SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lee* [2012] QCA 239
PARTIES:	**R** **v** **LEE, Martin Giles** (appellant/applicant)
FILE NO/S:	CA No 311 of 2011 DC No 248 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	7 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2012
JUDGES:	Holmes and Muir JJA, North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of one count of rape and one count of attempted rape – where the appellant contended that the verdict was 'unsafe and unsatisfactory' – whether the complainant's failure to seek the help of a visitor who attended the appellant's apartment, inconsistencies in her account as to whether the appellant was wearing a condom, and the absence of injuries to her so affected her credit as to render the verdict unreasonable – whether the conviction should be set aside CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted of one count of rape and one count of attempted rape – where the complainant's evidence was recorded prior to trial under s 21AK of the *Evidence Act* 1977 – where the appellant gave evidence of matters not put to the complainant – where the appellant's counsel had not sought to have the complainant re-called to give further evidence on

those matters – where there was no evidence of his instructions on those matters – where the trial judge directed the jury that there might be reasons for the failure to put the matters to the complainant that did not reflect on the appellant's credibility – whether the failure to re-call the complainant resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the statement of a witness who could not be located was tendered at the trial – where the appellant contended that the trial should not have proceeded until the witness was found – where no application for an adjournment was made – where the appellant sought to adduce evidence that the complainant had previously been sexually assaulted – where the appellant contended that the complainant's boyfriend should have been called as a witness but failed to identify any admissible evidence he could give – whether any miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of one count of rape and one count of attempted rape – where the complainant was 15 years of age at the time of the offences, and there was a significant age disparity between the complainant and appellant – where the intoxication of the complainant made her particularly vulnerable – where the appellant has failed to show any remorse – where the appellant pleaded not guilty to the offences and was convicted after a full committal and trial – where there was no serious violence involved in the offences – whether the sentence imposed was manifestly excessive

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4(2)
Evidence Act 1977 (Qld), s 21AK, s 21AN, s 93A

R v Breckenridge [1998] QCA 136, considered
R v Foley [2000] 1 Qd R 290, [1998] QCA 225, cited
R v Hutchinson [2010] QCA 22, considered

COUNSEL: A J Donaldson for the appellant/applicant
B J Merrin for the respondent

SOLICITORS: Gatenby Criminal Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant was convicted, after a trial, of one count of rape and one count of attempted rape and was sentenced to terms of six years and three years imprisonment respectively. Originally unrepresented on the appeal, he lodged a notice of appeal against conviction on the ground that the conviction was "unsafe

and unsatisfactory and not according to law" and applied for leave to appeal against sentence on the ground that the sentences imposed were manifestly excessive. On the hearing of the appeal he was represented by counsel (who had not appeared for him at trial). Counsel, by leave, added a ground of appeal: that the appellant had suffered a miscarriage of justice because his counsel at trial, having failed to put certain matters to the complainant, led evidence of them. Counsel did not advance any argument on the unsafe and unsatisfactory ground or on the sentence application, but said that he had no instructions to abandon them.

The complaint

[2] The complainant in respect of both the rape and attempted rape counts was a 15 year old girl, to whom I shall refer by the initial "H". She and her mother had recently moved to the Gold Coast and were staying in an apartment complex when they became acquainted with the appellant, who occupied the neighbouring unit. On 31 October 2008, H took part in an interview with police (subsequently tendered under s 93A of the *Evidence Act* 1977) in which she described having been sexually assaulted by the appellant the previous night. She had been drinking alcohol and smoking cannabis with him. The appellant danced with her and then started to push himself up against her saying that it "was all right for us to do it … Age doesn't matter". (H said that on a previous occasion the appellant had asked her how old she was and she had told him that she was 15.) He began to kiss H and to touch her legs and buttocks, moving his hands up her body.

