SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coss* [2015] QCA 33
PARTIES:	**R** **v** **COSS, Michael Joseph** (appellant)
FILE NO/S:	CA No 227 of 2014 CA No 307 of 2012 DC No 1505 of 2013 DC No 113 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 672A *Criminal Code*
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	13 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2015
JUDGES:	Holmes, Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The convictions on Counts 1 and 2 on Indictment No 113 of 2012 are quashed.** **3. The appellant be retried on Counts 1 and 2 on the said Indictment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where the appellant was convicted by a jury of two counts of rape – where the Crown case put to the jury at trial relied upon prerecorded evidence from affected child witnesses – where a previous appeal to this Court against conviction on other grounds was dismissed – where the trial judge failed to direct the jury in accordance with s 21AW(2) of the *Evidence Act* 1977 (Qld) – where the Attorney-General referred the appellant's petition to this Court in 2014 – whether the failure to direct in accordance with s 21AW(2) resulted in a miscarriage of justice within the meaning of s 668E(1) of the *Criminal Code* – whether the proviso in s 668E(2) can be invoked *Crimes Act* 1958 (Vic), s 568(1)

Criminal Code (Qld), s 668E(1), s 668E(2), s 672A(a)
Evidence Act 1977 (Qld), s 21AC, s 21AK(1), s 21AK(2)(b), s 21AV, s 21AV(2), s 21AW, s 21AW(1), s 21AW(1)(a), s 21AW(1)(c), s 21AW(2)

R v AAR [2014] QCA 20, distinguished
R v Carter [2014] QCA 120, distinguished
R v Coss [2013] QCA 156, considered
R v DM [2006] QCA 79, cited
R v Drake (2013) 233 A Crim R 588; [2013] QCA 222, considered
R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179; considered
R v Horvath [2013] QCA 196, cited
R v Michael (2008) 181 A Crim R 409; [2008] QCA 33, cited
R v RAQ [2014] QCA 261, considered
R v TN (2005) 153 A Crim R 129; [2005] QCA 160, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered

COUNSEL: M J Copley QC for the appellant
A W Moynihan QC for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **GOTTERSON JA:** On 1 November 2012, Michael Joseph Coss was convicted of two counts of rape. The convictions were entered at the conclusion of a trial in the District Court at Cairns. He was sentenced to imprisonment for seven years on each count, the sentences to be served concurrently. Mr Coss appealed the convictions on the sole ground that the verdicts were unreasonable and could not be supported by the evidence. That appeal was dismissed by this Court on 30 April 2013.[1]

[3] Later, on 17 December 2013, Mr Coss submitted a petition to the Governor of Queensland for the exercise of the pardoning power in his case.[2] Pursuant to s 672A(a) of the *Criminal Code* (Qld), the Attorney-General for the State of Queensland referred the whole of Mr Coss's case to this Court.[3] Accordingly, his case is to be heard and determined as for an appeal. It is convenient to refer to Mr Coss in these reasons as "the appellant".

The point raised in the petition

[4] The petition raises a point which, on the appellant's argument, would require this Court to allow the putative appeal conformably with s 668E(1) of the *Code*. It is distinctly different from the ground of appeal relied upon in the appeal that has been determined. The point arises in the following statutory and factual context.

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1 *R v Coss* [2013] QCA 156.
2 Record Book ("RB") 18-25.
3 RB26.

[5] The complainant was a child who was 11 or 12 years old at the time of the alleged offending. She was 13 years old in June 2012 when her evidence for the trial was prerecorded. At that time, the evidence of three other child witnesses was also prerecorded for the trial. One was a girl aged 13 years and the others were two boys aged 14 years. They were called in the prosecution case as preliminary complaint witnesses. It is common ground that the complainant and each of these complaint witnesses was then an affected child as that term is defined for the purposes of Division 4A (ss 21A-21AX inclusive) of the *Evidence Act* 1977 (Qld) ("the Act").[4]

[6] Subdivision 3 of Division 4A (ss 21AI-21AO inclusive) contains provisions for the video-taping of an affected child's evidence at a preliminary hearing presided over by a judicial officer prior to the trial.[5] The evidence must be presented at the trial.[6] Here, the indictment containing the two counts was presented in the District Court on 22 March 2012. The affected children's evidence was prerecorded on 21 June 2012 by use of an audio visual screen.

