SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAT* [2013] QCA 251
PARTIES:	**R** **v** **WAT** (appellant)
FILE NO/S:	CA No 33 of 2013 DC No 340 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	6 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2013
JUDGES:	Holmes and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The appellant's conviction is set aside and a re-trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – where the appellant was convicted of three counts of indecent treatment of a child under the age of 12 who was under his care – where the appellant argued that the complainant's evidence should not have been accepted because she failed to recall one aspect of the relevant event and failed to make an earlier complaint, because there was a minor discrepancy between her statement and evidence and because there was a motive for the complaint – where the jury was made aware of a possible motive for complaint – where the complainant said that the appellant had warned her not to tell anyone what had happened – whether the matters identified raised significant questions about the complainant's credibility or reliability – whether on the whole of the evidence, the jury was entitled to accept the complainant's evidence and be satisfied beyond reasonable doubt of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR

CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where at trial, the appellant's counsel objected to evidence that there was a suspicion another person had dealt with the complainant in some indecent way – where the trial judge agreed to direct the jury that they should have no regard to evidence about another person – where in the end, such direction was not given and no re-direction was sought – whether any miscarriage of justice resulted

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the complainant child gave evidence at a pre-recorded hearing with the presence of a support person, pursuant to s 21AV of the *Evidence Act* – where the trial judge gave the jury directions concerning the recording of the complainant's evidence and its playing before them in accordance with s 21AW(2) of the *Evidence Act* – where the trial judge did not refer to the additional measure of having a support person – where counsel for the respondent Crown accepted that the omission amounted to an error of law, but submitted that no substantial miscarriage of justice had occurred – where the complainant's evidence was available for the Court's consideration in recorded form and the evidence of other witnesses was not challenged – where the Crown case depended entirely on the uncorroborated evidence of the complainant who was a small child when the events took place, and gave no account of them for four years – where there were some unusual aspects to the complainant's evidence – whether the Court could be satisfied that no substantial miscarriage of justice resulted from the failure to give the mandatory warning

Evidence Act 1977 (Qld), s 21A(2), s 21AV, s 21AW

R v BCL [2013] QCA 108, cited
R v Bisht [2013] QCA 238, cited
R v Drake [2013] QCA 222, cited
R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179, considered
R v Little [2013] QCA 223, cited
R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, considered

COUNSEL: The appellant appeared on his own behalf
P J McCarthy for the respondent

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

[1] **HOLMES JA**: The appellant was convicted by a jury of three counts of indecent treatment of a child, with the further aggravating circumstances that she was under 12 and was under his care at the relevant times. He appealed those convictions on the grounds that they are unreasonable and that the trial judge wrongly failed to direct the jury to disregard certain evidence. In addition, Mr McCarthy for the respondent Crown very fairly identified an error on the part of the trial judge, in that no warning was given pursuant to s 21AW(2) of the *Evidence Act* 1977 in respect of the presence of a support person while the complainant was giving evidence. The appellant was given leave to add a ground in respect of that error.

The evidence

[2] The offences were alleged to have occurred between 30 April 2008 and 12 June 2008. The appellant at that time was 22 years old and the complainant, M, his sister, was eight years old. In 2008, he was living with her and was her guardian because their mother had died. They had a half-sister, D. In early 2012, however, M (now twelve years old) was living with a friend of her mother's, Ms W. Ms W and M's older sister, D, quizzed M about whether she had been "touched", as they put it. M said that once when she was living with her brother at a house in Ipswich, at a time when she had a broken leg, she had been made to watch seven hours of pornography. According to Ms W, M said neither she nor her brother had clothes on at the time, but she had not been "touched down there inside" on that occasion. D, on the other hand did not recall any mention of clothing or the lack of it, and said that M disclosed that the appellant had "touched" her. M told the two women of an incident in which the appellant was tickling her and told her that if she kept moving "it would go in"; Ms W said that that information emerged a week or so later, while D seemed to place it on the same day as the other revelations.

[3] Ms W's 12 year old daughter, J, said that she was also present with D and Ms W when M said that she was molested by her brother when they were living alone together. They were sitting in the living room when this occurred; the girls had been getting ready for school. According to J, it "came out" that the appellant was "touching" M, at a time when she had a broken leg, while they were watching a "seven hour porno". Ms W and D then had a further conversation with M, but J went into the kitchen and did not hear the details.

[4] As a result of those revelations, M and J were interviewed by police on the same day. M said that she and the appellant had been living in a house at Ipswich. He was married, but he and his wife had argued and his wife had returned to live with her parents. M had a broken leg which was in a cast from her foot to above her knee. (The appellant formally admitted at trial that the child's leg was in plaster between 30 April 2008 and 12 June 2008.) She was in her brother's room and they were watching what she called "porno movies" on DVD. She described seeing couples having intercourse and masturbating in the films. (That event gave rise to the first of the counts of which the appellant was convicted, of wilfully exposing M to an indecent film). M said that her brother kept a number of pornographic DVDs in a silver briefcase.

