SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAQ* [2014] QCA 261
PARTIES:	**R** **v** **RAQ** (appellant)
FILE NO/S:	CA No 148 of 2014 DC No 437 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	Orders delivered ex tempore 2 October 2014 Reasons delivered 17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2014
JUDGES:	Holmes and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 2 October 2014:** **1. Leave is granted to amend the Notice of Appeal.** **2. Appeal allowed.** **3. Conviction quashed.** **4. Re-trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant and the child complainant were swimming – where it was alleged that while playing a game the appellant digitally penetrated the complainant – where the appellant was convicted of rape and sentenced to three years imprisonment to be suspended after 18 months with an operational period of three years – where at trial the evidence of the complainant and other child witnesses were pre-recorded – where the learned trial judge did not give directions strictly in accordance with the requirements of s 21AW(2) *Evidence Act* 1997 (Qld) – whether a miscarriage of justice has occurred *Criminal Code* 1899 (Qld), s 668E(1A) *Evidence Act* 1977 (Qld), s 21AK, s 21AW(2), s 93A *R v AAR* [2014] QCA 20, cited *R v Doolan* [2014] QCA 246, cited *R v Horvath* [2013] QCA 196, cited

COUNSEL:	T A Ryan for the appellant T A Fuller QC for the respondent
SOLICITORS:	Howden Saggers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA.

[2] **GOTTERSON JA:** On 21 May 2014 and on the third day of his trial in the District Court at Southport, the appellant, RAQ, was convicted of an offence against s 349 of the *Criminal Code* 1899 (Qld) ("*Code*"). The count on which he was convicted alleged that between 1 December 2009 and 26 January 2010 he raped the complainant, his step-daughter, PD, by digitally penetrating her vagina.

[3] The appellant was sentenced that day to a term of imprisonment of three years to be suspended after serving 18 months with an operational period of three years.

[4] On 6 June 2014, the appellant filed a Form 26 notice of appeal against his conviction on the single ground that the verdict was unsafe, unsatisfactory and unreasonable on the evidence. At the hearing of the appeal on 2 October 2014, the appellant was granted leave to amend his Notice of Appeal by substituting two new grounds of appeal for the stated ground.

[5] At the conclusion of the hearing, the Court made orders allowing the appeal, quashing the conviction and ordering a re-trial. Delivery of reasons was reserved.

Circumstances of the offending and the conviction

[6] The appellant and the complainant's mother had begun cohabitating in 2002. At the time the complaint was four years old. In 2004, the appellant and the complainant's mother married and the family moved into a house in DK, Windaroo. The property had a pool. The offending which is detailed in the following paragraph occurred after they had been residing at that address for at least five years and during summer months.

[7] The complainant and her half-brother (the son of the appellant and the complainant's mother) were playing a game while swimming at night in the pool. The game involved the appellant picking up the complainant in a "cradling" position[1] and then throwing her into the water. As the appellant picked up the complainant with her back in his arms, he moved her bikini bottom aside and inserted two fingers into her vagina.[2] When the complainant resisted, the applicant launched her into the water. The complainant excused herself from the pool and went inside the house.

[8] The complainant did not report the incident to police until about 4 September 2012. An interview followed. The interview was recorded for the purposes of admissibility under s 93A of the *Evidence Act* 1977 (Qld) ("*Evidence Act*"). After testifying about the incident, the complainant noted that "nothing" had happened before the pool incident and that "nothing" had happened since.[3]

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1 AB213 L28.
2 AB214 LL20-50.
3 AB217 L58 – AB218 L8.

[9] An indictment was presented on 3 May 2013. It particularised the date of offending as a date unknown between 9 December 2010 and 24 January 2011. Pursuant to s 21AK *Evidence Act* the complainant's evidence for trial was pre-recorded: the first time on 21 June 2013 and the second time on 8 August 2013. During the second cross-examination of the complainant, it was established that the incident occurred during the summer holidays between 2009 and 2010, but before the complainant's birthday which coincided with Australia Day.[4] The indictment was subsequently amended to particularise the offending as having occurred "… on a date unknown between the first day of December, 2009 and the twenty-sixth day of January 2010."

[10] The appellant's first trial commenced on 10 December 2013, however, on the second day the jury was discharged because of that trial judge's concern about the admissibility of part of a police interview of another child witness which had been played to it. Following the first trial, the appellant engaged new legal representatives. A third and final s 21AK pre-recording of the complainant's evidence was conducted by the new counsel on 16 May 2014. The second trial began on 19 May 2014. It is convenient to refer to it in these reasons as "the trial".