[7] Section 21AV in subdivision 5 of Division 4A of the Act relates to the presence of a support person when an affected child gives evidence in such circumstances. It provides (and then provided) as follows:

> "(1) An affected child, while he or she is giving evidence in a relevant proceeding, is entitled to have near to him or her a person who may provide the child with support (a ***support person***).
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> (2) A person may be the child's support person only if the person is approved by the court on application by the party proposing to call the child.
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> (3) The support person must be permitted to be in close proximity to the child, and within the child's sight, while the child is giving evidence.
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> (4) An affected child may, with the agreement of the court, waive the entitlement to a support person under subsection (1).
>
> (5) The court must not agree to the waiver if the court considers the waiver is not in the child's best interests."

[8] Approval was given pursuant to s 21AV(2) for a person to be a support person for each of the complainant and the three preliminary complaint witnesses. The prerecorded evidence was presented at trial. It was viewed by the jury.

[9] Leave to adduce evidence by way of an affidavit made by a legal officer of Legal Aid Queensland on 4 February 2015 was granted by this Court at the hearing of the referred petition. This evidence discloses that the deponent viewed the video recordings of the evidence of these witnesses in October 2013. The deponent observed that for one of the preliminary complaint witnesses, the support person was visible; that for another, the support person was not only visible but was also heard to remind the child witness to say, "So help me God" and later was heard to say, "Thank you, your Honour"; and that for the third preliminary complaint witness, the support

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4 See definition in s 21AC.

5 Section 21AK(1).

6 Section 21AK(2)(b).

person was visible. In the case of the complainant, the support person was visible and the complainant could be seen to smile at her.

[10] Section 21AW of the Act concerns instructions to be given to the jury when the evidence of an affected child is taken. It provides (and then provided) 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;
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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.
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> (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."

[11] At the appellant's trial, the learned trial judge referred on three occasions to the circumstances in which the prerecorded evidence was given. In the course of his opening address, his Honour said:

> " … The Prosecutor told you that three of the witnesses in this case were children. When we take evidence from children - and that invariably applies for anyone under the age of 16 or so for current purposes - the evidence is taken differently. Instead of the evidence-in-chief which is the evidence where the Prosecutor asks the questions you are played a video of the original interview between the police and the child in question. Instead of the cross-examination before you in Court you are played cross-examination which was done before a Judge at an earlier time. Now, that will be different to the adults as you will see. Now, this is the way we do things, and it's been the practice now in relation to children for over a decade. You should not - because we deal with children's evidence differently - draw any inference as to the accused's guilt. You can't say, "Oh, the children were dealt with this way. The children were dealt with differently to adults, therefore he's guilty." You can't conclude that. The probative value of the evidence is not increased or decreased because we do it that way. Probative value means its ability to prove things. The evidence is not to be given any greater or lesser weight because we do it that way. In short, that's just the way we do it. It's

> a different procedure for children, for whatever reason, and it means absolutely nothing in terms of the worth or otherwise of the evidence. It's just the way we do things."[7]

[12] The prerecorded evidence of the complainant[8] and of the preliminary complaint witnesses[9] were presented and played to the jury. The prosecutor then proceeded to call the first witness to give evidence before the jury. At that point, the learned trial judge said:

> "Just before you do; members of the jury, you're going to notice now a difference in how the evidence is given in the trial and I mentioned this to you yesterday. Up until now all the witnesses have been children and, as I told you yesterday, their evidence-in-chief has been given by way of interviews with police and the cross-examination is set out in the prerecorded hearing which, in this case, was held on the 21st of June this year.
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> As I explained to you yesterday, the mere fact that we do it that way with children does not mean that you can draw an inference of guilt. You can't assume that he's guilty just because the evidence was taken that way. The evidence doesn't have any greater probative value. In other words, its ability to prove things is not any greater or lesser because we do it that way, and it cannot attract any more weight or any lesser weight because we do it that way. It's just the way we do things. I just remind you of that. And you'll notice a distinct difference now in how things are done. …"[10]