[5] According to M, she and the appellant were both on his bed watching the movies; she was intermittently falling asleep and waking. She said she recalled both of them being naked. She was lying on her belly and her brother tried to have sex with her from behind (the subject of one of the indecent dealing counts). His hands were cold and were tickling her, making her wriggle. He cautioned, "stop moving or else

it'll go in". He moved his penis up and down against her vulva for what she said she thought was "about an hour".

[6] M said that the appellant suspended the activity to allow her to go to the toilet. On her return she got back on the bed. The appellant pushed her down and resumed his position. He recommenced rubbing his penis up and down against her genitals (the remaining count of indecent dealing). She said this lasted "about an hour or two". When he stopped she could feel something wet between her legs. The appellant gave her a towel to wipe away what he told her was ejaculate. The following morning he told her never to tell anyone what had happened.

[7] M was cross-examined at a recorded hearing prior to trial. She said that her brother had taken the silver briefcase containing the pornographic DVDs from a wardrobe. At that point, she and he were still fully clothed. The first disc played was supposed to last for seven hours, but the appellant skipped some parts to bring it down to three hours. She had been wearing a shirt and shorts with underwear. To remove the shorts and underpants with her leg in plaster would have required some assistance, but she could not recall how they came to be taken off.

[8] M agreed that at about the time of the events she had gone to stay with a family friend for a few days and, although she had had a "heart to heart chat" with her about problems and things happening in her life, she had not mentioned this event. She conceded that she had for some time wanted to live with Ms W rather than her brother because the former was easier to get along with; she did not like him assuming the role of her father. She also preferred to live with Ms W because she could be in the company of children her own age.

[9] J also gave evidence at the pre-recorded hearing. Cross-examined, she could not recall how the topic of the appellant's dealings with M arose. M had mentioned a seven hour pornographic video and had not qualified that reference by saying that only three hours was watched.

[10] The appellant did not give evidence. Counsel's addresses were not in the record but the points made on his behalf can be gleaned from the trial judge's summing-up. They were, that M's original account of watching a seven hour pornographic movie was not credible and had been subsequently altered by her; that her description of the appellant's actions lasting for an hour or so in each instance was extraordinary; that she had not identified the child J as being present when she made her disclosure about the appellant's conduct; that descriptions she had given of an adventure with her boyfriend and of her academic prowess to the police during her interview were improbable; that there were inconsistencies in her evidence about whether she had nieces or nephews at the time of the incidents; and most importantly, that there was a significant delay between the alleged events and their disclosure.

The unreasonableness ground

[11] The appellant's written argument consists of nine references to M's evidence. In four instances he gives a response which he might have made had he chosen to give evidence at the trial. Those assertions, unsupported as they are by the evidence which was in fact before the jury, cannot now be considered. The contention arising from two other references seemed to be that M's evidence should not have been accepted because of its improbability. Those concerned her claim not to be able to remember how she had removed her shorts and her evidence that she had had

a "heart to heart" with a family friend in which she did not mention the incidents in question. Next, the appellant raised a relatively insignificant discrepancy between M's saying to the police she could not remember if the incidents occurred on a school day whereas her recollection at the pre-recorded hearing was that she had gone to school that day.

[12] A further point in the appellant's submissions was that M's evidence showed that she had wanted to live with Ms W, and not the appellant, the argument being, presumably, that the complaint was invented to ensure that occurred. The remaining point made by the appellant was that there had been a redaction of M's police interview in which she said that her sister, D, had told her where the silver coloured briefcase was kept. In contrast, in her pre-recorded hearing she denied the proposition put to her that she only knew that the DVDs were kept in the silver briefcase because D had told her so. But that redaction presumably was made with the consent of defence counsel.

[13] None of the matters the appellant identified, alone or together, raised such significant questions about M's credibility or reliability that they must have led to an acquittal. The jury was aware of a possible motive for the complaint in M's desire to live with Ms W. In so far as there was a weakness in her evidence because she could not recall the removal of her shorts, it was apparent to the jury, and it was not of such proportions as to mean that because of it a properly instructed jury could not have convicted. M's failure, as an eight year old child, to make an earlier disclosure of what had happened was consistent with the warning she said she had been given not to tell anyone what had happened. For completeness, I should say that I have watched the video recordings of M's interview and her evidence at the pre-recorded hearing. Nothing in her demeanour would raise a concern about her truthfulness.

[14] On the whole of the evidence, the jury was entitled to accept M's account of the commission of the offences and to be satisfied beyond reasonable doubt of the appellant's guilt of them. The contention that the verdicts were unreasonable must be rejected.

