SUPREME COURT OF QUEENSLAND

CITATION:	*R v Drake* [2013] QCA 222
PARTIES:	**R** **v** **DRAKE, Lawrence James** (appellant)
FILE NO/S:	CA No 73 of 2013 DC No 109 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	16 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2013
JUDGES:	Margaret McMurdo P, Muir JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal be allowed.** **2. Appellant's conviction be set aside.** **3. Appellant be retried on count 1 on the indictment.**
CATCHWORDS:	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 of one count of rape – where the complainant was an "affected child" under Pt 2 Div 4A of the *Evidence Act* 1977 (Qld) – where a support person was present during the pre-recording of the complainant's evidence pursuant to s 21AV – where the trial judge gave a direction as to the reception of pre-recorded evidence – where the direction did not explicitly or implicitly encompass reference to the support person – whether the trial judge erred in failing to direct the jury in accordance with s 21AW(2) as to the presence of a support person – whether a miscarriage of justice occurred *Criminal Code* 1899 (Qld), s 668E(1A) *Evidence Act* 1977 (Qld), s 21AK, s 21AV, s 21AW, s 93A *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, considered

Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, considered
R v BCL [2013] QCA 108, considered
R v DM [2006] QCA 79, cited
R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179, considered
R v Horvath [2013] QCA 196, considered
R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, considered
R v TN (2005) 153 A Crim R 129; [2005] QCA 160, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered

COUNSEL: C L Morgan for the appellant
M B Lehane for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for allowing this appeal against conviction.

[2] The judge's omission to direct the jury in accordance with s 21AW *Evidence Act* 1977 (Qld) as to the presence of a support person during the complainant child's pre-recorded evidence is an error of law. This requires that a new trial be ordered unless, under s 668E(1A) *Criminal Code* 1899 (Qld), this Court determines there has been no substantial miscarriage of justice. See *R v DM*;[1] *R v Michael*;[2] *R v BCL*.[3]

[3] Although the appellant did not give evidence contradicting the complainant's sworn testimony that he raped her, her evidence was not without difficulties. There was no other evidence directly supporting her account. She made no complaint for over two years. On the prosecution case, the offence must have happened on or about the night of 22–23 October 2009, the only occasion the appellant stayed over at the complainant's family home. This was also the occasion when her mother became so intoxicated that the complainant's older sibling telephoned for assistance and ambulance officers attended at the home. Later on 23 October, the children were taken to the police station where they remained until collected by another family member. Child Safety officers spoke to the complainant three days later. She made no complaint either to the ambulance officers, the police or the Child Safety officers. Nor did she relate the alleged offence to the night when ambulance officers came to her home and she was taken to the police station. Indeed, it seems she had no recollection of such an incident.

[4] The support person is clearly depicted in the complainant's pre-recorded evidence. In the absence of the warning required by s 21AW(2), I am unpersuaded that the jury did not give the complainant's evidence undue weight because of the presence

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1 [2006] QCA 79, [26].
2 [2008] QCA 33, [38].
3 [2013] QCA 108, [8].

of the support person. In my view, the resolution of the factual matters to which I have referred in circumstances where the appellant has not had a procedurally fair trial, should be resolved by a jury. I am unpersuaded that the guilty verdict has not resulted in a substantial miscarriage of justice.

[5] The appellant's second ground of appeal is that the jury should have been warned in terms of *Robinson v The Queen*[4] of the need to carefully scrutinise the complainant's evidence before accepting it and convicting the appellant. Whether such a warning should be given at any retrial will turn on the evidence at the retrial.

[6] I agree with the orders proposed by Muir JA.

[7] **MUIR JA**: The appellant was convicted on 26 March 2013 after a trial in the District Court of one of the two counts of rape on the indictment. The prosecution did not proceed with the second count. He appeals against his conviction on grounds that:

1. the trial judge erred in failing to direct the jury in accordance with s 21AW of the *Evidence Act* 1977 (Qld) (the Act);

2. there was a miscarriage of justice because the trial judge failed to identify matters affecting the reliability of the complainant's evidence and failed to warn the jury to scrutinise that evidence with great care before arriving at a conclusion of guilt.

