SUPREME COURT OF QUEENSLAND

CITATION:	*R v Little* [2013] QCA 223
PARTIES:	**R** **v** **LITTLE, Russell Selwyn** (appellant)
FILE NO/S:	CA No 164 of 2012 DC No 196 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore 16 July 2013 Reasons delivered 16 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 16 July 2013:** **1. The appeal is allowed.** **2. The convictions are quashed.** **3. A re-trial is ordered.** **4. The Court will publish its reasons later.**
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 two counts of attempted carnal knowledge of an intellectually impaired person and two counts of indecent dealing with an intellectually impaired person – where the complainant was declared a special witness and gave pre-recorded evidence in the presence of a support person pursuant to s 21A *Evidence Act* 1977 (Qld) – where the trial judge failed to give the mandatory warning about the presence of a support person required by s 21A(8) *Evidence Act* – whether miscarriage of justice occurred *Criminal Code* 1899 (Qld), s 216(4)(b), s 668E(1A) *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 5(1)(f)

Evidence Act 1977 (Qld), s 21A(1), s 21A(2), s 21A(8), s 93A

R v BCL [2013] QCA 108, cited
R v Libke [2006] QCA 242, cited
R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: The appellant appeared on his own behalf
T A Fuller QC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was charged with two counts of rape (counts 1 and 4), alternatively carnal knowledge of an intellectually impaired person (counts 2 and 5); and two counts of indecent dealing with an intellectually impaired person (counts 3 and 6). The judge left for the jury's consideration the further uncharged alternative counts to counts 2 and 5 of attempted carnal knowledge of an intellectually impaired person. All alleged offences were charged as occurring in December 2006. On 7 June 2012 after a four day trial, the jury found him not guilty on the counts of rape and carnal knowledge of an intellectually impaired person, but guilty of the uncharged alternatives to counts 2 and 5, attempted carnal knowledge of an intellectually impaired person, and the counts of indecent dealing. On 20 June 2012, he was sentenced to three years and seven months concurrent imprisonment for each count of attempted carnal knowledge and 12 months concurrent imprisonment for each count of indecent dealing, with parole eligibility set after serving 20 months imprisonment. He has applied for leave to appeal against his sentence on the ground that it is manifestly excessive and has also appealed against his convictions.

[2] At the hearing of this appeal on 16 July 2013 this Court allowed the appeal, quashed the convictions and ordered a re-trial, noting that it would publish its reasons later. These are my reasons for joining in those orders.

[3] The appellant was self-represented in this appeal. His notice of appeal did not contain any grounds but he raised a number of unpromising complaints in his handwritten outlines of argument and in his oral submissions. In the true spirit of an officer of the court, counsel for the respondent, Mr Fuller QC, raised the question whether the primary judge erred in not giving the jury a mandatory direction in terms of s 21A(8) *Evidence Act* 1977 (Qld). With the encouragement of the Court at the appeal hearing, the appellant adopted that as a ground of appeal. Before discussing that ground, I will set out the relevant evidence and events prior to and at the trial.

The relevant evidence and events prior to and at the trial

[4] On 2 March 2012, his Honour Judge Reid, after considering the report of a psychologist, made orders including the following. The complainant was declared a special witness under s 21A *Evidence Act*. A video-taped recording was to be made of her evidence and viewed and heard in the appellant's trial instead of her

direct testimony. During the recording of her evidence she was to be in a room other than in which the court is sitting and (of special relevance to this appeal) from which all persons are excluded, other than a support person nominated and approved by the presiding judge.[1] These orders are recorded in both the transcript and on the indictment.

[5] Her evidence was pre-recorded before his Honour Judge Jones on 3 May 2012. In light of Judge Reid's orders it is not clear why the prosecutor asked Judge Jones to make an order under s 5(1)(f) *Criminal Law (Sexual Offences) Act* 1978 (Qld) for a support person to be present whilst the complainant gave evidence. Although the indictment records that application was granted, the transcript does not record that the judge made that order.[2] There is no doubt that a support person was present throughout the pre-recording.

[6] The following evidence at trial was uncontroversial. At the time of the alleged offences in 2006, the complainant was 22 years old. A psychologist gave uncontested evidence that she had a full scale IQ of 64. This indicated that she had an intellectual disability amounting to an impairment of mind. She had, however, an adequate understanding of sexuality and the ability to consent to sexual intercourse.

