SUPREME COURT OF QUEENSLAND

CITATION:	*R v Auchterlonie* [2015] QCA 243
PARTIES:	**R** **v** **AUCHTERLONIE, Jason** (appellant)
FILE NO/S:	CA No 263 of 2014 DC No 23 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Unreported, 11 September 2014
DELIVERED ON:	27 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2015
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – OTHER MATTERS – where the appellant was tried on a six count indictment – where Counts 1 to 5 inclusive alleged offences against s 210(1)(a) of the *Criminal Code* (Qld) of unlawful and indecent dealing with a child with circumstances of aggravation that the child was under 16 years of age and under care – where Count 6 alleged an offence against s 349 – where the jury returned verdicts of guilty on Counts 1 to 5 inclusive – where on Count 6, the appellant was found not guilty of rape; however, the jury returned an alternative verdict of guilty of unlawful and indecent dealing on that count – where convictions were entered on counts 1 to 6 – where the appellant was sentenced on Count 6 to four years' imprisonment and to shorter periods of imprisonment on each of the other counts, all terms of imprisonment to be served concurrently – where the complainant was born in May 1996 – where the complainant's mother and the appellant had partnered – where the complainant's mother and the appellant lived together "on and off" at different residences, the complainant and her siblings with them – where the complainant's mother and her four children moved to Brisbane and the complainant's mother resumed an "on and

off" relationship with the appellant – where the appellant was about 28 years old when the relationship with the complainant's mother began and 40 years old at the date of sentence – where the appellant did not give evidence at his trial – where the complainant was interviewed by police when she was 14 years old and alleged sexual activity by the appellant with her – where the complainant's evidence for trial was pre-recorded pursuant to s 21AK of the *Evidence Act* (Qld) – where this evidence was given when the complainant was 15 years old – where the complainant's evidence-in-chief consisted of the account she gave during the recorded s 93A interview and thereafter she was cross-examined by counsel who appeared for the appellant at his trial – where after the trial opening, the s 93A interview was played to the jury and next, the jury viewed the complainant's pre-recorded evidence – whether a miscarriage of justice occurred because the learned judge who presided over the pre-recorded evidence denied the appellant a fair trial as a consequence of the learned judge's interventions

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION AND NON-DIRECTION – where in directing the jury the learned trial judge expanded upon the mandatory components of s 21AW(2) – whether such an expansion was an error in law which prejudiced the appellant's right to a fair trial

Criminal Code (Qld), s 210(1)(a), s 210(3), s 210(4), s 349
Evidence Act 1977 (Qld), s 21AK, s 21AW(2), s 21AW(2)(a), s 21AW(2)(b), s 21AW(2)(c), s 93A

RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, considered

COUNSEL: S M Ryan QC, with C Morgan, for the appellant
V A Loury for the respondent

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

[1] **GOTTERSON JA:** The appellant, Jason Auchterlonie, was tried over four days in the District Court at Brisbane on a six count indictment. Counts 1 to 5 inclusive alleged offences against s 210(1)(a) of the *Criminal Code* (Qld) of unlawful and indecent dealing with a child with circumstances of aggravation that the child was under 12 years of age[1] and under his care.[2] For Counts 1 and 2, the alleged offending was between 1 October 2005 and 26 January 2007 at Mackay; for Count 3 between 20 November 2005 and 26 January 2007 at Mackay; and for Counts 4 and 5 between 20 January 2007 and 20 May 2008 at Collingwood Park, Brisbane. Count 6 alleged an offence against s 349 of the *Code* in that between 20 January 2007 and 20 May

1 Section 210(3).
2 Section 210(4).

2008 at Collingwood Park, he raped the same complainant child who was the subject of the alleged unlawful and indecent dealing. The particulars of that count alleged rape by digital penetration of the complainant's vulva.

[2] At the conclusion of the trial on 11 September 2014, the jury returned verdicts of guilty on Counts 1 to 5 inclusive. On Count 6, the appellant was found not guilty of rape; however, the jury returned an alternative verdict of guilty of unlawful and indecent dealing on that count. Later that day, convictions were entered on Counts 1 to 6. The appellant was sentenced on Count 6 to four years' imprisonment and to shorter periods of imprisonment on each of the other counts, all terms of imprisonment to be served concurrently. A parole eligibility date at 11 March 2016 was set.