The evidence before the jury

[8] In an interview with police on 21 December 2011, the complainant, then 10 years of age, gave an account to the following effect. She was in her mother's bed and her mother was in the shower when a person came in and lay next to her. That person "kept on like putting his finger up [her] bum". She told him to stop and when she got up the offender said, "don't tell anyone". He then followed her to her room and stood next to her bunk bed. It was "really late" when the offending occurred and she asked the offender if she could go to sleep. Her sister was asleep on the bottom bunk at the time. When her mother came out of the shower, the offender walked out and she then went to bed. On the night the offending conduct occurred, she went to get into her mother's bed and was told by her mother to "go back to bed it's really late at night".

[9] She identified as the perpetrator her mother's friend "Lawrence" who had brown skin and curly black hair. She described what she was wearing at the time, how the appellant managed to penetrate her anus under her clothes and the duration of the relevant conduct. She said that she felt soreness, "sometimes", over a period of "a couple of days". She said that she was nine as it probably happened two years prior to the interview.

[10] The offender left early the next morning. She did not tell her mother what had happened because she was "too scared". She had not seen him since that time.

[11] The complainant's first complaint about the subject conduct was made to her aunt Dianna between 16 and 18 December 2011. The complainant and her siblings were staying with the aunt for a couple of days. The aunt said that she was in the kitchen

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4 (1997) 197 CLR 162.

cooking with her two children and the complainant. Her children were discussing an incident at their school when the complainant volunteered that "something bad happened to [her] once". The aunt asked her children to leave and asked the complainant what had happened. She was informed that "Lawrence" "put his finger up [her] bum" and that "she was scared of him coming back". After this discussion, she read a book to the complainant about keeping secrets as a means of conveying to the complainant that she had done the right thing.

[12] The complainant's mother's evidence was to the following effect. On a night which admissions established was that of 22 October 2009, she had been drinking at home with the appellant who had arrived with alcohol after 9.00 pm that evening. She became ill and went and lay in the bathtub under the shower with a towel under her head. Her son came into the bathroom and then telephoned for an ambulance. It was admitted by the defence that: when a police officer attended the complainant's dwelling on 23 October 2009 at 4.30 am, the complainant's mother was on the floor of the bathroom and a male, who the evidence established was the appellant, was asleep in a bedroom; the children present, including the complainant, were taken to the police station where they remained until another family member attended and picked them up; and the complainant made no complaint to police about the appellant.

[13] It was also admitted that when the complainant was seen by child safety officers on 26 October 2009 she: made no complaint; told them that the appellant was teaching her to dance; said that she went to bed at about 2.00 am and when she awoke her mother was in the bathroom; told the officers that she wanted her mum to stop drinking. It was further admitted that when seen by different child safety officers on 15 January 2010 and 14 September 2010, the complainant made no complaint about the appellant.

[14] The complainant's mother's evidence was that the night of 22 October 2009 was the only night on which the appellant stayed over at her house. That evidence is of particular significance.

[15] Ms McManus, a paramedic with the Queensland Ambulance Service (QAS), said that she arrived at the complainant's mother's house at 4.00 am on 23 October 2009. She saw a female in the bathtub who appeared to be intoxicated. After treating the female, she woke up a male whom she noticed in a bedroom. He told her that he had been drinking. She said that the complainant's mother "was quite abusive towards us and her children. She was quite upset and angry at the children that they'd called QAS 'cause she deemed that there was nothing wrong with her". Her report stated, "Patient was dressed and put to bed with partner that she had been drinking with. Patient was asleep".

[16] Another witness who had been a student paramedic with the QAS gave evidence of attending the house with Ms McManus. His recollection was that, when he and Ms McManus entered the house, a man was lying on a couch watching television. That man came to the bathroom and said, "She'll be right, she's just drunk". The man "looked like he'd had a few drinks". The witness accepted that he had previously described the complainant's mother as, "The most intoxicated person I had ever seen".

[17] There was evidence from the complainant's older brother that he had not seen the appellant at the house after this occasion.

[18] It is now convenient consider ground 1.

