SUPREME COURT OF QUEENSLAND

CITATION:	*R v Horvath* [2013] QCA 196
PARTIES:	**R** **v** **HORVATH, Sandor** (appellant)
FILE NO/S:	CA No 28 of 2013 DC No 1794 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2013
JUDGES:	Chief Justice and Holmes and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Convictions set aside; and** **3. Appellant to be re-tried on all counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – the appellant was convicted of five counts of indecent treatment of a child under the age of 16 years – the complainant's evidence was not formally corroborated but she complained to two friends and a friend's mother – evidence from the complainant and two friends was adduced through pre-recorded interviews and tape-recorded conversations with police officers – during introductory remarks the Judge told the jury that their assessment of the probative value of the complainant's evidence should not be affected by the method in which it was given – the trial Judge did not instruct the jury that no inference should be drawn as to the guilt of the appellant from the manner in which the evidence of the complainant and her friends was adduced – whether the Judge failed to direct the jury as required by s 21AW(2)(a) of the *Evidence Act* 1977 (Qld) (the Act) – whether other directions given by the Judge were sufficient to indirectly satisfy the requirements of s 21AW(2)(a) of the Act

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – while summarizing "rival contentions" during the summing up, the Judge stated that the prosecutor submission that there was no reason for the complainant to lie – the Judge also stated that the prosecutor invited the jury to consider why a child would put herself through cross-examination if the allegations were a fabrication – no redirection was sought by the appellant's counsel – whether the Judge had given a "judicial imprimatur" to the prosecution's submissions in his summary – whether the Judge's summary encouraged the jury to accept the complainant's evidence with a lower burden of proof

Evidence Act 1977 (Qld), s 21AW(2)(a)

R v BCL [2013] QCA 108, cited
R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179, cited
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, cited

COUNSEL: A J Edwards for the appellant
M R Byrne QC for the respondent

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

[1] **CHIEF JUSTICE:** The appellant was convicted in the District Court on five counts of the indecent treatment of a child under the age of 16 years. In three of those cases, there was the aggravating feature that the child was under 12 years of age. He was sentenced to an effective two year term of imprisonment.

[2] The appellant was a friend of the complainant female child's family. The charged conduct was, for count one, touching the complainant on the breasts and her vagina under clothing while they were in the lounge room at her home; for count two, showing the complainant pornographic material, forcing her hand onto his penis, whereupon he masturbated and ejaculated over her leg, again in the lounge room; for count three, putting his hand on the complainant's stomach as she was sleeping; for count four, touching the complainant's breasts; and for count five, placing the complainant's hand on his penis. The last two offences were committed in the appellant's car on the way to the complainant's birthday party.

[3] The complainant's evidence was uncorroborated in a formal sense. She did however make complaint to two of her friends, and to the mother of one of her friends. The complainant's evidence, and the evidence of her two friends, was led by tape-recorded conversations with police officers, and pre-recorded interviews.

[4] Although the ground specified in the notice of appeal was that the verdicts were unreasonable, that was abandoned and it was two other grounds which were argued: that the learned trial Judge did not direct the jury as required by s 21AW(2)(a) of the *Evidence Act* 1977; and that the Judge erred in failing to direct the jury "about

considerations of the complainant's motivation to lie" and in directing the jury "about considering why a child would put herself through cross-examination if the allegations were a fabrication".

[5] As to the first ground, the statutory provision requires in a case like this – where the complainant child's evidence was given in that way, and where the child's evidence was taken in the presence of a support person, that the trial Judge must give the instructions set out in s 21AW(2):

> "(2) The judicial officer presiding at the proceeding must instruct the jury that –
>
> (a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
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> (b) the probative value of the evidence is not increased or decreased because of the measure; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the measure."

[6] In the course of his introductory remarks at the trial, the Judge said this to the jury:

> "The prosecution will endeavour to discharge that burden of proof by means of evidence. Evidence is what the witnesses will say from the witness-box and any exhibits which are tendered during the trial. Now, you will hear the evidence of the young girls you've mentioned – you've heard mentioned by way of video rather than them being here personally. Now, that's nothing unusual in this jurisdiction. The Courts do it every day of the week. The fact you're seeing it by video doesn't mean the evidence has any more or less – that is, greater or lesser – probative value, probative value being – going towards proving a particular fact. It is just the way things are done in this Court. So don't feel that that's anything unusual."