The grounds of appeal

[11] The appellant relies on the following grounds of appeal:

1. Justice miscarried because the trial judge failed to direct the jury as required by section 21AW of the *Evidence Act* 1977; and
2. The admission into evidence of inadmissible material caused justice to miscarry.

Ground 1- s 21AW direction

[12] For the purposes of Division 4A (ss 21AA – 21AX) of the *Evidence Act*, the term "affected child" includes a child who is a witness in a criminal proceeding for an offence of a sexual nature, not being the defendant. Section 21AK *Evidence Act* is a provision in Subdivision 3 of Division 4A. It enacts the following measure: that the evidence (including examination-in-chief and cross-examination) of an affected child witness for a trial is to be taken and video-taped at a hearing prior to the trial and that the recording of it is to be presented at the trial.

[13] At the trial the jury were shown the complainant's video-taped evidence and the discs recording it were tendered.[5] They were also shown the video-taped evidence of another affected child witness to whom the complainant had allegedly made a preliminary complaint in late 2012. A disc recording that evidence was also tendered.[6]

[14] A section which demands attention presently is s 21AW *Evidence Act* in Subdivision 5 of Division 4A. It applies to a proceeding on indictment if, inter alia, an affected child's evidence is taken in a way provided for by s 21AK.[7] Section 21AW(2) provides as follows:-

> "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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4 AB21-25.
5 AB 117, 121, 124.
6 AB 139.
7 Section 21AW(2).

(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."

[15] In light of the presentation of the s 21AK evidence at the trial, an instruction in conformity with s 21AW was clearly required. The principal issue raised by this ground is whether such a direction was given by the learned trial judge.

[16] In the opening remarks, his Honour directed to the jury what evidence is. He said:

> "Evidence is what the witnesses say from the witness box and the exhibits, if any, admitted into evidence by me during the trial. In addition, because there are a number of child witnesses in this case, their evidence will be given by means of a CD. It's the usual way for children to give evidence in this state. Their evidence is pre-recorded at an earlier time, some time – on one occasion before me, but more often before another judge, and that recording is then played to you. That's, as I say, the usual way children give evidence. It doesn't attract any greater or lesser weight because of that, and I'll talk to you more at the time of the introduction of such evidence.
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> In addition, their evidence-in-chief is given by way of an interview between the child and a police officer. It's commonly referred to as a section 93 statement. And the other evidence, where it's pre-recorded in trial, is a section 21 recording. They're just sections of the Evidence Act that empower the court to take evidence in that way and the police to take evidence in that way in respect of child witnesses. As I say, it's to be considered alongside all other evidence, exactly the same as evidence given before you in the witness box."[8]

[17] Later that day after the complainant's s 21AK evidence had been shown to the jury, the learned trial judge again reminded them about "… what I said earlier about the routine nature of such evidence… and that you shouldn't give it any different weight, you assess it exactly the same way as you would if the evidence had been given directly in front of you."[9]

[18] No relevant instruction was given at the time when the s 21AK evidence of the other affected child witness was shown to the jury. No instruction in terms of s 21AW(2) was given or requested during the summing-up.

[19] The nub of the appellant's argument on the principal issue is that "… missing in the present case, 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" and that "(a)lso missing… was an instruction that the probative value of the evidence was not increased or decreased because of the measure."[10] Because of these deficiencies, the jury was not properly instructed in accordance with s 21AW(2).

[20] The appellant also identified particular features of the case which, it was submitted, called for careful adherence to s 21AW(2). One was that there had been three

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8 AB99 LL15-31.

9 AB124, LL 3-10.

10 Appellant's Outline at [51], [52].

s 21AK examinations of the complainant. Another was that the efficacy of the *Longman* direction that was given to the jury might have been impaired by the absence of a specific direction as to the weight to be given to the pre-recorded evidence. A third was the combination of the following: that the complainant's evidence was not corroborated; the lengthy delay before the complainant approached the police; that it was a single episode of offending; and that there was no medical evidence confirming the digital penetration.

[21] The respondent concedes that the trial judge did not specifically instruct the jury as to the drawing of inferences or the attribution of probative value in terms of s 21AW(2)(a) and (b).[11] The concession is appropriately made.

[22] In light of the concession, the respondent ventured to submit that the directions that were given when considered in combination sufficiently instructed the jury for the purposes of s 21AW(2). However, in developing the submissions, the respondent referred only to the statements by the learned trial judge that the pre-recorded evidence shown to them "does not attract any greater or lesser weight because of that" and that such evidence is to be considered "exactly the same as evidence given before you in the witness box."