Ground 1

[19] Section 21AW of the Act provides:

> "**21AW Instructions to be given to jury**
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> (1) This section applies to a proceeding on indictment if any of the following measures is taken—
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> (a) an affected child's evidence is taken in a way provided for under subdivision 3 or 4;
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> (b) a person is excluded under section 21AU while an affected child gives evidence;
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> (c) an affected child has a support person under section 21AV while the child gives evidence.
>
> (2) The judicial officer presiding at the proceeding must instruct the jury that—
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> (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
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> (c) the evidence is not to be given any greater or lesser weight because of the measure."

[20] It was common ground that s 21AW applied. Cross-examination of the complainant was pre-recorded on 16 August 2012 and 30 November 2012 pursuant to s 21AK of the Act. A support person was present during the pre-recording and was approved by the Court in accordance with s 21AV of the Act. The support person was clearly visible throughout the recordings which were played at trial.

[21] The trial judge relevantly directed the jury, at the commencement of the trial, as follows:

> "Now, a fair portion of the evidence that you're going to hear today is going to be by way of recorded evidence and that's because there's quite a few children that are giving evidence and there's a provision in our Evidence Act that provides that children don't have to come into Court and give evidence.
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> Their evidence is pre-recorded, so at an earlier date the evidence-in-chief was taken by a police officer and cross-examination occurred, I think some months ago in this case – I'm actually not sure because I didn't do it – but it's all been recorded and that will be played in Court for you instead of the children coming in, and it's just thought that that's an easier way for children to be able to give evidence.
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> But I need to tell you that that measure is a routine practice of the Court and you shouldn't draw any inference as to [the appellant's]

> guilt from it. The probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of the measure. So it's just another way of taking evidence and it should be treated in exactly the same way as if they'd come into the Court and given evidence."

The respondent's construction argument

[22] The respondent argued that the direction was favourable to the appellant "to the extent that the s 21AW(2) direction encompassed the taking of the children's s 93A statements" as s 21AW did not require such a direction. Given the generality of the direction, the jury would have understood it "to attach to the process in its entirety, including the presence of the support person during the complainant's pre-recorded evidence".

Consideration of the respondent's construction argument

[23] The first and second paragraphs of the above passage in the summing up concerned the reception in trials of the pre-recorded evidence of children. It is apparent, from the words "that measure" in the first sentence of the third paragraph, the words "the evidence" in the second sentence and the content of the paragraph generally, that it is concerned with the matter addressed in the first two paragraphs: the admitting into evidence in criminal trials of the pre-recorded evidence of children.

[24] Plainly, the judge's directions to the jury gave no express instruction in terms of s 21AW(2) of the Act in relation to the presence of the support person. There was no mention of any support person. Nor did the directions implicitly encompass a reference to the support person. Contrary to the respondent's submission, there was no logical reason why the jury would reason that the direction, which related to the reception of pre-recorded evidence, also concerned the presence of the support person. The jury were not instructed, and were unlikely to understand, that the presence of a support person when a child's evidence was being pre-recorded was "a routine practice". I note that in *R v Horvath*,[5] the Chief Justice, Holmes and Gotterson JJA agreeing, said of s 21AW(2):

> "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."

The respondent's other arguments

[25] It was argued that should it be found that there was a failure to give the required direction, this Court should conclude that the error would have had no significance in determining the verdict[6] and that s 668E(1A) of the *Criminal Code* 1899 (Qld) (the proviso) applied. It was further submitted that as no redirection was sought by defence counsel, no miscarriage of justice occurred as it was not demonstrated that it was "reasonably possible" that the failure to properly direct the jury "may have affected the verdict".[7]

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5 [2013] QCA 196 at [10].

6 *Weiss v The Queen* (2005) 224 CLR 300 at 317.

7 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38] per McHugh and Gummow JJ.

