SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAH* [2012] QCA 154
PARTIES:	**R** **v** **KAH** (appellant/applicant)
FILE NO/S:	CA No 44 of 2011 DC No 116 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	14 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2012
JUDGES:	Chief Justice, Holmes and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Convictions are set aside.** **3. New trial is ordered.**
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 convicted by a jury of one count of maintaining an unlawful sexual relationship with a child and one count of rape – where the appellant gave evidence in the course of the trial that he was "always in gaol" – where the trial judge acknowledged the need to issue a direction to the jury to overcome the prejudice attached to this evidence – where the trial judge failed to give this direction – where the Crown conceded there had been a miscarriage of justice – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted by a jury of one count of maintaining an unlawful sexual relationship

with a child and one count of rape – where five interviews with the complainant were admitted into evidence and played in the course of the trial – where the jury asked for the "tape exhibits" prior to the summing-up – where the trial judge directed, in the absence of any objection from counsel, that the relevant exhibits be made available in the jury room – where the trial judge failed to give a direction to the jury to guard against the risk of giving the evidence of the five interviews disproportionate weight – where the Crown conceded there had been a miscarriage of justice – whether there was a miscarriage of justice

Evidence Act 1977 (Qld), s 99

R v DAJ [2005] QCA 40, cited
R v GAO [2012] QCA 54, cited
R v H [1999] 2 Qd R 283; [1998] QCA 348, cited

COUNSEL: K Prskalo for the appellant
V A Loury for the respondent

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

[1] **HOLMES JA:** The appellant appeals against his conviction by a jury of one count of maintaining an unlawful sexual relationship with a child and one count of rape. He was granted leave to amend the notice of appeal to add a number of grounds, of which only two are now of significance, for reasons which will become apparent. They are, in substance, that the learned Judge erred in permitting section 93A recordings to go into the jury room when the jury retired and in failing to give a direction on the matter; and that a miscarriage of justice occurred because the jury heard evidence that the appellant was currently, and had previously been, in prison, and the trial Judge failed to either discharge the jury or direct them to draw no adverse inference from that evidence.

[2] The appellant lived with the mother of the six year old complainant child. The complainant was taken to hospital in November 2007 with vaginal bleeding. Medical examination revealed the absence of any hymen and scarring and extension of the vagina consistent with repeated penetration. She was interviewed on five different occasions by police and Child Safety officers. In the first two interviews, she said she had injured herself in a bike accident. In her third, she gave no information. In the fourth, she said that the appellant had put a stick in her vagina after tying her legs apart using shoelaces. In the fifth interview, which was relied on by the Crown, she said that the appellant had tied her legs and then had penetrative sex with her, injuring her. She said that the same thing had happened lots and lots of times.

[3] All of the interviews were admitted into evidence and the video recordings of them were duly played in the course of the trial. Immediately before the summing-up, the jury asked whether they could have the "tape exhibits". In the absence of any objection from counsel, the trial judge directed that the relevant exhibits (cassette

and DVD recordings of the five interviews) be made available in the jury room, where there were facilities on which they could be played.

[4] Section 99 of the *Evidence Act* 1977 confers a discretion on the court to direct that a document be withheld from the jury during their deliberations if it appears it might be given undue weight. The judge was entitled to exercise his discretion in favour of making the material available to the jury. But he did not, unfortunately, give any direction warning the jury to guard against the risk of giving that evidence disproportionate weight, a direction this Court has made clear is necessary in such circumstances: see *R v H* [1999] 2 Qd R 283; *R v DAJ* [2005] QCA 40; and *R v GAO* [2012] QCA 54.

[5] During cross-examination, the appellant was asked what was in his mind when he heard of the complainant's injury. He said he thought, "something's going to happen"; by which he meant, he explained, that he had, in fact, been arrested and spent two years in gaol. More damagingly, when the appellant was questioned by the prosecutor about times he would have been alone with the complainant child, he said that for most of the time he was not with her and her siblings because he was "always in gaol". That was the case, he said, for six to eight months of the year.

[6] The latter evidence, so far as it went to opportunity to commit the offence, was relevant, but it clearly required a direction to overcome the prejudice which attached to it, as did the appellant's evidence about being on remand. The learned trial judge recognised that that was so, and said that he intended to tell the jury not to draw any adverse inference. Unfortunately, he failed, in the event, to give such a direction. Inexplicably, neither counsel drew his attention to the omission.

[7] The Crown conceded, very properly, that the two errors constituted by the failure to give directions about the section 93A statements and the fact that the appellant had been imprisoned constituted, in combination, a miscarriage of justice which was beyond the application of the proviso. In my view, that concession is correct and was properly made.

[8] The consequence must be that the appeal against conviction is allowed, the convictions are quashed, and a new trial is ordered.

[9] **THE CHIEF JUSTICE**: I agree.

[10] **GOTTERSON JA:** I agree.

[11] **THE CHIEF JUSTICE:** The orders are as indicated by Justice Holmes