[3] On 3 October 2014, the appellant filed a combined Notice of Appeal against conviction and Application for leave to appeal against sentence.[3] This document was superseded by an Amended Notice of Appeal filed on 28 July 2015 for which leave was given at the hearing of the appeal on the following day. The application for leave to appeal against sentence is not pursued in the amended document.

The circumstances of the alleged offending

[4] The complainant was born in May 1996. She is the second eldest of four children. Her mother and the appellant had partnered. Their relationship began in 2002 when the mother was living in Mackay. They lived together "on and off" at different residences in the Mackay area, the complainant and her siblings with them. After a sojourn with a former partner in Melbourne in the winter of 2003, the mother and her four children moved to Brisbane. She resumed an "on and off" relationship with the appellant. The mother, her children and the appellant moved into a house at DB, Collingwood Park in August 2004.

[5] The appellant was about 28 years old when the relationship with the complainant's mother began and 40 years old at the date of sentence. He did not give evidence at his trial.

[6] The complainant was interview by police on 3 September 2010. At that time she was 14 years old. The interview followed upon a disclosure to her mother of alleged sexual activity by the appellant with her in which he would bend her over and rub his penis back and forward in between the tops of her legs, whether she was clothed or not, and on one occasion attempted to put his penis inside her, whereupon she went to scream and he covered her mouth.[4] The disclosure was reported forthwith to police on 1 July 2010.[5]

[7] The police interview took place at the Ipswich Police Station. It was recorded on a disc which was tendered at the appellant's trial pursuant to s 93A of the *Evidence Act* 1977 (Qld).[6]

[8] In the interview, the complainant spoke of certain incidents which she said occurred when her family was living at Slade Point, Mackay in a house that belonged to the appellant's mother, AL.[7] One day, when she was nine years old, the complainant was

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3 AB462-466.

4 AB128; Tr2-34 ll22-24; ll44-47.

5 AB109; Tr2-15 ll15-19.

6 Exhibit 1. The transcript of the interview is Exhibit MFI C: AB286-399.

7 It is common ground that the house was at DH, Beaconsfield in Mackay area. The appellant's mother died on 15 May 2008, shortly prior to the complainant's twelfth birthday.

standing at a bench in the kitchen making sandwiches for lunch. Her mother was at work. She and the appellant were alone in the kitchen. He reached over as if to get something from the refrigerator and grabbed her right "boob" with his hand, then he struck her "butt" with a "slap-type tap". He said that he was sorry and that it was an accident.[8] This conduct constituted the Count 1 offending.

[9] The Count 2 conduct related to the complainant's account of an event which occurred early one evening when she and the appellant were sitting next to each other in the backseat of a sedan. Her mother and the appellant's mother were in the front seat. They were travelling to a mid-week market night at a venue in Mackay. She was wearing short pants. The appellant began "feeling up" her left leg. Each time, he would venture further up and tickle her. She described him as having tickled her "up near (her) vagina". She closed her legs and tried to move away.[9]

[10] The complainant told of a third incident at the house when she was nine years old. It occurred about lunchtime one day. She was lying on a couch watching television and eating chips. The appellant came and sat next to her. He lifted her head up and put it near "his doodle". He was wearing pants. She lifted herself up and moved away from him. He told her not to be uncomfortable. After she had sat for a while, she resumed lying on the couch but not close to him. The appellant then grabbed her hand and put it on his penis under his pants. He placed his hand over hers and made her squeeze his penis. It was hard. She also felt "two little lump things". She became upset and pulled away. He began to swear at her.[10] This conduct was the basis for Count 3.

[11] The Count 4 conduct concerned an event at the house in Collingwood Park. The complainant, who was in Grade 6 or 7 at the time, was at home. Her mother was at work. The complainant was on her bed in her room listening to music. She was clothed. The appellant entered the room. He began touching her leg. She resisted. He got angry and pulled her towards him. He had removed his pants. He bent her over so that she was on her knees on the bed with her head down. He started to rub his penis against her "bum", his penis was hard. She started to scream. He put his hand over her mouth and continued with the rubbing. After some time, he let go of her. He told her that he would kill her and her family if she told her mother.[11]

[12] The complainant told of another incident when she was in Grade 6. One weekend, the appellant was to take the complainant to the Rocklea Markets. They were to go first to a McDonalds for a meal. They travelled in the appellant's work utility. The complainant was in the front seat. As he steered with one hand on the steering wheel, he used the other to grab her "boob". Then he grabbed her leg and knee and placed his hand near her vaginal area on the outside of her clothing.[12] This conduct constituted the Count 5 offending.

