SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCJ; Ex parte Attorney-General (Qld)* [2015] QCA 123
PARTIES:	**R** **v** **SCJ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 7 of 2015 DC No 49 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	Childrens Court at Townsville – Unreported, 23 January 2015
DELIVERED ON:	Order delivered ex tempore on 16 June 2015 Reasons delivered 10 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Delivered ex tempore on 16 June 2015:** **The Court answers the points of law referred to it by the Attorney-General under s 668A *Criminal Code* 1899 (Qld):** **(a) Does a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of an earlier out of court statement by that child witness under section 93A of the *Evidence Act* 1977? – Yes.** **(b) Does a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of earlier out of court representations by that child witness under section 93B of the *Evidence Act* 1977? – No.**
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 respondent was charged with sexual offences committed

against three different complainants (RKM, BV and LN) – where the trial judge determined that RKM's statements to police, her mother and Dr Tilse, were made by a person who was not competent to give evidence in the proceedings and should not be admitted into evidence – where a party raises an issue about the competency of a person called as a witness, the *Evidence Act* Pt 2, Div 1A is applicable – where under s 9 *Evidence Act*, every person, including a child, subject to Pt 2, Div 1A, is presumed to be competent to give evidence in a proceeding and to give that evidence on oath – where s 93A facilitates the admission into evidence of an earlier out of court statement by either a child or a person with an impairment of the mind at the time of making the statement – where as long as the maker of the statement sought to be admitted under s 93A is found to be not competent under s 9A to give evidence in the proceeding, the maker of the statement is not available to give evidence in the proceeding (s 93A(1)(b)) so that the statement is not admissible under s 93A – where evidence is sought to be admitted under s 93B, the person whose evidence is sought to be admitted must be unavailable, either because the person is dead or because he or she is mentally or physically incapable of giving evidence (s 93B(1)(b)) – where a statement which is inadmissible under s 93A may be admissible under s 93B – where s 93A has a general application in any "proceeding", a term which is broadly defined as "any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is or may be given, and includes an arbitration" – where for evidence to be admitted under s 93B, the proceeding must be a "prescribed criminal proceeding" (s 93B(1)), that is, the trial must concern an offence in Ch 28 – Ch 32 *Criminal Code* (s 93B(5)) – where upon reference by the Attorney-General the question whether a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of an earlier out of court statement by that child witness under section 93A of the *Evidence Act* 1977 should be answered in the positive – where upon reference by the Attorney-General the question of does a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of earlier out of court representations by that child witness under section 93B of the *Evidence Act* 1977 be answered in the negative

Criminal Code (Qld), s 668A
Evidence Act 1977 (Qld), s 9A, s 93A, s 93B, s 98, s 130

R v Cowie; Ex parte Attorney-General [1994] 1 Qd R 326, cited
R v Lewis; Ex parte Attorney-General [1991] 2 Qd R 294, cited

COUNSEL: M R Byrne QC for the appellant
S M Geeves for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Malcomson Lawyers for the respondent

[1] **MARGARET McMURDO P:** The respondent is charged with attempted indecent treatment of a child under 12 (count 1); nine counts of indecent treatment of a child under 12 (counts 2 to 9 and 13); rape (count 10) and attempted rape (count 11) alternatively, indecent treatment of a child under 12 (count 12). The counts involve three different complainants, BV (counts 1, 2, 7, 8, 11 and 12), LN (counts 3 and 4) and RKM (counts 5, 6, 9, 10 and 13).

[2] Counts 1 to 6 were alleged to have occurred on the same unknown date between 30 April and 1 August 2012 at a community centre. Count 7 was alleged to have occurred on 29 September 2012. Counts 8 to 13 were alleged to have occurred on the night of 29 September 2012 in a tent in the yard at BV's home.

[3] The following day RKM spoke to her mother and later to Dr Tilse about some of the allegations. On 1 October 2012, she took part in a recorded conversation with police. It was intended that the evidence of those conversations be given at trial under s 93A *Evidence Act* 1977 (Qld).

[4] At a pre-trial hearing to pre-record RKM's cross-examination on 10 April 2014, two medical reports were tendered. In a report dated 3 December 2013, psychologist, Ms Carolyn Seri, stated she has treated RKM since 16 October 2012. She considered RKM probably suffers from general anxiety and may have selective mutism. She will be at a disadvantage if giving evidence in a high stress situation where speaking is her only means of communication. Ms Seri suggested that RKM be allowed to use pencil and paper to write her answers if she failed to provide a verbal response and that she have specified support people present if requested. The court support person should ask the questions of RKM, or RKM could respond to a tape recording device rather than to a person directly. She would need breaks to relax and regulate her emotions and should be given an extended amount of time to respond.[1]