[26] Reliance was placed on the following passage from the reasons of Hayne J, Crennan and Heydon JJ agreeing, in *Gately v The Queen*:[8]

> "Trial counsel for the appellant consented to the jury having the access they did to the pre-recorded evidence of the complainant. Great weight must be attached to that consent in considering whether there was a miscarriage of justice. So much follows inevitably from the adversarial nature of a criminal trial. As was said in *R v Birks*, '[a]s a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted'. It is for the parties, by their counsel, to decide how and on what bases the proceeding will be fought. Consent by counsel for a party to a course of conduct is usually an important indication that that party suffers no miscarriage of justice by pursuit of the intended course. But, as the cases concerning allegations of incompetent representation illustrate, the miscarriage of justice ground may yet be established despite the course that is taken by an accused person's counsel at trial. In the present case there was no allegation of incompetent representation. The circumstances surrounding trial counsel consenting to the course that was followed require the conclusion that there was no miscarriage of justice." (citations omitted)

[27] The failure to seek a redirection could be attributed to a rational forensic decision by defence counsel. The pre-recorded evidence largely consisted of the complainant's cross-examination. The Crown prosecutor emphasised in her closing address that the complainant's s 93A statement enhanced the child's reliability. While defence counsel's submissions were not confined to criticism of the complainant based upon her pre-recorded evidence, he devoted some time to the topic. Any direction in respect of the support person was prone to direct the jury's attention to the cross-examination of the complainant. The complainant was upset at times when giving her pre-recorded evidence. A direction which dealt with the presence of the support person could have drawn attention to the complainant's condition "presenting a reason why allowances should be made for her answers in cross-examination". It might also have been thought that a direction to the effect that the presence of a support person did not increase or decrease the probative value of the evidence required the jury to draw too subtle a distinction, in circumstances where the defence were propounding that the probative value of the complainant's evidence had been diminished by what transpired in the pre-recording.

[28] It was open for defence counsel to conclude that his client's interests had been adequately protected by the general directions given by the primary judge.

Consideration of the respondent's further arguments

[29] I do not accept that defence counsel's failure to seek a redirection should be attributed to the making of a rational forensic decision. I am sceptical as to the asserted disadvantages to the defence of such a redirection. More significantly, however, I would not, in the absence of cogent evidence, conclude that defence counsel, knowing that the trial judge's direction failed to meet a statutory

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8 (2007) 232 CLR 208 at 232–233 [77].

requirement, left the error uncorrected thereby breaching his duty to the Court.[9] The error, of course, was one which also escaped the notice of the trial judge and the Crown prosecutor.

[30] A failure to direct as required by s 21AW(2) constitutes an error of law[10] which results in any convictions affected by the misdirection being set aside unless the proviso is able to be applied.[11] The proviso is applicable if the Court, after considering the whole of the evidence, concludes that no substantial miscarriage of justice has occurred. In making its determination in this regard, the Court:[12]

> "… must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty." (citations omitted)

[31] The fact that the jury returned a guilty verdict is a relevant consideration,[13] but the fact that it was arrived at without the benefit of the direction required by s 21AW diminishes its significance.

[32] Chesterman and Mullins JJ, McPherson JA agreeing, explained the role and significance of s 21AW(2) as follows in *R v Hellwig*:[14]

> "[22] Division 4A has provided, for reasons which Parliament deems sufficient, that a different procedure should be followed in cases involving a certain class of witness. The difference is such as is likely to surprise jurors who have some knowledge, whether first or second hand, of ordinary court proceedings. Without the benefit of the instructions required by s. 21AW(2) that surprise may well turn into conjecture adverse to an accused. The subsection is intended to dispel the surprise and to prevent the conjecture. That that occurs is clearly of the utmost importance to a fair trial. Parliament cannot have intended that the new procedures should prejudice the fair trial of an accused. It has enacted that, to ensure a fair trial, the jury must be instructed how to evaluate evidence led in this way.
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> [23] To exclude an accused from the complainant child's presence, or to protect the child from the accused's presence is likely to give rise to speculation by a jury that the measure has been undertaken because of some particular characteristic of the accused which is likely to be associated with his guilt. It is essential that that speculation be quashed and directions specified in s. 21AW(2) are designed for that purpose."

