SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ali* [2015] QCA 191
PARTIES:	**R** **v** **ALI, Wajid** (appellant)
FILE NO/S:	CA No 104 of 2015 DC No 453 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich – Unreported, 7 May 2015
DELIVERED ON:	Orders delivered ex tempore 1 October 2015 Reasons delivered 13 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2015
JUDGES:	Gotterson JA and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 1 October 2015:** **1. Appeal allowed.** **2. Conviction set aside.** **3. A retrial on the count in the indictment is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the Court made orders allowing an appeal by the appellant against his conviction of an offence against s 210(1)(a) of the *Criminal Code* (Qld) – where the count on which the appellant was convicted alleged that he unlawfully and indecently dealt with a teenage boy who was then 14 years old – where the appellant was sentenced to release on entering into a recognisance in the amount of $200 on the condition that he keep the peace and be of good behaviour for two years – where on appeal this Court ordered that the appellant's conviction be set aside and that there should be a retrial on the count – where the complainant's evidence was that he was visiting the Ipswich City Library with his family – where the complainant was searching through the aisles – where the complainant noticed a man of Indian appearance, the appellant, sitting in

a lounge area, staring at him and being "really creepy" – where the complainant noticed the appellant in the same aisle – where the appellant asked the complainant his name and offered his right hand to him for a handshake – where whilst the appellant was speaking to the complainant, the appellant started to feel and touch his pants in the groin area with his right hand – where it seemed to the complainant that the appellant's penis was erect underneath his pants – where the appellant asked the complainant for the time – where the complainant checked on his mobile phone and told the appellant the time that he saw displayed – where the appellant said that that was the wrong time and that the complainant should accompany him back to his car so that he could show him the right time – where the complainant was uneasy because he could see that the appellant had his own iPhone with him – where the complainant walked away from the appellant – where the complainant resumed looking for books in the aisles – where the appellant approached the complainant a second time and again offered his hand – where the appellant kept asking if he could drive the complainant home or if the complainant could go back to the appellant's place – where the appellant put his hands around the complainant's waist and put his head on the complainant's shoulder and tried to kiss his neck – where the complainant could feel the appellant rubbing his penis against the complainant's body – where the complainant found his father and made a complaint to him – where the complainant's father went searching for the person, the subject of the complaint, but was unable to find him – where at trial the complainant's reliability was challenged – where during the jury's deliberations they sent a note that they wished to hear again the evidence of what the complainant had told the male police officer and view the complainant's evidence in court – where the learned trial judge read the evidence the male police officer gave from his notes of his interview with the complainant and the answers the police officer gave to questions in cross-examination – where arrangements were made for the recordings of the s 93A interview and the s 21AK cross-examination of the complainant to be shown to the jury – where, during the playing of the interview, there was a short adjournment and the jury sent a note saying they did not need to be shown the complainant's cross-examination – where consequently, the jury were not again shown the recording of the complainant's s 21AK evidence, specifically the cross-examination of the complainant contained in it – where the appellant contended that in the interests of fairness it was necessary for the learned trial judge to remind the jury of the matters put to the complainant during cross-examination which he accepted – whether the failure of the learned trial judge to direct the jury accordingly occasioned a substantial miscarriage of justice

Criminal Code (Qld), s 210(1)(a), s 668E(1)
Evidence Act 1977 (Qld), s 21AK, s 21AV, s 21AW, s 93A

R v SCG [2014] QCA 118, cited

COUNSEL: N W Weston for the appellant
S J Farnden for the respondent

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

[1] **GOTTERSON JA:** On 1 October 2015, this Court made orders allowing an appeal by the appellant, Wajid Ali, against his conviction on 7 May 2015 of an offence against s 210(1)(a) of the *Criminal Code* (Qld). The count on which he was convicted alleged that on 26 June 2013, he unlawfully and indecently dealt with a teenage boy who was then 14 years old. The appellant was sentenced on 25 May 2015 to release on entering into a recognisance in the amount of $200 on the condition that he keep the peace and be of good behaviour for two years.[1]

[2] This Court also made orders at that time setting aside the appellant's conviction and ordering a retrial on the count. The orders were made upon the conclusion of argument in an appeal against the appellant's conviction initiated by a notice of appeal filed on 28 May 2015.[2] The orders to which I have referred were made for the following reasons.