[5] Paediatrician, Dr William Frischman, in a report dated 13 December 2013 noted that since the alleged sexual assault in September 2012, RKM had become much more anxious and her selective mutism more pervasive. It was unlikely that she would be able to give verbal evidence.[2]

[6] Despite the best efforts of the primary judge, the prosecutor and the support people, no evidence relevant to the case was able to be obtained from RKM on 10 April 2014. Defence counsel submitted that RKM was not "possessed of the competence to give an intelligible account and evidence." The prosecutor submitted that RKM had given a version of events to police and that she was capable of giving an intelligible account of events. His Honour considered that an issue had arisen about her competence and that there was presently no material from which he could conclude that she was able to give an intelligible account of events she had observed or experienced. The prosecutor asked for an adjournment to obtain a psychiatric report. The defence opposed the adjournment. The judge noted that RKM's evidence was not crucial to the prosecution case and granted an adjournment for about six weeks.

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1 MFI "A", AB 50.
2 MFI "B", AB 51.

[7] During the adjournment, the prosecution had psychiatrist, Dr David Hartman, examine RKM. He interviewed her mother and read various background material. He considered RKM did not meet the narrowly defined criteria for selective mutism. She had features of an autism spectrum disorder. She also had an anxiety disorder which was a common problem in children with autism spectrum disorders. She was unable to give evidence by video link on 10 April 2014. Despite a close and trusting therapeutic relationship with psychologist, Ms Seri, she was still unable to talk about the alleged offending in any detail with her. Nor had she been able to give an intelligible account to him, despite his best efforts to minimise her anxiety and to encourage participation. She clearly gave an intelligible account of events to the police in her interview on 1 October 2012 and has given intelligible accounts to her mother. Her fluctuating ability to speak of her experiences is a manifestation of her high level of social anxiety, compounded by her social awkwardness which is due to her mild autistic symptoms. Dr Hartman therefore considered she was not competent to give evidence in court due to her mental disorder.

[8] On 7 July 2014 the prosecution applied to the District Court for a ruling that RKM's recorded statement to police and the evidence of her mother and Dr Tilse as to RKM's account to them of the alleged offences, be admitted at trial pursuant to s 93B *Evidence Act*.

[9] The matter was re-listed before the primary judge on 11 July 2014. Although the argument centred on s 93A, the prosecutor's submissions effectively included that RKM's mental disorder meant that she was unable to give evidence so that evidence of the conversations was admissible under s 93B.[3] His Honour determined that RKM's statements to police, her mother and Dr Tilse, were made by a person who was not competent to give evidence in the proceedings and should not be admitted into evidence. His Honour stated that he would publish his reasons as soon as he could.[4] His Honour did not discuss s 93B.

[10] It is common ground that, after almost a year, the primary judge has not published his reasons.

The questions referred to this Court

[11] On 23 January 2015, the Attorney-General referred the following points of law to this Court for its consideration and opinion under s 668A *Criminal Code*:

> "(a) Does a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of an earlier out of court statement by that child witness under section 93A of the *Evidence Act 1977*?
>
> (b) Does a finding that a child witness is not competent to give evidence in a proceeding of itself preclude the admission of earlier out of court representations by that child witness under section 93B *Evidence Act 1977*?"

[12] At the hearing of the reference this Court answered question (a) – "Yes" and question (b) – "No". The Court stated it would give its reasons for answering the questions in this way later. What follows are my reasons for those answers.

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3 T1-7 – T1-8, AB 88 and 89.
4 T1-10, AB 91.

The relevant statutory provisions

[13] The critical provisions to the questions raised in this reference are s 93A and s 93B *Evidence Act* which relevantly provide:

> "**93A Statement made before proceeding by child or person with an impairment of the mind**
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> (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if–
>
> (a) the maker of the statement was a child or a person with an impairment of the mind at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
>
> (b) the maker of the statement is available to give evidence in the proceeding.
>
> …"
>
> **"93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable**
>
> (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact–
>
> (a) made a representation about the asserted fact; and
>
> (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
>
> (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was–
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> (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or
>
> (b) made in circumstances making it highly probable the representation is reliable; or
>
> (c) at the time it was made, against the interests of the person who made it.
>
> (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding–
>
> (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;

(b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.

(4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.

(5) In this section–

prescribed criminal proceeding means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.

representation includes–

(a) an express or implied representation, whether oral or written; and

(b) a representation to be inferred from conduct; and

(c) a representation not intended by the person making it to be communicated to or seen by another person; and

(d) a representation that for any reason is not communicated."

Conclusion

[14] The questions posed in the Attorney-General's reference, as both counsel conceded at the hearing, raised points of law concerning the construction of s 93A and s 93B *Evidence Act* which are matters of considerable general importance to the criminal justice system. It follows that this was an appropriate case in which to answer the questions posed by the Attorney-General in the reference: see *R v Lewis; Ex parte Attorney-General*.[5] Both counsel also agreed that question (a) should be answered "Yes" and question (b) should be answered "No". But that does not absolve this Court from independently answering the questions.

