SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBA* [2012] QCA 49
PARTIES:	**R** **v** **DBA** (appellant)
FILE NO/S:	CA No 289 of 2011 DC No 1066 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2012
JUDGES:	Fraser JA, and Daubney and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was found guilty of one count of rape with circumstances of aggravation, and guilty of three counts of indecent dealing with circumstances of aggravation – where the complainant had two interviews with police, both admitted as preliminary complaint evidence pursuant to s 4A of the *Criminal Law (Sexual Offences) Act* 1978 – the second interview provided details as to complaints that preceded in time the complaints in the first interview – where criminal proceedings were underway at time of second interview – where appellant argued that second interview was not preliminary complaint evidence – whether the second interview was admissible as preliminary complaint evidence – whether there was a miscarriage of justice *Acts Interpretation Act* 1954 (Qld), s 32C(a) *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A *Evidence Act* 1977 (Qld), s 21AK, s 93A

R v LSS [2000] 1 Qd R 546; [1998] QCA 303, considered
R v RH [2005] 1 Qd R 180; [2004] QCA 225, considered
R v Riera [2011] QCA 77, considered
Suresh v The Queen (1998) 72 ALJR 769; [1998] HCA 23, considered

COUNSEL: M J Copley SC for the appellant
D A Holliday for the respondent

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

[1] **FRASER JA:** The appellant was found guilty by a jury after a trial in the District Court of one count of rape with circumstances of aggravation and three counts of indecent dealing with circumstances of aggravation. He has appealed against those convictions.

[2] The appellant's notice of appeal filed on 31 October 2011 relied upon one ground of appeal, that his conviction was caused by a miscarriage of justice by the wrongful admission of certain preliminary complaint evidence. An amended notice of appeal which was filed out of time repeated that ground and added a second ground. At the hearing of the appeal the appellant's senior counsel disclaimed reliance upon the amended notice of appeal and it was struck out.

[3] Leave was granted to the appellant to amend the ground of appeal so that it provides:

> "The ruling that the evidence of [C] was admissible as evidence of preliminary complaint constituted a wrong decision of a question of law".

[4] It is necessary to give only a very brief summary of the relevant evidence in order to discuss that question.

The contentious evidence

[5] In January 2009, the complainant, who was then 12 years old, gave a recorded statement to police which was later admitted in evidence at the trial. She described conduct by the appellant on two occasions some years earlier which formed the bases of the indecent dealing charged in count 1 on the indictment and the rape charged in count 2 on the indictment. In the same police interview the complainant said that the appellant had done "the same thing" and "same things … in different ways" regularly, but she was not able to give details of those other events. Those other events were not the subject of any charge in the indictment.

[6] By November 2010 criminal proceedings against the appellant in relation to the offences charged in counts 1 and 2 were well underway. The complainant then gave another recorded statement to police, also admitted in evidence, in which she described quite different kinds of conduct by the appellant on two different occasions before January 2009. That conduct formed the bases of the charges of indecent dealing in counts 3 and 4 of the indictment. The complainant said that she had not felt comfortable telling the police officer about these matters at the first interview, but she had talked to her friend (C), who said she should tell her mother.

[7] C was interviewed by police two days later in November 2010. She told the police that (in 2008 and 2009) the complainant had told her of conduct by the appellant. The conduct she described accorded generally with the conduct the subject of counts 1 and 2. It was not of the same nature as the conduct the subject of counts 3 and 4. Secondly, C also said that "this year" the complainant had told her of other, different kinds of conduct by the appellant, being conduct of the kind which formed the bases for counts 3 and 4.

[8] No issue arises under this ground about C's evidence relating to counts 1 and 2. The issue concerns only C's evidence of the complainant's subsequent statements to C about the appellant's conduct the subject of counts 3 and 4. C's recorded interview with police was admitted in evidence under s 93A of the *Evidence Act* 1977 and her pre-recorded evidence of those statements was admitted under s 21AK of the *Evidence Act*.

The Trial Judge's Ruling

[9] That evidence was admitted as "preliminary complaint" evidence pursuant to s 4A of the *Criminal Law (Sexual Offences) Act* 1978 over the objection of defence counsel. The trial judge directed the jury that this aspect of C's evidence only related to counts 3 and 4. The trial judge also gave conventional directions concerning the permissible use of that preliminary complaint evidence.

[10] Section 4A provides:

> "4A Evidence of complaint generally admissible
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> (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.
>
> (3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
>
> (4) If a defendant is tried by a jury, 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.
>
> (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).
>
> *Example—*
> Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (*complaint 1*). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (*complaints 2 and 3*). The complainant visits the local police station and makes a complaint to the police officer at the front desk (*complaint 4*). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (*complaint 5*). After a criminal proceeding is begun, the complainant gives a further formal witness statement (*complaint 6*).
>
> Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints."