The circumstances of the alleged offending

[3] The complainant's evidence was that he was visiting the Ipswich City Library with his family. He, his father and his sister went to the computers to search the library catalogue. He could not find what he was looking for in the catalogue and started looking through books stacked in the aisles.

[4] He noticed a man of Indian appearance, the appellant, sitting in a lounge area, staring at him and being "really creepy". The complainant walked down the aisle he was in and out of the appellant's eyesight. Suddenly, he noticed the appellant in the same aisle. The appellant asked him his name and offered his right hand to him for a handshake. As the appellant was speaking to the complainant, the appellant started to feel and touch his pants in the groin area with his right hand. It seemed to the complainant that the appellant's penis was erect underneath his pants.

[5] The appellant asked the complainant for the time. The complainant checked on his mobile phone and told the appellant the time that he saw displayed. The appellant said that that was the wrong time and that the complainant should accompany him back to his car so that he could show him the right time. The complainant was uneasy because he could see that the appellant had his own iPhone with him. The complainant walked away from the appellant.

[6] The complainant resumed looking for books in the aisles. He noticed that the appellant was doing likewise. The appellant approached him a second time and again

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1 The sentencing judge stated that but for the fact that the appellant had been placed in immigration detention for 13 and a half months following upon his alleged offending, a custodial sentence of nine months' imprisonment would have been imposed.

2 AB249-251.

offered his hand. The complainant said, "No". The appellant mumbled. He asked the complainant his name and what he was doing that night. The complainant replied that he was going to hockey training. The appellant kept asking if he could drive the complainant home or if the complainant could go back to his (the appellant's) place. The complainant began to ignore the appellant.

[7] The appellant then said, "Excuse me" and went to walk past the complainant. But, instead, he put his hands around the complainant's waist. The appellant put his head on the complainant's shoulder and tried to kiss his neck. He moved one of his hands down the complainant's right arm towards his wrist. The complainant moved to step forward and away. The appellant stepped with him. The complainant could feel the appellant rubbing his penis against the complainant's body.

[8] The complainant began to crack his knuckles. The appellant took a small step back. The complainant turned around and said to the appellant that he was going and walked away. He found his father and made a complainant to him. His father went searching for the person, the subject of the complaint, but was unable to find him.

The trial

[9] The appellant's trial in the District Court at Ipswich continued over four days. It commenced on Monday, 4 May 2015. Prior to the empanelment of the jury just before midday on the first day, the complainant's evidence was taken. He was an "affected child" as defined in the *Evidence Act* 1977 (Qld) ("the Act"). His evidence was taken by audiovisual link and video recorded pursuant to s 21AK of the Act. The complainant was accompanied by a support person as is permitted by s 21AV thereof.

[10] The complainant's evidence-in-chief was relatively brief. He confirmed that he had participated in an interview with police on 27 June 2013. A video recording of the interview which contained the complainant's account of the alleged offending was tendered pursuant to s 93A of the Act.[3] Photographs of areas of the library were also tendered.

[11] The complainant was cross-examined for a period of one hour. The reliability of his account was challenged. He was asked if he was suspicious of Indian adults and why he had remained in the aisle areas after the first encounter. It was put to him that he did not tell his father at the library anything about the Indian man feeling or touching himself or about the man's erection. The complainant insisted that he had. Nor, it was put, did the complainant tell his father about the man trying to kiss his neck, rubbing his penis against the complainant, or asking the complainant to accompany him to his car. The complainant accepted that he did not tell his father about those matters, stating that he was embarrassed to tell his father about the rubbing. He also accepted that he did not tell a male police officer about the rubbing – which, he said, was because of his embarrassment; but did disclose it later to a female police officer during the recorded interview.