[13] In the course of summing up, his Honour instructed the jury as follows:

> "I'll remind you of something that I've already touched on twice in the trial, but I'll mention it again, and that is the way the children have given evidence. You know what I'm talking about; how it's different, how it's prerecorded both in-chief and when questioned by the defence. I explain again that that's a routine practice of the Court and you should not draw any inference as to his guilt because we did it that way. In other words, you can't say, "Oh, these children have been treated differently, therefore he must be guilty." The probative value, the ability of that evidence to prove things, is not increased or decreased because we do it that way, and the evidence is not to be given any greater or lesser weight because we do it that way. As I've told you twice now, that's just the way we do it."[11]

[14] The appellant submits that the learned trial judge failed to comply with s 21AW(2) in that no instructions were given to the jury concerning the measure referred to in s 21AW(1)(c), namely, that the affected child witness had a support person while he or she gave their evidence. The submission is a valid one. The instructions that were given on the three occasions were given only in the context of the measure referred to in s 21AW(1)(a), namely, that their evidence was prerecorded. They

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7 RB49; Tr1-7 ll1-35.
8 Exhibit 4.
9 Exhibits 1, 2 and 3.
10 RB61; Tr2-4 l42 – RB62; Tr2-5 l4.
11 AB116; Tr3-10 ll11-37.

were not given, explicitly or implicitly, with respect to the presence of a support person, the measure referred to in s 21AW(1)(c).[12]

[15] Yet the clear words of s 21AW(2) require the instructions to be given with respect to each measure taken. If more than one of the measures listed in s 21AW(1) is taken, then, plainly, the instructions required by s 21AW(2) must be given in a way that is referrable to each of those measures.

[16] That did not occur in this case. There was an evident failure to comply with s 21AW(2). So much is conceded by the respondent by the acknowledgement that there was an error of law on this account.[13] This concession is consistent with many decisions of this Court.[14]

[17] As a consequence of this error, the jury were not given an instruction which the legislature has enacted be given. They were left to assess the evidence of the child witnesses without the benefit of instructions which the law prescribes as necessary for that exercise.[15] Such an error will ordinarily result in a miscarriage of justice within the meaning of s 668E(1) of the *Code*.[16] That provision will require the convictions to be set aside unless the proviso to it is invoked.

The proviso in s 668E(2)

[18] The substantive issue in dispute between the parties here is whether the proviso in s 668E(2) can be invoked. It would permit this Court to dismiss the appellant's appeal if it considers that, notwithstanding the error of law, no substantial miscarriage of justice has actually occurred. In *Weiss v The Queen*[17] the High Court made the following observations with respect to the similarly worded proviso in s 568(1) of the *Crimes Act* 1958 (Vic):

> "Next, the permissive language of the proviso ('the Court ... *may*, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal ...') is important. So, too, is the way in which the condition for the exercise of that power is expressed (if it considers that no *substantial* miscarriage of justice has *actually* occurred). No single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."[18]

[19] Those observations require the appellate court in this instance to review the evidence properly admitted at trial in order to determine for itself whether or not it

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12 As was also the case in *R v Drake* [2013] QCA 222 at [23], [24].

13 Respondent's Summary of Argument, paragraph 11.

14 *R v TN* [2005] QCA 160; (2005) 153 A Crim R 129 at [87]; *R v DM* [2006] QCA 79 at [1]-[3], [26]; *R v Hellwig* [2006] QCA 179; [2007] 1 Qd R 17 at [12]-[14], [22]-[24]; *R v Michael* [2008] QCA 33; (2008) 181 A Crim R 409 at [36], [37].

15 Per McMurdo J in *R v DM* at [70]; *R v BCL* [2013] QCA 108 at [10].

16 Per Williams JA in *R v DM* at [3].

17 [2005] HCA 81; (2005) 224 CLR 300.