[3] On H's account, the appellant pushed her onto a couch; pulled her trousers down, despite her telling him to stop, that it did not feel right; and, ignoring her protests, penetrated her vagina with his penis. Asked by the interviewing officer whether the appellant had worn a condom, H said that she did not think so. When asked why she thought he did not, H responded that the appellant had told her to have a shower (the inference being that there would otherwise have been no transmission of ejaculate to make washing necessary). H said that the appellant joined her under the shower. Then, pushing her up against a wall, he again attempted to penetrate her, on this occasion unsuccessfully, because his penis was not completely erect and because H resisted.

[4] After the failed attempt at penetration, H said, she dried herself, dressed and drank some beer. Her mother telephoned, causing the appellant some anxiety; he gave H her cigarettes and told her to leave. Back at her own unit, H said, she showered and got into bed. Her mother asked her whether the appellant had done anything to her. When H revealed what had happened, her mother contacted the police. H was taken to a nearby hospital where she was examined in the early hours of the morning, and she was interviewed by the police later that day, giving the account set out above.

The trial

[5] H's evidence was recorded at a preliminary hearing in October 2010, when she was 17. In cross-examination, she was asked in detail about the amount of alcohol she had drunk. It was suggested that she had kissed the appellant and willingly had sexual intercourse with him in the lounge room and in the shower. It was put to her, and denied by her, that while she was naked on the couch and the appellant was having intercourse with her, a neighbour had come to the door and that she had picked up her clothes and moved into the bathroom.

[6] The appellant's trial commenced in October 2011. His counsel informed the trial judge that he had received his brief only the previous day (when the appellant's previously instructed lawyers had been given leave to withdraw). He had read almost all of it but needed some time to finish it and to re-read some parts. It was agreed that the jury would be empanelled and that counsel would be given whatever time he needed to read that material. Then defence counsel raised another matter:

> "The only other issue is that obviously the 21AK [the pre-recording of H's evidence] was conducted according to certain instructions. My client hasn't signed instructions yet, but - but has given them and I anticipate that he will sign them. I'm just waiting for my solicitor who is of course very busy with this matter. If there is some significant difference between - if I perceive that there has been a failure at the 21AK recording to put certain things that ought to have been put in accordance with Browne and Dunne and that's not a criticism of anyone, but it's only I'm required to put the instructions that I have. I may have to seek your Honour's leave under section 21AK to conduct a further hearing so that those matters can be put."

[7] The jury was duly empanelled and time given to counsel to proceed with his preparation, as agreed. The prosecutor opened his case, and H's police interview and pre-recorded evidence were played to the jury. Once that was done, the jury were allowed to leave for the day. The appellant's counsel indicated that his inclination was not to ask for H to be recalled, but he said that he would be in a position to confirm his position at the beginning of proceedings the following Monday. (This discussion was taking place on Friday afternoon.)

[8] When the court resumed on the following Monday, some matters were raised in the jury's absence. They included the tendering of a statement from the appellant's neighbour, a Mr Graham, made within a couple of days of the events involving H. In it, he said that on the night in question he had gone to the appellant's unit. When the appellant opened the door, Mr Graham was able to see the lounge area; he saw a naked girl get up from the couch, grab her clothes and run into the bathroom. By the time of trial, police were unable to locate Mr Graham. By agreement, his statement was tendered in the Crown case. The appellant's counsel, however, took issue with one sentence in the statement, in which Mr Graham described the girl as looking "still quite young". Counsel, in arguing for the exclusion of that sentence, pointed out its possible prejudicial effect, remarking that if H's age were to be an issue, the onus would fall on his client to show he had reasonable grounds for believing that she was of age. The statement was tendered, with the sentence deleted. The discussion turned to the subject of H's recall; counsel indicated that he would not make any application in that regard.

[9] The trial proceeded, with H's mother giving evidence that immediately after her visit to the appellant's flat, H was in a distressed state and alleged that the appellant had threatened her, held her down and had sex with her. H's mother also asserted that she had informed the appellant on the occasion when she and H first met him that H was 14 years old (although the girl was, in fact, by then 15). During her evidence, a recording was tendered of a telephone call she had made to the appellant on 1 November 2008, at the direction of police. In the course of the conversation, the appellant said that he thought H was,

> "mature, she's going on like she's about 19 or 20".