[12] As well, it was put to the complainant that he reacted to his instincts in thinking that the man was speaking inappropriately. He agreed that he thought what was being said was inappropriate even though sometimes he did not understand the words the man was using. He also agreed that he had told the female police officer that after they

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3 Exhibit 1 at the trial: Transcript at AB251-242.

shook hands and the man moved his hand toward his groin area, he (the complainant) looked away and he "didn't really see what he was doing pretty much".

[13] Counsel for the appellant put a different version of events to the complainant. It entailed the following sequence. The complainant, his mother and sister were together in an aisle near the lounge area in the library. He and his mother went to and from the computers several times. The man was sitting on a couch in the lounge area, spending his time mostly on the phone. The complainant and he engaged in a look. The complainant made faces at him, gave him "the bird" with a finger, and mouthed words at him. This happened several times. The man moved and went to an aisle. The complainant went to the aisle, went over to the man and offered him his hand. They shook hands. The man told him where he worked. Then, the complainant went back to his mother. Nothing further occurred between them at the library.[4]

[14] The complainant rejected this version, specifically giving the man "the bird", mouthing words and approaching him. He also rejected propositions made to him that the rubbing of the groin area by the man, the rubbing of the man's penis against him and the attempt made to kiss his neck had not happened.

[15] After the empanelment of the jury and formal matters were attended to, the prosecutor opened the Crown case. The s 93A police interview was played to the jury. Next, the complainant's s 21AK evidence was played to them. The prosecutor called other witnesses, including the complainant's father, the two police witnesses and the librarian. The defence case was opened in the afternoon of the second day of the trial. The appellant testified through an interpreter. He gave evidence-in-chief which was broadly consistent with that put by his counsel in the cross-examination of the complainant. His evidence continued into the third day. In cross-examination, he maintained his version and specifically rejected the complainant's version when it was put to him event by event.

[16] The defence case concluded. The trial judge discussed directions with counsel and then began her summing up at about 3.40 pm on the third day of the trial. The summing up continued into the fourth day for about 20 minutes. The jury retired to consider their verdict. About an hour or so later, they sent a note that they wished to hear again the evidence of what the complainant had told the male police officer and view the complainant's evidence in court. Her Honour read the evidence the male police officer gave from his notes of his interview with the complainant and the answers the police officer gave to questions in cross-examination.

[17] In accordance with the jury's request, arrangements were made for the recordings of the s 93A interview and the s 21AK cross-examination of the complainant to be shown to the jury. During the playing of the interview, there was a short adjournment. When the court resumed, the transcript reveals that the following occurred:

> "HER HONOUR: Now, members of the jury, you've sent me a note saying you don't now need to be shown Jake's cross-examination. Are you all agreeing on that? Okay. Do you want to see the rest of this tape?
>
> JUROR: Yes.
>
> HER HONOUR: Okay. All right. Well, we'll finish playing this. Thanks.

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[4] It was suggested to the complainant that he saw the man several days later on the train but took no steps to move away from him. The complainant said that he did see someone on the train who looked like the man and told his mother.

RECORDING PLAYED

HER HONOUR: Okay. So, members of the jury, you're content with just seeing that DVD at this stage. I will just remind you, though, that, of course, Jake did give further evidence on Monday. You saw that tape, and his evidence to the police officer wasn't tested in any way by cross-examination. That happened in the – in the proceedings on Monday – and also to remind you that whilst the Prosecution relies on Jake's evidence to support the charge, there were other witnesses in the Prosecution case, and of course, you heard from Mr Ali with his account of what – what he said happened. So it's on the whole of the evidence that you return your verdict. All right. I'll let you retire again. Thank you.

THE JURY RETIRED [12.01 pm]

HER HONOUR: Anything arising, Mr Needham?

MR NEEDHAM: No. Thank you, your Honour.