18 At [44].

is persuaded that that evidence proved the appellant's guilt beyond reasonable doubt. This exercise differs in approach from that required to be undertaken in deciding the appeal that was dismissed. In that instance, determination of the sole ground of appeal involved an independent assessment by the appellate court in order to determine whether the properly admitted evidence was such that it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences of which he was charged.[19]

The appellant's submissions

[20] It was submitted for the appellant that a combination of circumstances preclude this Court, in undertaking the task required of it by *Weiss*, from being satisfied beyond reasonable doubt of his guilt. One circumstance is that the complainant's evidence is uncorroborated. Counsel for the appellant placed reliance upon a line of decisions of this Court which display a strong disinclination to invoke the proviso where the evidence of a child complainant is uncorroborated.

[21] In *R v Hellwig*[20], Chesterman and Mullins JJ (with whom McPherson JA agreed) observed:

> "The appellant's conviction must be quashed. There should be a re-trial. This is not an appropriate case for the application of the proviso. The one issue in the case, whether the complainant should be believed or whether a reasonable doubt attends her testimony should be determined by a jury properly instructed. It is quintessentially a jury question and 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."[21]

Other cases in this line of authority are *R v Horvath*[22] and *R v RAQ*.[23]

[22] Another circumstance is that there are significant discrepancies between the evidence of the complainant, on the one hand, and the evidence of two adult preliminary complaint witnesses as to what the complainant told them, on the other, concerning the alleged offending. The nature and extent of the discrepancies are set out by North J in his reasons for judgment in the appeal that was dismissed. The adult preliminary complaint witnesses to whom his Honour referred are the complainant's mother and an adult female, CP, to whom the complainant made complaints separately.

[23] His Honour said:

> "[14] ... I have referred to the evidence given by the complainant's mother. In her evidence she stated that the complainant told her that she was lying in her bed and saw the appellant standing beside it, that he told her to take her clothes off and that although she was apprehensive she did so. According to her mother, the complainant said that the appellant had said she was "pretty sexy" and that she should

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19 *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 at [21].
20 [2006] QCA 179; [2007] 1 Qd R 17.
21 At [38].
22 [2013] QCA 196 at [12].
23 [2014] QCA 261 at [25], [26].

> let him have sex with her, and that [the] appellant then got into bed beside her and rolled on top of her. Counsel for the appellant noted that no such detail was provided by the complainant to police or in her evidence in chief. When the complainant was cross examined the evidence given by her mother was put to her and the complainant stated she did not remember telling her mother that the appellant was naked or that he asked her to take her clothes off. The complainant did not remember whether she had to take her clothes off or not. Under cross examination the complainant agreed that the appellant never told her that he really liked her and that she should have sex with him. The complainant's mother said that the complainant told her that she and the appellant ended up on the floor beside the complainant's bed, but this detail was not provided by the complainant in her account given to the police or at trial. When questioned as to this under cross examination the complainant stated that she did not tell her mother that the appellant had scooped her off the bed and laid her on the floor and denied that the appellant did such a thing.
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> [15] Counsel submitted that there were important differences between the complainant's evidence and the terms of the complaint CP said was made to her. Counsel noted that while the complainant acknowledged she had a conversation with CP about the incident, the complainant stated that it took place at her father's house, not at the IGA store. Importantly, according to CP the complainant told her that the appellant had crept into her room, woken her up, fingered her in the vagina, started sucking on her nipples and "put his penis in there" (pointing to her vagina). According to CP the complainant told her that the appellant had asked her whether he could play with her and she said no. At trial the complainant denied telling CP that the appellant whispered "I love you. Can I play with you", and denied that she told CP that the appellant put his fingers down her pants and started to finger her or that he sucked on her nipples. ..." (Footnoted transcript references omitted.)

[24] The third circumstance to which reference was made was the delay on the part of the complainant in making a complaint to her mother about the alleged offending. A number of months elapsed between the date on which the complainant ceased to live with her father and returned to live with her mother and the date on which she made the complaint. This, it was submitted, would cast doubt upon the reliability of the complainant's version of events.