H's mother pointed out that she was 15. The appellant responded:

> "You don't get round, she's nearly 16, you don't go round ….."

continuing, after an interruption, that one did not "go round", as H's mother did, providing girls of that age with alcohol and cigarettes; H was mature for her age. In his evidence, H denied having said that H was "nearly 16", but I have listened to the recording: those words are clear.

[10] The doctor who had examined H was called in the Crown case. The appellant's counsel made a formal admission that swabs she had taken from H contained the appellant's semen. The doctor recounted the history that H had given her, which included that the appellant had been wearing a condom at times during the incident but may not have had it on all the time. In cross-examination, she agreed that her note recorded H as saying that the appellant had been wearing a condom when he had intercourse with her on the couch but that it kept coming off. She said she had found no injuries to H's genital area, but that fact did not exclude recent penetration of her vagina. Under cross-examination, the doctor agreed that the consumption of cannabis could lead to hallucinations.

[11] The appellant gave evidence in his own defence. He said that H invited him to strip for her. He obliged, and she performed oral sex on him. He asked her if she wanted to "do something else… to have sex", and she agreed. He obtained a condom and put it on and was having intercourse with H on the lounge when Mr Graham knocked at the door. He answered the door, spoke briefly to Graham, and returned to see that H had got into the shower. She advised him that she wanted to have "another root" and told him not to worry about condoms this time. She urged him to have sex with her in the shower and he did so. The appellant said that he thought from H's appearance, and her behaviour in drinking alcohol and smoking cigarettes and cannabis, that she was 18. He did not hear in any conversation with H and her mother any mention of H's age.

[12] In cross-examination, it was put to the appellant that his counsel, when H's evidence was recorded, had not challenged her as to her evidence that she had told the appellant her age; the appellant could not recall whether that was so. He agreed that it had not been mentioned at the pre-recording of H's evidence that H had performed oral sex on him, saying:

> " – no-one's even mentioned that, no."

The appellant conceded during cross-examination that about an hour after he had intercourse with H, he went to Byron Bay. The recorded telephone conversation occurred while he was there; in the course of it he said that he was

> "at a mate's place hiding".

The appellant said that he left his apartment, not out of any consciousness of guilt, but because he was threatened by H's mother.

The appeal against conviction

The failure to put matters later the subject of the appellant's evidence

[13] Counsel for the appellant here argued that the failure to seek H's recall to put to her the propositions that she had not told the appellant her age and that she had fellated

him had led to the cross-examination of the appellant about the matters not put. That in turn had led to a miscarriage of justice.

[14] The principal difficulty with that argument is that it proceeds in the absence of evidence of any relevant instructions given by the appellant. His counsel at the trial was plainly alive to the issue of whether H should be recalled. He had time to consider the appellant's instructions before deciding that he would not make any such application and informing the court accordingly. There is no evidence as to whether he then had any instructions on which to base further questioning of H. One might reasonably infer that counsel had, at that point, canvassed with his client the subject of the latter's knowledge of H's age; he did in submissions refer to the prospect that H's age would be an issue. But as to the appellant's evidence that H began their sexual encounter by performing fellatio on him, there is simply no means of knowing whether counsel was given any instructions on that matter, or instead heard it for the first time when the appellant was giving evidence.

[15] If counsel had received from his client a denial of H's account that he asked her age when they first met, he may have made a forensic decision that seeking her recall on that basis alone was not justified. Under s 21AN of the *Evidence Act*, it would have been necessary to convince the trial judge that it was in the interests of justice that H be recalled. And to require the girl to become a witness once more, merely to have it put to her that what she had said was not true (with the high likelihood that her answer would be that it was) was hardly likely to endear the appellant to the jury. It would be a rational choice to desist from the application and to rely, if the prosecution took any point, on the judge's directing (as indeed he did) that there might be explanations for the failure to put the matters which did not affect the appellant's credibility.