[7] The appellant, who was 53 years old, was employed as a taxi driver and regularly drove disabled people to a workshop with facilities for people with disabilities. In the course of this employment, he came to know the complainant who was employed at the workshop but he was not engaged to drive her there. Sometimes when he had a spare seat in his taxi, he would pick her up from her bus stop and drive her to the workshop and they became friendly. Early on 11 December 2006, he drove her in his taxi to a public swimming pool car park not far from the workshop and he attempted to have sex with her. This incident relates to the conviction on the uncharged alternative to count 2, attempted carnal knowledge of an intellectually impaired person.

[8] The following day he drove her in his taxi to an area of grassland off a service road where he touched her vagina. This incident relates to the conviction on count 3, indecent dealing. He again attempted to have sex with her in the back of the taxi. This incident relates to the conviction for the uncharged alternative to count 5, attempted carnal knowledge of an intellectually impaired person.

[9] The next day the appellant drove her to a riverside street where he touched her on the vagina inside her clothing. He abandoned his sexual advances as he needed to go to the toilet. This incident relates to count 6, indecent dealing.

[10] On the first day of the jury trial before a third judge, the prosecutor tendered under s 93A *Evidence Act* two tapes and a DVD containing the original and an edited version of the interview between the complainant and police officers on 13 October 2006.[3] Before the edited version was played, the trial judge gave the following direction:

> "Now ladies and gentlemen, you're about to hear a tape recording of a conversation that took place between police officers and the

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1 AB 4; Transcript of pre-trial hearing (02.03.12) T1-18.18-35 (AB 28).

2 Transcript of pre-record (03.05.12) T1-8.48 to T1-9.3 (AB 67-68).

3 Together with the original taped interviews: Ex 1.

> complainant … . The law provides, in circumstances such as these, for the tape-recorded evidence as such to be placed before the jury. You've also heard, during the course of [the prosecutor's] opening address, that cross-examination of the complainant by [defence counsel] has also occurred at some time prior to today and has been video-recorded and the video recording of that cross-examination will be placed before you as well, so that you'll hear the evidence from this witness via the method of video-recording.
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> Now that measure is a routine practice of the Court and you should not draw any inference as to the [appellant's] guilt simply because this measure is being adopted. The probative value of the evidence of the complainant 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. When I say probative, when I speak of probative value, probative means affording proof or evidence, so to say that the probative value of evidence is not increased or decreased because it is pre-recorded and played to you means it's not better evidence or worse evidence than any other evidence given by a witness in the presence of a jury in the courtroom."[4]

[11] I note that there was no statutory provision mandating such a direction in respect of s 93A statements. His Honour ordered that during the complainant's evidence all persons other than those referred to in s 5(1) *Criminal Law (Sexual Offences) Act* be excluded from the court room.[5]

[12] On the second day of the trial, the DVD of the complainant's pre-recorded evidence was tendered for identification.[6] The judge gave this direction immediately prior to it being played to the jury:

> "Just remember ladies and gentlemen the caution I gave you yesterday about the pre recorded evidence not having greater or lesser weight simply because it's in that format. You recall what I said to you yesterday, there's not need for me to repeat it?"[7]

[13] The judge gave no further directions concerning the format of the pre-recorded evidence and neither counsel sought any redirections.

[14] I have watched the DVD of the pre-recorded evidence. The support person is clearly depicted throughout in an insert in the right hand corner of the picture. The complainant regularly turns her head as she gives her pre-recorded evidence in the direction of what could only have been the support person and has non-verbal interaction with the support person. It therefore seems likely that the support person would have been obvious to the jury when the complainant's pre-recorded evidence was played in court.

[15] In the pre-recorded cross-examination, the complainant, although plainly suffering from at least a mild intellectual disability, gave considered, responsive, discriminating answers. She agreed to the following matters in a way which was

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4 T1-11.33-57 (AB 101).
5 T1-12.22-25 (AB 102).
6 Marked for identification "C".
7 T2-4.17-21 (AB 118).

not gratuitous concurrence. She told an employee at the workshop that the appellant was her boyfriend. She held hands with him whilst she waited in his taxi. They had a friendship which developed into a romantic relationship. He was probably fond of her and sometimes told her that he loved her. By the time they went to the swimming pool car park, they were in "a real caring relationship", "an adult male/female relationship".[8] During this first episode of sexual contact (counts 1 and 4), she kissed him, he cuddled her and she probably cuddled him.