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9 *R v DM* [2006] QCA 79 at [8].
10 *R v TN* (2005) 153 A Crim R 129 at 147; *R v DM* [2006] QCA 79; *R v Horvath* [2013] QCA 196.
11 *R v DM* [2006] QCA 79; *R v Michael* [2008] QCA 33; *R v BCL* [2013] QCA 108.
12 *Weiss v The Queen* (2005) 224 CLR 300 at 316.
13 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].
14 [2007] 1 Qd R 17 at 22.

[33] In *R v Michael*,[15] Keane JA, Holmes JA and Mullins J agreeing, observed that the provisions of s 21A(8) of the Act "are clearly informed by the same solicitude for the provision of a fair trial as informs the equivalent provisions of s 21AW".[16] His Honour observed:[17]

> "In both cases, the legislation is concerned to ensure that it is made unequivocally clear to the jury that the special arrangements made to assist the complainant should not be taken to reflect adversely upon the accused. The risk of such adverse pre-judgment is at least as strong where a complainant is seen to be afforded support while giving evidence – which might be thought to reflect a justified fear of the accused – as it is in the case where a young complainant is seen to give pre-recorded evidence." (citations omitted)

[34] All of the complainant's evidence was in her s 93A statement and pre-recorded evidence, videos of which were played to the jury. That suggests that the advantage enjoyed by the jury over this Court was relatively limited. Nevertheless, I am not persuaded that it is appropriate for this Court to apply the proviso.

[35] The issue of whether a complainant should be believed beyond reasonable doubt is quintessentially a jury question. The view has been expressed that such a question should not be determined by an appellate court "even in circumstances where all the relevant evidence is available on video-tape and the accused did not testify".[18] I understand this statement as intending to convey that such a determination will normally be inappropriate rather than legally impermissible.

[36] In this case, it would be inappropriate for the proviso to be applied. If the complainant's mother's evidence is accepted, the subject incident could only have occurred on the night on which she lay in the bath in a drunken stupor until ambulance officers arrived. That was because, according to the mother, the appellant had not slept over on any other occasion. This evidence was not contradicted by the evidence of any other witness, including that of the complainant's siblings. The complainant's account was that the incident happened late at night after the appellant came to the house. When it happened, she was in her mother's bed and her mother was in the shower. After the incident, she went to her own room and was followed by the appellant who left the room when her mother came out of the shower.

[37] The complainant's account does not sit well with the evidence that the mother was extremely inebriated and unable to leave the bath until assisted by ambulance officers. Perhaps more concerning is the fact that the complainant does not recall an occasion on which the ambulance was called to the house on account of her mother's inebriation and she and her siblings were taken to a police station in the early hours of the morning and then placed in the care of relatives for an unspecified time. It is not appropriate that this Court attempt to resolve such evidentiary difficulties.

[38] It is also a relevant consideration that the appellant has not had a trial in which the rules prescribed by the legislature for ensuring procedural fairness where the pre-recorded evidence of a child is admitted into evidence were followed.

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15 [2008] QCA 33.

16 *R v Michael* [2008] QCA 33 at [37].

17 *R v Michael* [2008] QCA 33 at [37].

18 *R v Hellwig* [2007] 1 Qd R 17 at 24 [38]; see also *R v Michael* [2008] QCA 33 at [40].

Conclusion

[39] In view of my conclusion in respect of ground 1, it is unnecessary to consider ground 2.

[40] For the above reasons, I would order that the appeal be allowed, the appellant's conviction be set aside and that he be retried on count 1 on the indictment.

[41] **ATKINSON J:** The circumstances of this case and the submissions of the parties have been fully set out by Muir JA so there is no need for me to repeat them.

[42] If this appeal were not governed by the authorities referred to by McMurdo P and Muir JA, I would be of the opinion that the direction given by the trial judge at the commencement of the trial, which is set out in the judgment of Muir JA, satisfied the requirements of s 21AW of the *Evidence Act* and that the presence of a support person would be taken by the jury to be part of the "measure which is a routine practice of the court." However I am obliged by authority to hold to the contrary. Were it not for that legal error there would in my view be no grounds to allow the appeal. As Muir JA correctly observes, the issue of whether a complainant should be believed beyond reasonable doubt is "quintessentially a jury question."

[43] In these circumstances, I agree with the orders proposed by Muir JA.