[16] If counsel had instructions about the alleged incident of fellatio, the need to recall H would have been much more pressing; this was not a topic which had ever been raised with her. But whether he did is unknown. One cannot conclude that there was any miscarriage of justice arising from counsel's failure to seek H's recall to question her on the matter, when there is no evidence that he was aware of it.

[17] In any event, assuming there to have been avoidable prejudice to the appellant resulting from the failure to put the two matters to H and his consequent cross-examination, it was remedied by the judge's direction. In accordance with *R v Foley*,[1] his Honour explained to the jury that there might be reasons, which did not reflect on the appellant's credibility, for the failure to put the matters; he gave the obvious example of oversight by counsel.

[18] In short, there is no evidentiary basis on which this court could conclude that there was an error by counsel of the kind suggested in the appeal ground; and if there were, the trial judge's direction served to cure it.

"Unsafe and unsatisfactory" ground

[19] The appellant, while unrepresented, forwarded submissions in respect of this ground. In support of it, he raised a number of matters, including the examining doctor's evidence that H had no visible injuries and the apparent inconsistency between H's account to the doctor and what she said to the police about whether the appellant had worn a condom. The first is rendered neutral by the doctor's evidence

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1 [2000] 1 Qd R 290.

that the absence of injuries did not rule out penetration. The difference in accounts about the condom use was before the jury, which was not obliged to (and evidently did not) regard it as fatal to H's credibility. It is conceivable, in fact, that the answers are reconcilable: that her answer to the police was focussing on the lack of any condom at the point of ejaculation (given her rationalisation about being told to have a shower), whereas she was giving a more general answer to the doctor.

[20] The appellant also pointed to an inconsistency in evidence about a male acquaintance of H and her mother, and said that the man should have been called as a witness. The starting point for this argument seems to lie in the appellant's own evidence: he said that H told him she had a 29 year old boyfriend with whom she regularly had sex. H's mother said that her daughter arrived at the Gold Coast units before she did and had been staying there with some people including a man about 29 years old. H, on the other hand, rejected a proposition put to her in cross-examination that she had stayed at the units for a day or two with the young man, saying that her mother was there. Even accepting the man had had a sexual relationship with H, that, of course, was immaterial to the charges against the appellant; and there is no suggestion of any relevant evidence he might have given. On any view, the difference in recollection between the mother and daughter as to whether the man in question had stayed in the unit before or after the mother's arrival is entirely inconsequential.

[21] The next aspect of the appellant's argument concerned Mr Graham's statement. His first point did not go to the reasonableness of the verdict; rather he asserted that his trial should have been adjourned until police found Mr Graham. But there was no application for an adjournment on that basis; not surprisingly, since a police officer gave evidence of a variety of checks through police systems and government and telecommunications authorities which had failed to locate him. In the absence of any prospect that Mr Graham would be found an adjournment would not have been granted. His statement, which certainly tended to assist the appellant and did not harm his case in any way, was before the jury.

[22] The appellant's major point about Mr Graham's statement was that it should have convinced the jury of his innocence, because if H's account were true, she would have screamed to Mr Graham for help while he was at the door. Instead, she grabbed her clothing and ran to the shower. But assuming that the jury accepted Mr Graham's account as accurate, it does not follow that in a state of distress H would have registered his presence at the door; or that if she did, her response would have been to seek help from somebody evidently friendly with the appellant, as opposed to seeking to conceal herself.

[23] Nothing in the points raised above raises a concern as to the reasonableness of the jury's verdict. In particular there is nothing identified which should have compelled the jury to reject H's account as credible. On the other hand there were statements by the appellant in the recorded telephone conversation and in his evidence which they may well have regarded as lies, as to whether he had had sex with H (in the telephone conversation) and whether he knew her age (in evidence), so as to dismiss his account.

