SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAL* [2011] QCA 264
PARTIES:	**R** **v** **WAL** (appellant)
FILE NO/S:	CA No 79 of 2011 DC No 2 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	30 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2011
JUDGES:	White JA, Margaret Wilson AJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave granted to amend Notice of Appeal.** **2. Leave granted to file amended Notice of Appeal.** **3. Allow the appeal.** **4. Set aside the conviction.** **5. Order a retrial.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES INVOLVING MISCARRIAGE – MISDIRECTION – where the appellant was convicted after a trial of maintaining a sexual relationship with a child – where the appellant contends that the primary judge failed to give directions to the jury explaining the limitations of the use of preliminary complaint evidence – where the respondent concurs that a new trial is necessary – whether misdirections or failures to direct the jury in the judge's summing up amounted to a miscarriage of justice *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A *Evidence Act* 1977 (Qld), s 93A(1) *Jones v R* (1997) 143 ALR 52; [1997] HCA 12, cited *R v Lillyman* [1896] 2 QB 167, cited *R v Mason* [2006] QCA 125, cited *R v RH* [2005] 1 Qd R 180; [2004] QCA 225, cited

COUNSEL: M Copley SC for the appellant
R G Martin SC for the respondent

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

[1] **WHITE JA**: The appellant was convicted after a trial of maintaining an unlawful relationship of a sexual nature with his granddaughter between 1 January 2008 and 27 October 2009. She was born in February 2001 and was aged between nearly seven and eight years when the offending occurred. The appellant gave evidence at the trial denying the offending. In his Notice of Appeal the appellant contends that the verdict is "unsafe and unsatisfactory having regard to the evidence". He has sought and was given leave to amend the Notice of Appeal by adding the following ground:

> "[T]he learned judge erred and/or a miscarriage of justice occurred in that the jury was not directed about the use that could or could not be made of the preliminary complaint evidence."

The appellant abandoned his original ground of appeal.

[2] The complainant's mother gave evidence that she and her husband had discussed with their children that they should not permit anyone to touch them inappropriately. In her evidence-in-chief the mother said that on 27 October 2009 she asked the complainant if anyone had touched her inappropriately. The complainant responded "no" but in a manner which made the mother think that she was hiding something so she told her that it was "okay" and that she "could tell [her]".[1] The mother asked the child "whether it was grandad" and she "just nodded her head".[2] The following day the mother contacted police. The mother was cross-examined about that evidence and the contents of her statement given to police on 9 February 2010. She accepted that the child did not offer the complaint voluntarily but agreed when leading questions were asked of her. The mother was asked some further detail of her conversation with her daughter as recorded in her statement. The complainant had said that the conduct did not happen "every time" she visited her grandparents - only when her grandmother was not present. The mother asked her whether he put his hand "there" gesturing with her eyes towards her private parts and the child responded with agreement.

[3] On 31 October 2009 the complainant was interviewed by police . That interview was recorded and admitted pursuant to s 93A(1) of the *Evidence Act* 1977 (Qld). The complainant described digital and penile penetration of her vagina as well as an act of sodomy and oral sex upon her by the appellant. She told the police interviewer that her grandfather had told her not to tell anyone. She was asked who was the first person that she did tell. The complainant answered "My mum because she asked".[3] The police officer asked why she had not told her mother until she was asked. The complainant answered, because her grandad had said not to tell anyone. She said she did not tell her mother straight away and related, consistently with her mother's evidence, the conversation.

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1 AR 109.
2 AR 109.
3 AR 231.

[4] In a summing-up which commenced on 29 March in the late afternoon and continued the following morning the trial judge did not direct the jury about how they could use the complainant's preliminary complaint evidence. He said:

> "And [the complainat] didn't tell her mother about all of these things that are alleged to have happened to her over this period of time. And she didn't tell her mother or anyone else until much later.
>
> And she says … that she didn't tell her mother or anyone else because her grandfather told her not to tell anyone."[4]

The judge told the jury later on "But the whole case turns on your assessment of [the complainant's] evidence and to an extent, on [the sister's] evidence."[5] His Honour was not asked for any redirection.

[5] In *Jones v R*[6] the High Court noted:

> "It has been clear, at lease since *R v Lillyman*,[7] that upon a trial for rape or a kindred offence the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of the complaint, may be given in evidence. It is not evidence of the facts complained of, but of the consistency of the conduct of the prosecutrix with her account in the witness box of the relevant events …"[8]

The court concluded:

> "Unless the trial judge made clear to the jury the limited use they might make of the evidence of the complainant of her complaints and the evidence of those to whom she complained, there was every likelihood the jury might treat that evidence as confirmatory proof of the facts which the Crown alleged. The distinction may not be an easy one for a jury to grasp but this does not detract from the need for the distinction to be carefully explained. Unless explained, the evidence might well have played an important part in the jury's assessment of credibility."[9]

[6] Section 4A was inserted into the *Criminal Law (Sexual Offences) A*ct 1978 (Qld) in 2005. It provided for evidence of preliminary complaint to be admissible regardless of when the preliminary complaint was made. By sub-section (4) the judge must not warn or suggest in any way to the jury that the law regards a complainant's evidence to be more reliable or less reliable only because of the length of time before the preliminary complaint or other complaint was made. By sub-section (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."

[7] In *R v RH*[10] Williams JA and, in separate reasons, Jerrard JA, with both of whom Davies JA agreed, held that s 4A(4) was in precise terms and should not be given

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4 AR 192.
5 AR 198-9.
6 (1997) 143 ALR 52; [1997] HCA 12.
7 [1896] 2 QB 167.
8 At 53.
9 At 54.
10 [2005] 1 Qd R 180; [2004] QCA 225.

any wider operation than the words strictly construed required. Consistently with *Jones v The Queen*, his Honour held that a direction should be given that evidence of preliminary complaint did not constitute proof of what actually happened, that is, it did not constitute proof of the commission of the offences in question.

[8] In *R v Mason*[11] the President, with whom Jerrard JA and Holmes J, as her Honour then was, agreed, emphasised the need for a specific direction about the limited use to be made of evidence of complaint. Her Honour said:

> "Subject to s 4A(4), nothing in s 4A takes away a judge's obligation to give such a direction where the credibility of the complainant is, as here, central to the prosecution case."[12]

Her Honour also referred to the model direction in the Queensland Supreme and District Courts Bench Book at 64.1. Consultation of that useful resource would have revealed that a direction consistent with *Jones* and *RH* should have been given in this case. As Mr M Copley SC for the appellant submits, the risk that the evidence may have been wrongly used by the jury was exacerbated by the earlier direction to the jury:

> "So, people give evidence of things that they heard or saw or did and if you believe that evidence you've got evidence that you can accept that something did happen."[13]

[9] Mr RG Martin SC, for the respondent, properly concedes in his written outline that no relevant and appropriate directions were given drawing the jury's attention to the preliminary complaint evidence and the limitations on the use of that evidence and that the appeal, accordingly, should be allowed. As the authorities make plain, this is not a case for the proviso particularly where, as here it was pointed out to the jury, that the credibility of the complainant was crucial to securing a conviction.

[10] It is a matter of great regret that neither counsel drew this omission to the judge's attention. It means that this family will be required to endure another trial.

[11] The orders which I would make are:

1. Allow the appeal.
2. Set aside the conviction.
3. Order a retrial.

[12] **MARGARET WILSON AJA**: I agree.

[13] **FRYBERG J**: I agree.

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11 [2006] QCA 125.
12 At [27].
13 AR 174.