Failure to direct the jury to disregard evidence

[15] In the course of her evidence, Ms W said that there had been a suspicion M's step-father (who had left the family after her mother's death) had touched M in some indecent way. The appellant's counsel objected to the evidence, saying that it had been agreed it would not be led. The trial judge expressed some puzzlement as to how it could harm the appellant's case to have a suggestion that some other person had molested M, but said that she would direct the jury that they should have no regard to evidence about any other person. In the event, she omitted to do so, and no re-direction was sought.

[16] The appellant raised this failure on the appeal. It does seem to have been oversight, but the evidence could have caused his defence no conceivable harm. Presumably, it was of little moment in his counsel's perception because it had either passed from his mind as worth raising or, if he had reflected on it, he had decided that it was better left unmentioned. Whatever the cause of the failure to remind the judge about the matter, by no stretch of the imagination could the omission to give a direction on the topic have caused any miscarriage of justice.

Failure to direct in accordance with s 21AW(2)

[17] Section 21AW of the *Evidence Act* 1977 provides as follows:

> "(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;
> (b) a person is excluded under section 21AU while an affected child gives evidence;
> (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
> (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."

[18] M's evidence at the pre-recorded hearing was given in the presence of a support person, pursuant to s 21AV of the *Evidence Act*. (It is not clear from the transcript whether the support person was also present for J's evidence, although it seems likely.) At the commencement of the trial before the jury, and prior to the playing of the children's video taped evidence, the trial judge, in accordance with s 21AW(2), gave the jury directions that the recording of the children's evidence, and its playing before them, was a routine practice; that they should not draw any inferences to the appellant's guilt from it; and that the probative value of the evidence was not increased or decreased, and it was not to be given any greater or lesser weight because that measure had been taken. She did not refer to the additional measure of having a support person under s 21AV.

[19] The significance of compliance with s 21AW(2) was discussed at length in *R v Hellwig*.[1] In that case, the instruction given under s 21AW(2) in relation to the pre-recording of the complainant's evidence was inadequate; it did not address all the elements of the sub-section. Having analysed the relevant legislative provisions, the court made these observations:

> "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

[1] [2007] 1 Qd R 17.

> 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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> 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."[2]

[20] In *Hellwig*, all the relevant evidence, consisting of the complainant's account and evidence of preliminary complaint, was available on video-tape and the accused did not testify. The only issue was as to the credibility of the complainant, who had made statements contradicting her own account of being molested. The court concluded the case was not one for the application of the proviso. Whether the complainant's evidence should be accepted so as to lead to a conclusion of guilty beyond reasonable doubt was quintessentially a jury question which an appellate court should not determine.

[21] In *R v Michael*,[3] a special witness was provided with a support person under s 21A(2) of the *Evidence Act*. The court articulated the consequence of a failure to give the relevant direction:

> "The failure to comply with a mandatory requirement for the giving of the directions contemplated by s 21A(8) means that this Court can uphold the conviction only if it is convinced, upon its own review of the whole of the record, that there has been no substantial miscarriage of justice in terms of s 668E(1A) of the *Criminal Code* notwithstanding the non-compliance with the law."[4]

The proviso could not be applied in that case because the court was not in a position to reach any conclusion on the competing accounts of the complainant and another Crown witness who gave evidence before the jury. A series of recent cases has similarly addressed the consequences of failure to direct in accordance with s 21AW(2) (or in instances involving intellectually impaired complainants, s 21A(8)) in connection with a support person measure: *R v BCL*,[5] *R v Drake*,[6] *R v Little*[7] and *R v Bisht*.[8] In each of those cases the court was unable to conclude that no substantial miscarriage of justice had resulted.

[22] Mr McCarthy for the respondent accepted that the omission to direct the jury in terms of s 21AW(2) as to the presence of the support person was an error of law, but argued that the court would reach the view that there was no substantial miscarriage of justice. Unlike the situation in *R v Michael*, [9] the guilt of the appellant here did not turn upon the resolution of conflicting evidence. M's evidence was available in recorded form, while the evidence of other witnesses went to preliminary complaint and was not the subject of cross-examination.

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2 At [22] - [23].
3 [2008] QCA 33.
4 At [38].
5 [2013] QCA 108.
6 [2013] QCA 222.
7 [2013] QCA 223.
8 [2013] QCA 238.
9 [2008] QCA 33.

[23] It is true to say that the present case does not present any great difficulty in terms of assessment of witness credibility. The evidence of the complainant and J can be seen in the same form as it was viewed by the jury. As Mr McCarthy pointed out, the evidence of other witnesses was not challenged. Nonetheless, there are these features which militate against application of the proviso. The Crown case depended entirely on the complainant's evidence, which was not corroborated in any form. She was a small child when the events took place, and no account was given of them for another four years. There were some odd aspects to her description. While a jury could reasonably convict, the case is not such an overwhelming one that one could conclude no substantial miscarriage of justice resulted from the failure to give the mandatory warning.

[24] The appeal should be allowed, the appellant's conviction set aside and a re-trial ordered.

[25] **MUIR JA**: I agree with the Holmes JA's reasons and proposed orders.

[26] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.