[11] In the course of ruling that C's evidence of a disclosure by the complainant about counts 3 and 4 was admissible in relation to counts 3 and 4, the trial judge observed that the legislative intention was that the evidence of complaints which included disclosures would be admissible regardless of when the complaints were made. The trial judge declined to reject C's evidence in the exercise of the discretionary power to exclude evidence referred to in s 4A(3).

The appellant's arguments

[12] The appellant did not challenge that exercise of discretion. Nor did the appellant contend that there was any inadequacy in the trial judge's directions to the jury confining the jury's consideration of this aspect of C's preliminary complaint evidence to counts 3 and 4 and instructing the jury about the permissible use of that evidence.

[13] Senior counsel for the appellant submitted that C's evidence of the complainant's disclosures relating to counts 3 and 4 was not admissible in relation to those counts because it was not "preliminary complaint evidence" as described in the definition of that term, that being the only form of evidence which is made admissible by s 4A(2). The contention was that C's evidence was not of a "preliminary complaint" as defined in s 4A(6) because her evidence concerned a complaint made after the complainant had made her first formal witness statement to a police officer in anticipation of criminal proceedings against the appellant. The effect of the argument was that it was irrelevant that the complainant's first formal witness statement related only to counts 1 and 2, and to other conduct of the same kind, and did not concern count 3 or count 4. It was submitted that such a "strict" construction of s 4A was required by *R v Riera*[1] and *R v RH*.[2] In the latter case, Williams JA observed that "[t]he wording of s 4A(4) is in precise terms and it should not be given any wider operation than the words strictly construed require".

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1 [2011] QCA 77 at [4]-[6].
2 [2005] 1 Qd R 180 at 184 [12].

[14] It was also submitted for the appellant that the construction of s 4A should be informed by an understanding of the common law test for the admissibility of evidence of prior complaint and criticism of that test. Reference was made to *Suresh v The Queen*,[3] in which Gaudron and Gummow JJ said:

> "Evidence of prior complaint is admissible in sexual offence cases by way of exception to the rule against hearsay. It is admissible because of the tendency of people to assume, at least in earlier times, that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false. It follows that evidence of complaint is only admissible if it is evidence of early complaint or, as is usually said, of 'recent complaint'. And it is admitted not as evidence of the facts in issue, but as evidence of consistency which buttresses the credit of the complainant.
>
> As Gaudron J explained in *M v The Queen*, the assumption that the victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity, particularly in cases of child sexual assault. And it is an assumption that is now frequently called into question, including by directions to the effect that there may be good reason why a person would delay in making a complaint. Where a direction of that kind is given, a jury may well take the view that evidence of a prior consistent complaint enhances the credit of the complainant even though the complaint was not made until well after the events in issue." (citations omitted)

[15] The appellant's outline of submissions referred to Thomas JA's observation in *R v LSS* that "…evidence of **first** complaint should always be receivable in cases involving sexual misconduct, as evidence which permits a better understanding of the story, irrespective of when it was made … The circumstances of **first** emergence of the complaint may enable the story to be seen in a different light".[4] It was submitted that this criticism of the common law test informed the legislative purpose underlying s 4A. The Court was referred to the Second Reading Speech, particularly the following passage:[5]

> "The recent complaint rule says that evidence of complaint (how, when and to whom the person first complained) is only admissible where the complaint is recent, that is, when it is made at the first reasonable opportunity. The rule requires judges to direct juries to question the credibility of a complainant who does not immediately report sexual abuse. The rule is based on the law's assumption that a victim of a sexual offence will complain at the first opportunity. However studies have consistently shown that an early complaint is not usual and many victims will make no formal complaint at all. The Project Axis inquiry found about half of the victims of child sexual abuse never report the abuse; less than a fifth of those who report to police at all do so within a month of the incident; and

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3 (1998) 72 ALJR 769 at 770 [4]-[5].

4 [2000] 1 Qd R 546 at 550. Emphasis added in the appellant's outline of submissions.

5 The Second Reading Speech for the *Evidence (Protection of Children) Amendment Bill* 2003 (Qld): Queensland, Legislative Assembly, *Record of Proceedings* (Hansard), 13 May 2003, p 1698.

> many will not disclose information about the incident until they reach adulthood. Children who are the victims of abuse from family members or other trusted adults are even less likely than adults to complain at the first reasonable opportunity. The assumption behind the recent complaint rule has been criticised by many eminent judges including members of the Queensland Court of Appeal. As well, courts recognise that it is of assistance to juries to know how and when any complaint about the conduct of the accused first emerged, regardless of when the complaint was made."