HER HONOUR: Mr Carroll?

MR CARROLL: No. Thank you, your Honour. I - - -

HER HONOUR: Okay.

MR CARROLL: But I'll place on record a – I guess a slight concern that I think your Honour – it occurred to your Honour as well – where the evidence of the complainant – untested and has been played, and in normal circumstances, the evidence under cross-examination would be played. I think that you identified that as an issue and – and addressed [indistinct] comments towards it.

HER HONOUR: Yes. I don't – I don't think I have to force them to sit through another - - -

MR CARROLL: Well - - -

HER HONOUR: Another DVD.

MR CARROLL: No, your Honour. I think that could potentially be counterproductive [indistinct]

HER HONOUR: Yes. If – if they say they don't need to – to see it, and anyway, I – I think what I've said to them should address that. All right. Well, if we haven't got a verdict by 1 o'clock, I won't take one till 2."[5]

[18] In the result, the jury were not again shown the recording of the complainant's s 21AK evidence, specifically the cross-examination of the complainant contained in it. The court adjourned at 12.03 pm. The jury returned at 1.54 pm and delivered the guilty verdict.

The conceded ground of appeal

[19] Leave to amend the grounds in the notice of appeal was given at the hearing of the appeal. In written submissions, the respondent conceded one of those grounds. In my view, the concession was properly made.

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5 AB204-205.

[20] The conceded ground concerned the failure to direct the jury when the recording of the s 93A interview was replayed at their request, not to place undue weight on it. That interview contained what was, in substance, the complainant's evidence-in-chief.

[21] It is well settled that, depending upon the circumstances, where the evidence of a complainant is replayed to a jury, fairness may require a direction in order to balance the risk that the jurors may place undue weight upon it by virtue of having seen and heard the evidence twice.[6] As the extract from the transcript set out above reveals, the learned trial judge did not direct the jury in these terms.

[22] A critical circumstance in this case was that the cross-examination of the complainant was not replayed to the jury. That circumstance put beyond question that a direction against putting too much weight on the replayed evidence-in-chief ought to have been given. The respondent concedes that it should have been given.

[23] Moreover, the observations that the trial judge did make to the jury were in other respects inadequate. Her Honour stated that the complainant was not cross-examined during the police interview and that his evidence was relied on by the prosecution. As to the appellant's account, all that was said was that the jury had heard it from him.

[24] This was a case in which the complainant's evidence was uncorroborated. His credibility had been put in issue. Where the cross-examination was not to be replayed to the jury, in the interests of fairness, it was necessary, at least, to remind the jury of the matters put to the complainant during the cross-examination which he accepted. As well, the account of the appellant ought to have been summarised in order to balance that of the complainant in his evidence-in-chief. These are directions which were required here in addition to a direction against giving undue weight to the account in the recorded interview on account of it having been viewed twice.

[25] It can be seen from the transcript extract that trial counsel for the appellant did not press for the cross-examination of the complainant to be replayed. In my view, neither the jury's later request that it not be replayed nor the acquiescence by counsel in that course, dispensed with the need for the trial judge to give due consideration to whether a replaying of it was required in the interests of fairness. It is unnecessary to decide, as another ground of appeal contends, whether the learned trial judge erred in not replaying the cross-examination.

[26] It is also unnecessary to deal with a separate ground of appeal challenging the adequacy of directions given in order to comply with s 21AW of the Act. This ground was resisted by the respondent.

Disposition

[27] As the respondent further conceded, the failure to give direction that ought to have been given occasioned a substantial miscarriage of justice. Conformably with s 668E(1) of the *Code*, the appeal must be allowed and the conviction set aside. Counsel for the appellant accepted that an order for a retrial on the count was appropriate.

[28] **PHILIP McMURDO J:** I agree with Gotterson JA.

[29] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Gotterson JA, with which I agree. I also agree with the orders proposed by his Honour.

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6 *R v SCG* [2014] QCA 118 at [35], [36].