[16] Her cross-examination adjourned at 11.08 am when she became tearful. The cross-examination resumed at 11.23 am after Judge Jones was satisfied she was ready to proceed. She said that, during the second episode of sexual contact (counts 2 and 5) she and the appellant kissed. They may have kissed again when he later dropped her at the workshop.

[17] During the third episode of sexual contact (count 6), she willingly went with him for a drive along the river. When he stopped the taxi, he opened the passenger side door, kissed her and fondled her breasts. After initially denying it, she conceded that he probably did tell her he loved her on that occasion but then added that she did not know. She was unsure whether he suggested they should live together. She denied that he suggested they talk to her parents about their relationship. He never forced her to do anything she did not wish to do. She did not initiate any complaint to police; this was done by others.

[18] In re-examination she was asked what her understanding was of a romantic relationship. She explained: "Well, two people, like two people, like in love and all that." When asked whether that was what she was talking of when she referred to a romantic relationship with the appellant, she answered: "Probably."[9]

[19] An employee at the workshop gave evidence that on 13 December 2006 the complainant told her that she had a boyfriend but that she was not allowed to tell her mum and dad. The witness agreed in cross-examination to the following. The complainant was excited when she spoke about her boyfriend. She told the complainant that her conduct with the appellant was wrong. Another worker at the workshop took advice and referred the matter to police.

[20] The appellant was first informed of the complaint four and a half years after the alleged offences when interviewed by police in April 2011. He admitted the three episodes of sexual contact in that interview and also in his evidence at trial. At trial, but not in his police interview, he said that he was keen to have a loving relationship with her with a view to moving in together.

Did the judge's directions comply with s 21A(8) *Evidence Act*?

[21] It is uncontentious that the complainant was a special witness as defined in s 21A(1)(b)(i) *Evidence Act* as she clearly had an intellectual impairment. Under s 21A(2) a court may make orders or directions where a special witness is giving evidence, relevantly including:

> "(b) that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;

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8 Transcript of pre-record (03.05.12) T1-16.13-19 (AB 75).

9 Transcript of pre-record (03.05.12) T1-28.48-52 (AB 87).

> …
> (d) that a person approved by the court be present while the special witness is giving evidence … in order to provide emotional support to the special witness;
> (e) that a video-taped recording of the evidence of the special witness or any portion of it made under such conditions as are specified in the order and that the video-taped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;
> … ."

[22] Section 21A(8) requires that the trial judge:

> "must instruct the jury that–
> (a) they should not draw any inference as to the defendant's guilt from the order or direction [given under s 21A(2)(a)-(e)]; and
> (b) the probative value of the evidence is not increased or decreased because of the order or direction; and
> (c) the evidence is not to be given any greater or lesser weight because of the order or direction."

[23] Judge Reid's orders under s 21A(2) are summarised in [4] of these reasons. In accordance with them, the complainant's evidence was pre-recorded in the presence of a support person. As this Court made clear in *R v Michael*,[10] the fact that Judge Jones may also have made an order under s 5(1)(f) *Criminal Law (Sexual Offences) Act* does not mean the mandatory requirements of s 21A(8) do not apply.

[24] The trial judge gave the directions to the jury set out in [10] and [12] of these reasons. Those directions were sufficient to comply with s 21A(8) in respect of Judge Reid's order made under s 21A(2)(e). But the trial judge gave no such direction in respect of Judge Reid's order as to the presence of a support person whilst the evidence was pre-recorded under s 21A(2)(d). The trial judge did not comply with the unequivocal mandatory requirements of s 21A(8) making the trial irregular. This Court in *Michael*[11] in 2008 and more recently in *R v BCL*[12] has made clear that it can uphold the resulting convictions only if convinced, notwithstanding the non-compliance and after reviewing the whole of the record, that there has been no substantial miscarriage of justice in terms of s 668E(1A) *Criminal Code* 1899 (Qld). This Court must enquire whether, upon its review the whole of the record, there has been a miscarriage of justice: *Weiss v The Queen*.[13]

[25] In light of the jury verdicts of acquittal, the sole issue at trial relevant to this appeal against conviction is whether the appellant established, on the balance of probabilities, that in terms of s 216(4)(b) *Code* he did the charged acts in circumstances not constituting sexual exploitation of the complainant.