[24] A remaining point which the appellant raised in his written submissions does not fall within the embrace of the appeal ground, but I shall deal with it for the sake of completeness: that the learned judge prevented the jury from hearing evidence of an

earlier incident involving H. The appellant's counsel sought leave under s 4(2) of the *Criminal Law (Sexual Offences) Act* 1978 to elicit evidence from H's mother that in 2007 the complainant had been sexually assaulted at a party. The argument advanced for adducing it depended on a theory that the incident had led H's mother to leap to conclusions of sexual assault in this case and, presumably, to influence her daughter in making a false complaint. Not surprisingly, the learned trial judge refused leave. Here, the appellant's submissions suggested a belief that the evidence would assist him in showing some sort of promiscuity on H's part. On any view, the evidence was not admissible.

[25] No ground has been shown for setting the conviction aside.

The application for leave to appeal against sentence

[26] The appellant was 48 years old when he committed the offences. He had a long criminal history, dating back to 1985, for minor assault and drug offences, almost invariably dealt with in the Magistrates Court and all resulting in fines and community based orders. The appellant's counsel at trial contended for a sentence of five years imprisonment, saying on his client's behalf that he had a reasonably good work history as a salesman and a surfing instructor, although his working ability was limited by a back injury. He lived with his sister and supported a son.

[27] Two decisions of this court were provided to the trial judge to assist him in fixing a sentence. The first was *R v Breckenridge*.[2] In that case, the applicant was a 34 year old without any prior criminal history who worked as a manager for a business in which the 17 year old complainant was also employed. He had taken advantage of her intoxicated and unconscious state at a party to have sexual intercourse with her. It was accepted that the applicant was otherwise of good character and was supporting a six year old son, and he had pleaded guilty to the charge. The sentencing judge in that case arrived at six years as an appropriate sentence but instead of making a recommendation for early parole, reduced the sentence to five years to allow for the applicant's previous good character, the absence of any violence in the offence and his plea of guilty. This court identified the discrepancy in the ages of the applicant and the complainant as an important factor. After a review of authority, it refused an application for leave to appeal against sentence as manifestly excessive.

[28] The second of the cases relied on at first instance was *R v Hutchinson*[3]. There, the 36 year old applicant pleaded guilty to rape of the 18 year old complainant, who had been living in his house at his wife's invitation, in order to escape an abusive relationship. He entered her bedroom while she was asleep and had unprotected intercourse with her. He had a criminal history which included offences of personal violence. There had been a lapse of some six years between the offence and the charging of the applicant which was no fault of his. The sentencing judge accepted that in the intervening period the applicant had largely rehabilitated himself, having ceased excessive drinking and gone into business as a motor mechanic. This court observed that the offence had been committed on a vulnerable young woman and was a serious violation of her, although violence was not used. The sentence imposed at first instance, of seven years imprisonment with parole eligibility after one-third, was upheld.

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2 [1998] QCA 136.

3 [2010] QCA 22.

[29] The appellant here complained of being sentenced immediately after the trial, something which is entirely unremarkable. Apart from that, he pointed out that there was no violence involved, that H's mother was a poor parent and that H had personal problems. It is correct to say that there was no serious violence involved, but the last two factors suggest a vulnerability in H which made the offence, if anything, the worse. H was, as the appellant knew, a 15 year old girl whose consumption of alcohol and cannabis left her all the more susceptible to abuse.

[30] *Hutchinson* and *Breckenridge* do not support the contention that six years imprisonment is excessive for rape of a vulnerable young person, notwithstanding the absence of violence. The discrepancy in age here was much larger than in those cases, and the complainant younger. And unlike those cases, there was here no element of remorse or co-operation with the administration of justice to be taken into account: the appellant had a full committal and a trial. The sentence imposed was not manifestly excessive.

[31] I would dismiss the appellant's appeal against his conviction and refuse the application for leave to appeal against sentence.

[32] **MUIR JA**: I agree that the appeal against conviction should be dismissed and that leave to appeal against sentence should be refused for the reasons given by Holmes JA.

[33] **NORTH J:** I agree with the reasons given by Holmes JA and the orders proposed by her Honour.