[15] If, as here, a party raises an issue about the competency of a person called as a witness, the *Evidence Act* Pt 2, Div 1A is applicable. Under s 9 *Evidence Act*, every person, including a child, subject to Pt 2, Div 1A, is presumed to be competent to give evidence in a proceeding and to give that evidence on oath. A person is competent to give evidence as a witness in a proceeding if, in the court's opinion, the person is able to give an intelligible account of events which he or she has observed or experienced: s 9A(1) and (2) *Evidence Act*.

[16] Section 93A facilitates the admission into evidence of an earlier out of court statement by either a child or a person with an impairment of the mind at the time of making the statement. But to come within s 93A, the maker of the statement must be available to give evidence in the proceeding (s 93A(1)(b)). The primary judge's finding of incompetency in respect of RKM on 11 July 2014 meant that an essential pre-condition to admissibility of RKM's out of court statements was not then met so that the evidence was inadmissible under s 93A. Unlike in *R v Cowie; Ex parte Attorney-General*[6] where the child was able to give evidence at trial even though she then had no memory

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5 [1991] 2 Qd R 294.

6 [1994] 1 Qd R 326.

of the alleged offences, RKM's statements to her mother, Dr Tilse and the police cannot be admitted under s 93A as long as RKM is not competent in the s 9A sense to give evidence in court. Stated more generally, as long as the maker of the statement sought to be admitted under s 93A is found to be not competent under s 9A to give evidence in the proceeding, the maker of the statement is not available to give evidence in the proceeding (s 93A(1)(b)) so that the statement is not admissible under s 93A.

[17] For these reasons, at the hearing of the reference I answered the Attorney-General's question (a) – "Yes".

[18] By distinct contrast with s 93A, where evidence is sought to be admitted under s 93B, the person whose evidence is sought to be admitted must be unavailable, either because the person is dead or because he or she is mentally or physically incapable of giving evidence (s 93B(1)(b)). A statement which is inadmissible under s 93A may be admissible under s 93B.

[19] There is another important difference between s 93A and s 93B. The former has a general application in any "proceeding", a term which is broadly defined as "any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is or may be given, and includes an arbitration".[7] But for evidence to be admitted under s 93B, the proceeding must be a "prescribed criminal proceeding" (s 93B(1)), that is, the trial must concern an offence in Ch 28 – Ch 32 *Criminal Code* (s 93B(5)). It follows that the prosecution can rely on s 93B in the present case only in relation to evidence concerning the charges of rape (count 10) and attempted rape (count 11) as the remaining counts concern offences in Ch 22 *Criminal Code*.

[20] RKM's statements to her mother, Dr Tilse and police, in so far as they relate to the offence of rape (count 10) and the offence of attempted rape (count 11), are representations about asserted facts (s 93B(1)(a)). The prosecution proposes to lead evidence under s 93B of RKM's representations about those asserted facts from the complainant's mother, Dr Tilse and police, all of whom, "saw, heard or otherwise perceived" RKM's representations, which were made "shortly after the asserted fact[s] happened" and, at least on the evidence before this Court, "in circumstances making it unlikely the representation is a fabrication" (s 93B(2)(a)). It follows that, unless a judge excludes the evidence concerning those representations in the exercise of discretion under s 98 or s 130 *Evidence Act* or under the common law, evidence of RKM's representations to her mother, Dr Tilse and police is admissible under s 93B.

[21] The finding that RKM was not a competent witness in the s 9A sense was made about a year ago. It may be that at some future time, a judge may be asked to exclude RKM's evidence in the exercise of discretion under s 98 or s 130 or under the common law or to revisit the question of her competency. As the Attorney-General fairly concedes, the question of RKM's competence may be relevant to the exercise of that discretion. That is especially so, if there is a finding that she was not competent at the time of making the representations sought to be led under s 93B.

[22] For these reasons, at the hearing of this reference I answered the Attorney-General's question (b) – "No".

[23] **PHILIPPIDES JA:** The two questions the subject of the reference were answered by the Court at the hearing of the reference; as to the first question "Yes" and as to

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7 *Evidence Act* Sch 3, "proceeding" (b).

the second question "No". The questions arise from a ruling by the primary judge. Counsel for the respondent properly conceded that he could not advance any cogent argument against those contended for by the Crown in respect of the questions raised. The Crown's submissions are clearly correct. I agree with the reasons stated by the President for the answers given by the Court.

[24] **BURNS J:** I agree with the reasons expressed by McMurdo P for the answers given at the hearing to the questions referred to the Court for its consideration and opinion pursuant to s 668A *Criminal Code*.