h) any person who makes application to the court to be present and whose presence, in the court's opinion -
> (i) would serve a proper interest of the applicant; and
> (ii) would not be prejudicial to the interests of the complainant."

[46] Furthermore it would seem clear that the judge was aware of the nature of the allegations and that a support person had been made available at the committal even though that application had been opposed at the committal.

[47] I consider that the giving of evidence in front of the jury in the circumstances of this case would have been traumatic for the complainant. There was no real opposition to the application at that time and whilst this may have been an irregularity there is no evidence that a support person who sat in with the complainant while she gave her evidence went beyond the role.

[48] In my view there is no appealable error in the way the trial judge exercised the discretion in relation to the support person of the complainant.

The sentence imposed

[49] In the event that the Court refuses leave to grant an extension of time the applicant seeks to add a further ground in relation to the sentence imposed. The applicant identifies a serious injustice in that the trial judge only imposed a single sentence for two offences. It is submitted that the trial judge erred in law in imposing one sentence in respect of convictions for two separate offences. It is well established that a sentencing Judge must impose individual sentences in respect of each count.[8]

[50] In my view there is some uncertainty in relation to the sentence which was actually imposed by his Honour, however there is a clear remedy available. The sentence should be reopened in accordance with s 188 of the *Penalties and Sentences Act* 1992 (Qld) and the matter should be reconsidered by his Honour in order to clarify the sentence that was in fact imposed.

[51] In particular the sentence imposed in relation to each count should be clarified. One interpretation is that 20 months was imposed on each count. The issue which then arises is whether those penalties were imposed as concurrent or cumulative, it would presumably be concurrent. If there needs to be a clarification the matter can appropriately be reopened before his Honour.

[52] In my view the applicant has been unable to establish a serious injustice and the application for an extension of time should be refused.

[53] **MARTIN J:** I agree, for the reasons given by Ann Lyons J, that the application should be refused.

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[8] See *R v Doolan* [2008] QCA 41; *R v Crofts* [1999] 1 Qd R 386.