The respondent's submissions

[25] In oral submissions, counsel for the respondent contended that the error of law conceded had no significance in determining the verdict of the jury.[24] It was argued that, despite the failure to give the instructions required by s 21AW(2) with respect

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[24] Tr1-10 ll19-20.

to the support person measure, the object of the provision was achieved. That was so, it was submitted, because the jury would have understood from the terms in which the trial judge referred to the prerecording of evidence measure, as set out in paragraphs [11]-[13] of these reasons, that the instructions he was then giving were applicable not only to that measure, but also to any difference that the jury might observe between the ways in which child witnesses, on the one hand, and adult witnesses, on the other, gave evidence. That would include the presence of a support person.

[26] Reliance was also placed on two decisions of this Court, *R v AAR*[25] and *R v Carter*[26]. Their relevance, it was submitted is as instances where the proviso was invoked in child witness cases where the jury had not been directly instructed in terms of s 21AW(2) with respect to the support person measure.

Discussion

[27] I do not accept the respondent's contention that the error of law was of no significance. There is no good reason to think that the jury would have understood the s 21AW(2) instructions given to them as being applicable to any measure other than the one to which his Honour expressly referred on the three occasions, namely, the prerecording of evidence. In all likelihood, the members of the jury observed that a support person was present when each child's evidence was prerecorded. However, by no means can an assumption be made that they associated, or were likely to associate, the instructions given with the presence of that person.

[28] The circumstances of *AAR* and *Carter* are markedly different from those here such as to render those two decisions of little assistance. In the former case, the trial judge directed the jury about the presence of a support person. She was identified. The jury was told that the measure was standard procedure, an expression which sufficiently referenced it to instructions which the trial judge had given in conformity with s 21AW(2) in relation to "routine practice" where the evidence of children is given.[27] In the latter case, the female child's evidence tended to exculpate, rather than inculpate, the accused.[28]

[29] Counsel for the appellant did not venture to suggest that the line of cases commencing with *R v TN* to which I have referred, establish that, as a matter of legal principle, the proviso may never be invoked when the evidence of a child complainant is uncorroborated. It was appropriate not to have done so given that none of the cases propound such a principle or imply that there is a doctrinal basis for such a principle. I agree with the observations of Muir JA in *Drake*[29] that the statement in *Hellwig* quoted at paragraph [21] of these reasons is intended to convey that a determination by the appellate court of whether the complainant child should be believed beyond reasonable doubt will normally be inappropriate, rather than legally impermissible.

[30] Here, the appellate court would be able to view the prerecorded evidence of the child complainant and also that of the child preliminary complaint witnesses. As noted, the child complainant's evidence gave an account of the offending which

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25 [2014] QCA 20 at [31].
26 [2014] QCA 120 at [65]-[75].
27 [2014] QCA 20 at [25], [26], [31].
28 [2014] QCA 120 at [73].
29 At [36].

differed, in not insignificant respects, from the accounts she gave to the two adult preliminary complaint witnesses, according to their evidence. When cross-examined about a number of the differences, the complainant responded with answers or explanations which do not appear to reconcile them.

[31] There are evidentiary difficulties in this case which involve not only the reliability of the child complainant's evidence but also potentially extend to its credit. This Court is at the distinct disadvantage of not having observed the two adult preliminary complaint witnesses give evidence. There is no recording of their testimony for the Court to observe. In these circumstances, it would, in my view, be inappropriate for this Court to attempt to resolve those difficulties.

[32] For these reasons, it would therefore be inappropriate for the proviso to be applied here. A similar approach was taken in other cases where the evidence of the child complainant has not accorded with the accounts of adult preliminary complaint witnesses of what the complainant told them. Examples are *Drake*[30] and *RAQ*[31].

Disposition

[33] The point raised in the petition is a valid one. It gives rise to a valid ground of appeal against conviction. In accordance with s 668E(1) of the *Code*, the appeal must be allowed. An order for the appellant to be retried on both counts ought also be made.

Orders

[34] I would propose the following orders:

1. Appeal allowed.

2. The convictions on Counts 1 and 2 on Indictment No 113 of 2012 are quashed.

3. The appellant be retried on Counts 1 and 2 on the said Indictment.

[35] **PHILIPPIDES JA:** I agree with the reasons of Gotterson JA and with his proposed orders.

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30 At [36], [37].
31 At [24].