[13] Count 6 was based on the complainant's account of offending at the Collingwood Park house when she was in Grade 7. After playing one afternoon, she was in the shower. The shower screen was blurry. She did not see the appellant enter the bathroom. When she got out of the shower, she saw him. He was not wearing pants. He grabbed her shoulders with both hands and squeezed them. He let go with one

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8 Exhibit MFI C pp10-26; AB295-311.
9 Exhibit MFI C pp 26-41; AB311-326.
10 Exhibit MFI C pp42-62; AB326-347.
11 Exhibit MFI C pp 62-78; AB347-363.
12 Exhibit MFI C pp 79-90; AB364-375.

hand and moved it to touch her vagina, "rubbing between (her) flaps".[13] The appellant tried to put a finger into her vagina. It hurt. She managed to free herself and ran to her bedroom.[14]

The complainant's pre-recorded evidence and other evidence

[14] The complainant's evidence for trial was pre-recorded pursuant to s 21AK of the *Evidence Act*. This evidence was given on 28 March 2012 when the complainant was 15 years old. The evidence was given before a District Court judge who was not the same judge as the trial judge.[15] It is convenient to refer to this judge as the pre-record judge.

[15] The complainant's evidence-in-chief consisted of the account she gave during the recorded s 93A interview. Thereafter she was cross-examined by counsel who appeared for the appellant at his trial.

[16] After the trial opening, the s 93A interview was played to the jury. Next, they viewed the complainant's pre-recorded evidence. The cross-examination contained in it is the subject of the first ground of appeal.

[17] The prosecution also adduced evidence from the police officer who conducted the interview and another police officer who was involved in investigations. Anatomical evidence was given by a medical practitioner. Preliminary complaint evidence was received from the complainant's mother. A psychologist testified that in an interview in August 2010, the complainant told her that she had been "victimised sexually by her mother's ex-partner when she was 10 years old, Years 5 and 6".

The grounds of appeal

[18] The Amended Notice of Appeal advances the following grounds of appeal:

> "**Ground 1:**
>
> That a miscarriage of justice has occurred in this case:
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> a. The learned Judge who presided on 28 March 2012 at the time of the pre-recording evidence of the child complainant pursuant to section 21AK of the Evidence Act (Qld) denied the Appellant a fair trial as the learned Judge's intervention, during the cross-examination of the complainant by the Appellant's counsel:
>
> i. was a departure from the due and orderly process of trial such as to involve a miscarriage of justice in the circumstances of the case;
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> ii. exceeded the limits of acceptable comment on the facts and those comments were unfair and lacking in judicial balance;

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13 The complainant stated that while she was restrained, the appellant would, at times, also use his free hand to masturbate his erect penis or to grab the complainant's hand and force it to masturbate it: Exhibit MFI C p 92; AB377.

14 Exhibit MFI C pp 91-112; AB376-397.

15 The time lapse between the pre-recording and the trial is attributable to two failed trials. One of them failed because of a jury issue; and the other failed because inadmissible evidence was volunteered by a witness.

iii. would have suggested to a fair-minded observer that the Judge was, or appeared to be, prejudiced or biased as against the Appellant;

and

iv. denied the Appellant a proper opportunity to advance a defence to the charges.

aa. Without forensic purpose, the appellant's counsel failed to apply for the exclusion of the cross-examination of the complainant.

ab. Notwithstanding that there had been no application by defence counsel to exclude the cross-examination, having regard to the prosecutor's duty to act fairly and impartially and to ensure that the prosecution case was presented properly and with fairness to an accused, the prosecutor ought not have allowed the trial to proceed with the cross-examination in that form.

b. The learned trial Judge failed to give adequate directions to the jury to remedy the improper interference of the Judge during the complainant's pre-recorded evidence such that the Judge's interference deprived the Appellant of a fair trial."