[16] As the appellant's senior counsel acknowledged in the course of his oral submissions, s 4A(2) renders the preliminary complaint evidence described in the section admissible regardless of when the complaint was made and regardless whether it was the complainant's first complaint. To that extent the legislative reform went further than Thomas JA's observation in *LSS* concerning evidence of the complainant's "first" complaint. That is so despite a statement in the Explanatory Notes for the Bill for the amending legislation that s 4A was intended to "reflect" Thomas JA's comments in *LSS*.[6]

[17] Senior counsel argued, however, that, where more than one sexual offence was charged, the proper construction of the definition of "preliminary complaint" in s 4A(6) confined the admissible evidence to evidence of a complaint prior to the complainant's first formal witness statement about any of the charged offences, regardless whether those offences were anticipated or charged when the statement was given. This proposition was said to find support in the provision in s 32C(a) of the *Acts Interpretation Act* 1954 that words in the singular include the plural.

[18] Upon that construction, C's evidence about the complainant's out of court statements concerning counts 3 and 4 was inadmissible in relation to counts 3 and 4 because it concerned statements made by the complainant after she had given her first formal witness statement to police, even though that first statement did not relate to and was not given in, or in anticipation of, any criminal proceeding in relation to counts 3 and 4.

Consideration

[19] I accept the submission for the respondent that C's evidence of the complainant's statements relating to counts 3 and 4 was admissible "preliminary complaint" evidence in relation to those counts.

[20] That is the result of the unambiguous text of s 4A. Reading paragraph (a) of the definition of "preliminary complaint" together with s 4A(2), the section makes admissible evidence of how and when any complaint was made by the complainant about the alleged commission of "the offence", other than 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 any complaint made after that statement. The plain meaning of the section is that the only formal witness statement by the complainant to police which excludes evidence of a subsequent complaint is a statement given "in" or "in anticipation of" a criminal proceeding in relation to the same alleged offence which is the subject of the subsequent complaint. C's formal witness statement in January 2009 was not of that character. It was not given "in" such a proceeding, since there was then no criminal

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6 Explanatory Notes for the *Evidence (Protection of Children) Amendment Bill* 2003.

proceeding on foot in relation to the conduct later charged in counts 3 and 4. It was not given "in anticipation of" such a proceeding, since there was then no evidence available to the authorities which suggested even the possibility of a criminal proceeding against the appellant relating to count 3 or count 4. C's evidence about the complainant's disclosures concerning counts 3 and 4 was therefore admissible in relation to those counts.

[21] The application of s 4A may well be more complex in relation to proceedings for an offence under s 229B of the *Criminal Code* of maintaining an unlawful sexual relationship. But that is not this case. Here, the contentious evidence was of a complaint about an offence which was different and entirely separate from the offence the subject of the witness statement.

[22] As to s 32C(a) of the *Acts Interpretation Act*, the general rule that the singular includes the plural may be displaced by a contrary intention appearing in any Act: see *Acts Interpretation Act*, s 4. If, which I very much doubt, the application of the general rule would alter the ambiguous meaning of s 4A(2), it should not be applied. To do so would be to distort the legislative purpose evidenced by the statutory text.

[23] In relation to the present issue, the natural and literal meaning of the provision is not inconsistent with the extrinsic evidence of the legislative intention upon which the appellant relied. It is apparent that the section radically altered the common law and that the alteration extended beyond that which was discussed in *LSS*. The extrinsic evidence to which the Court was referred sheds no light upon its meaning in a case such as this, in which more than one offence is ultimately charged, and the relevant evidence is of a preliminary complaint made after the first formal statement concerning one offence, but before the first formal statement concerning a different offence.

[24] Williams JA made the statement in *R v RH*, quoted earlier in these reasons, in the course of rejecting a submission that s 4A(4) implied that a trial judge should not give any direction in the course of the summing up with respect to evidence of preliminary complaints. It is not easy to see how such an implication could be derived from the statutory text. In the passage from *R v Riera* which the appellant cited, Chesterman JA merely applied the requirement of s 4A that the preliminary complaint evidence must be about the alleged commission of the offence with which an accused is charged. Neither decision is authority for the view that a narrow meaning of the section should generally be adopted in preference to its natural and literal meaning.

[25] The construction adopted by the trial judge in the present case was compelled by the terms of s 4A. As I have mentioned, it was not submitted that the trial judge erred in failing to exclude the contentious evidence in the exercise of the general discretion confirmed by s 4A(3).

Proposed order

[26] I would dismiss the appeal.

[27] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Fraser JA and with the order that the appeal be dismissed.

[28] **APPLEGARTH J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with those reasons and the order proposed by his Honour.