[26] The term "sexual exploitation" is not defined in the *Code* and therefore takes its ordinary meaning. The relevant Macquarie Dictionary definition of "exploitation"

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10 [2008] QCA 33, [29]-[34].
11 [2008] QCA 33, [38].
12 [2013] QCA 108, [8].
13 (2005) 224 CLR 300, 317 [41], [44].

is "selfish utilisation". Rightly, no complaint has been made about the judge's direction to the jury that sexual exploitation means taking advantage of the complainant in a sexual way. That involves an assessment of the nature of the relationship between the complainant and the appellant; the appellant's understanding, appreciation and knowledge of that relationship; and whether he abused that relationship for his own sexual gratification.[14] This direction was consistent with this Court's observations in *R v Libke*.[15]

[27] The respondent contends that, as there was little conflict between the appellant's evidence and that of the complainant, the present case can be distinguished from *BCL* and *Michael*: here, the Court is not required to make a determination between the credibility of the complainant and the appellant to resolve factual conflicts. For these reasons, the respondent contends, the Court can be satisfied beyond reasonable doubt of the appellant's guilt so that there has been no miscarriage of justice.

[28] The distinctions between the present case and *BCL* and *Michael* emphasised by the respondent are fairly made. But the unusual circumstances here raise a fresh set of difficulties. As I have explained, the issue for the jury's determination in this case was whether the appellant established, on the balance of probabilities, that he believed on reasonable grounds that his sexual conduct with the complainant did not amount to sexual exploitation (s 216(4)(b)). The resolution of that issue on the evidence, quintessentially a jury matter, was reasonably finely balanced. Properly instructed juries could reasonably have reached different conclusions resulting in either acquittal or conviction. The jury was required to assess the evidence both of the complainant and the appellant. This required the making of value judgments about the notoriously difficult matter of the nature of other people's intimate relationships. Cases like this involving the alleged sexual exploitation of intellectually impaired young women can be expected to arouse strong emotions. On the one hand, intellectually impaired people like the complainant are vulnerable to sexual predators. But on the other hand, the complainant, a young woman with a pleasant personality and disposition, was able to give informed consent to sex and had an adequate understanding of sexuality and relationships; she was entitled to make her own decisions about forming intimate relationships. There was no evidence the appellant was cruel or unkind to the complainant.

[29] In such a case, it was critical that the trial judge do everything possible to ensure the appellant received a fair trial according to law. The mandatory warnings contained in s 21A(8) were clearly intended by the legislature to ensure just that, whilst also giving the intellectually impaired complainant the best opportunity to present her evidence to the jury, including by having a court approved person to provide emotional support. The pre-recorded evidence shows the complainant turning towards the support person for reassurance on a number of occasions. The judge's omission to comply with the mandatory warnings in s 21A(8) in respect of the presence of the support person has resulted in the appellant being denied the procedural fairness intended by the legislature.

[30] This Court has had the opportunity to view the complainant give her recorded evidence,[16] but it has not had the opportunity to see the appellant give his evidence

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14 T3-30.43-55 (AB 216).

15 [2006] QCA 242, [100].

16 Ex 1.

at trial during which he asserted they had a caring and not an exploitive relationship. In all the circumstances of this unusual case, I am unpersuaded that it is appropriate for this Court to resolve the difficult, nuanced, quintessential jury question as to whether the appellant established that his sexual conduct with the intellectually impaired complainant was a caring and consensual sexual relationship rather than sexual exploitation. It follows that I am unpersuaded that no miscarriage of justice has arisen from the denial of procedural fairness arising from the non-compliance with s 21A(8).[17]

The appellant's other contentions

[31] The appellant in his filed handwritten submissions and in his oral submissions at the appeal hearing raised a number of other complaints about the correctness of his convictions. Even if established, they could not have resulted in this Court directing verdicts of acquittal. In light of my conclusion as to the effect of the trial judge's omission to comply with s 21A(8), it is unnecessary to deal with them or with his application for leave to appeal against sentence.

Summary

[32] For the reasons I have given as to the effect of the trial judge's omission to comply with s 21A(8) *Evidence Act*, I joined in this Court's orders made on 16 July 2013 allowing the appeal, quashing the convictions and ordering a re-trial. The appellant has now spent about 18 months in custody. It will be a matter for the prosecution, no doubt in consultation with the complainant and her family, as to whether to proceed with the re-trial.

[33] **FRASER JA:** I agree with the reasons for judgment of the President.

[34] **DOUGLAS J:** I agree.

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17 See *Weiss* (2005) 224 CLR 300, 317 [45].