[7] His Honour did not revisit those matters either when the recordings were played, or during the summing up.

[8] What was missing was an instruction that the jury should not draw any inference as to the guilt of the appellant from the manner in which the evidence of the complainant and her friends was adduced (sub-s (2)(a)).

[9] Counsel for the respondent submitted that the omission was supplied by the aggregation of other orthodox directions, namely, as to the presumption of innocence, that the verdict must be based on evidence, that inferences may be drawn only from established facts, and that adverse inferences may be drawn only in the absence of other reasonably competing favourable inferences.

[10] The section of the Act does not contemplate that its requirement may be satisfied in such an indirect way. It requires a direct instruction generally in accordance with the statutory prescription, and given in a composite way by reference to the evidence when foreshadowed or adduced.

[11] Here, the Judge has unfortunately simply missed out an integral part of the required instructions.

[12] Compliance with s 21AW(2) is mandatory, and particularly in the absence of corroboration, there can be no basis for the application of the proviso in this "word against word" case. See *R v Hellwig* [2007] 1 Qd R 17 para 13 and *R v BCL* [2013] QCA 108.

[13] The convictions must accordingly be set aside and a retrial ordered.

[14] I turn to the other ground.

[15] His Honour gave the following direction, which Counsel for the appellant accepts was appropriate:

> "Now in the closing address you'll recall Ms Hurley for the Prosecution raised the issue of motive of the complainant to lie and suggested that there was no reason for her to lie, that she was not attention seeking and that she was an honest person.
>
> Ms Hillard for the defence raised in response the motive question, and mentioned possible motives such as domestic violence within the family. Perhaps the complainant wanting to escape the home, the escalating violence at the home and her fear of her father, all that. There may be a motive, a motive to lie that has no explicable reason. Of course, there's no obligation on Mr Horvath to establish a motive. Any failure or inability on his part to prove a motive does not establish that a motive does not exist. If you reject the motive to lie put forward by the defence that doesn't mean that the complainant is telling the truth. If such a motive existed the accused may not know of it. There could be any number of reasons why a person may make or join in making false complaints. It's a matter for you, using your common sense and life experience, to determine what you make of the complainant's evidence.
>
> If you're not persuaded that there's any motive to lie by the complainant it would not necessarily mean that the complainant was truthful. Once again, draw on your common sense. It still remains necessary for you to satisfy yourself as to her truthfulness.
>
> It's for the Prosecution to satisfy you that the complainant is telling the truth because of its obligation to satisfy you beyond reasonable doubt of the guilt of the defendant. As I keep repeating, that question is entirely a matter for you."

[16] Then later in the summing up, when summarizing the "rival contentions", the Judge said this:

> "So the Crown, in essence, is saying to you (the complainant) is not lying. There's no reason for her to lie. It wasn't easy for her to speak about the matter she spoke of and to subject herself to cross-examination, and the Crown asks rhetorically, why would a child put herself through this if it was a fabrication. So the end invitation from

> the Crown is that you should find the defendant guilty of all counts and that you would have no difficulty accepting (the complainant's) evidence in support of those counts."

[17] Counsel for the appellant submitted that by repeating this submission without comment, the Judge gave his "judicial imprimatur" to the possibility that in the absence of evidence of a motivation to lie, the jury may proceed without more to accept the complainant's evidence.

[18] No redirection was sought.

[19] I consider the jury would have received this passage for what it was, that is, a recapitulation of Counsel's argument, and to be read subject to the earlier orthodox instruction about motivation to lie.

[20] Read as a whole, the summing up did not involve any invitation to the jury to proceed on the basis that the appellant bore any onus to establish any particular reason why the complainant would not be telling the truth (*R v Van Der Zyden* [2012] 2 Qd R 568, para 301).

[21] The appeal should succeed on the first ground, but not the other.

[22] I would order:

1. that the appeal be allowed;

2. that the convictions be set aside; and

3. that the appellant be re-tried on all counts.

[23] **HOLMES JA:** I agree with the reasons of the Chief Justice and the orders he proposes.

[24] **GOTTERSON JA:** I agree with the orders proposed by the Chief Justice and with the reasons given by his Honour.