[23] I do not accept the respondent's submission. The rather generalised references made by his Honour to weight of evidence did not capture, in word or spirit, the concerns addressed by s 21AW(2)(a) and (b) about drawing inferences as to guilt from implementation of the measure and about attributing probative value to evidence so given. It is impossible to treat the directions that were given as instructions to the jury which satisfied the requirement of the section.

[24] Recently, in *R v AAR*,[12] Fraser JA (with whom Daubney and Applegarth JJ agreed) summarised the nature of the s 21AW(2) requirement in the following way:-

> "The directions required by s 21AW(2) are mandatory. When a necessary direction under that provision is not given, the trial is irregular and the conviction can be upheld only if the court concludes for itself upon a review of the record that there has been no substantial miscarriage of justice."[13]

His Honour's reference to a review of the record alludes to the potential application of the proviso in s 668E(1A) of the Code.

[25] The circumstances of this case are similar to those considered by this Court in *R v Horvath*,[14] so far as non-compliance with s 21AW(2) and potential application of the proviso are concerned. There, the appeal against conviction arose from circumstances where "… the Judge has unfortunately simply missed out an integral part of the required [s 21AW] instructions."[15] In allowing the appeal, de Jersey CJ (with whom Holmes JA and I agreed) stated that:

> "(c)ompliance 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."[16]

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11 Respondent's Outline at [10].
12 [2014] QCA 20.
13 *Ibid* at [24]; citing, inter alia, *R v GAO* [2013] QCA 309.
14 [2013] QCA 196.
15 *Ibid* at [11].
16 *Ibid* at [12], citing *R v Hellwig* [2007] 1 Qd R 17 at [13] and *R v BCL* [2013] QCA 108.

[26] Like *Horvath*, the present case, too, is a "word against word" case without corroboration. That would in itself all but preclude an application of the proviso. However, other additional features of this case tell against its application. They include those collected as the third feature in paragraph 20 of these reasons as well as some inconsistencies in the complainant's testimony concerning the timing of a potential preliminary complaint made by her to a child safety officer.

[27] For these reasons, this ground of appeal must succeed.

Ground 2- Inadmissible material

[28] This second ground of appeal is focussed upon the reception into evidence of two pieces of evidence. One piece is that part of a s 93A police interview of a third child witness which suggested that the complainant had told her that the appellant had touched her (the complainant) in a similar manner on more than one occasion. The other piece is evidence adduced from the complainant in her first s 21AK cross-examination concerning a complaint made by her to a child safety officer. That evidence suggested that the conversation in which the complaint was made occurred before the alleged offending took place. The appellant submits that each piece of evidence was inadmissible and that a miscarriage of justice was caused by its reception into evidence.

[29] Both the appellant and the respondent recognise that it was a forensic decision of the appellant's trial counsel to not challenge the reception of this evidence. However, the appellant now submits that "… (trial) counsel's explanation inadequately defended her forensic decision to allow that material to remain (within disc and documentary evidence tendered in the prosecution case) and that there was no reasonable explanation for its retention."[17]

[30] Given that Ground 1 has succeeded, it is unnecessary to decide this ground of appeal in order to determine the fate of the appeal. Furthermore, a decision on it is unnecessary for guidance on the admissibility of evidence at any re-trial. In essence, the ground concerns the conduct of defence counsel in agreeing that the objectionable evidence remain in discs and transcripts of evidence which were shown to the jury. It is highly unlikely that that conduct would be repeated at any re-trial.

Disposition

[31] The success of Ground 1 has the consequence that the appeal must be allowed and the conviction quashed. The appellant rightly concedes that it would be appropriate to order a re-trial in that event.

[32] It need be said, that this is not the first time a conviction appeal based upon non-compliance with s 21AW(2) has been successful. There is now a clear line of authority from this Court emphasising the mandatory nature of the jury instructions required by s 21AW(2).[18] It is timely to apply to this provision, the observations of McMurdo P made with respect to a different required direction: "Counsel have a duty to listen carefully to the judge's directions to the jury and to try to ensure that all necessary directions are given".[19]

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17 Appellant's Outline at [65].

18 *R v AAR* [2014] QCA 20 at [24], citing *R v GAQ* [2013] QCA 309, *R v DM* [2006] QCA 79, *R v Michael* [2008] QCA 33 and *R v BCL* [2013] QCA 108.

19 *R v Doolan* [2014] QCA 246 at [34].

Orders

[33] These are the reasons for the following orders which were made at the conclusion of the hearing of the appeal on 2 October 2014:

1. Leave is granted to amend the Notice of Appeal.
2. Appeal allowed.
3. Conviction quashed.
4. Re-trial ordered.

[34] **MULLINS J:** I agree with Gotterson JA.