Ground 2:

Her Honour erred in law by expanding upon the mandatory components of s 21AW(2) in terms which prejudiced the appellant's right to a fair trial."

[19] In the course of her reply, senior counsel for the appellant sought leave to add a further ground of appeal to the effect that the learned trial judge should have intervened of her own motion to reject the pre-recorded evidence.[16] The grant of leave was opposed by counsel for the respondent.[17] Counsel for the appellant advised the Court by a memorandum filed on 4 August 2015 that the application for leave was withdrawn.

[20] It is convenient to consider Grounds 1 and 2 separately. As to Ground 1, paragraph (a) impugns the conduct of the pre-record judge as having denied the appellant a fair trial. Paragraphs (aa), (ab) and (b), however, impugn the conduct of the appellant's counsel, of defence counsel, and of the judge at the trial, with criticism of steps not taken or taken with respect to the pre-recorded evidence, particularly the cross-examination in it. In view of these differences, Ground 1(a) warrants separate consideration from the other aspects of the ground. There is a practical reason for considering first in that if the underlying contention in it that a fair trial was denied, is not made out; then the conduct at trial-based criticisms will have been seriously undermined.

Ground 1(a)

[21] In written submissions, counsel for the appellant categorised (i), (ii) and (iv) in Ground 1(a) as criticisms of unfairness and (ii) and (iii) as criticisms of bias.[18] In oral

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16 Transcript 1-36 ll43-47.
17 Transcript 1-38 l22.
18 At paragraph 41.

submissions, senior counsel for the appellant observed that unfairness was "the stronger argument for the appellant".[19] The implied concession that bias was a less strong argument is consonant with a realistic appreciation that a criticism of predisposition towards favouring a party in decision making, a hallmark of bias, is one that is apt for the process of decision making rather than supervision of the taking of evidence, the task performed by a pre-record judge. The difference was one that was graphically described by Gaudron A-CJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*[20] in the following terms:

> "… counsel for the appellant suggested that the trial judge had been antagonistic to counsel who had appeared for the appellant and that the conduct of the trial generally tendered to undermine the defence case and bolster that of the Crown. But these are not complaints of bias or the appearance of bias; they amount to a complaint that the conduct of the trial was unfair. That is a radically different complaint and it is wrong to seek to apply tests approved in connection with questions of apparent bias in deciding whether the trial was fair. That question will turn largely on whether the accused has had a proper opportunity to advance his or her defence to the charge."

[22] As to unfairness, the appellant's written submissions are supplemented by a Schedule headed "Interruptions and Comments" which lists interventions by the pre-record judge during the cross-examination of the complainant. The Court was taken to a number of them during argument of the appeal.

[23] By way of summary, senior counsel for the appellant informed the Court that the strongest argument is that "in the accumulation of interruptions and commentary there was a significant risk of unfairness and, in particular, a risk that the jury might, in the face of that commentary, have little confidence in the ultimate contentions made by the defence".[21] It was submitted that by the frequency, language and tone of her interruptions and comments, the pre-record judge crossed the line between permissible and impermissible intervention.[22] As a consequence, the defence case was disparaged in a way that risked unfairly influencing the jury in their evaluation of it.

[24] I have viewed the recording of the complainant's evidence and read the transcript of it. My overall impression is that the cross-examination was not unfairly constrained or hindered. The cross-examiner was able to put to the complainant the defence theory that she had complained falsely about the appellant in order to excuse her own behaviour[23] and out of dislike for him because she believed that he had caused her mother and father to break up.[24] No line of cross-examination was curtailed.[25] Further, the cross-examiner was able to put the defence case separately in respect of each count, namely, that the offending the subject of the count, had not occurred.[26]

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19 Tr1-19 ll12-16.

20 [2000] HCA 3; (2000) 199 CLR 620 at [11].

21 Tr1-20 l46 – Tr1-21 l2.

22 Tr1-21 ll16-19.

23 AB47; Tr1-31 ll3-31.

24 AB73; Tr1-57 ll18-34.

25 With the exception of a line of questioning about Family Court proceedings between the appellant and his wife of which the complainant was ignorant: AB52; Tr1-36 ll41-52.

26 Count 1: AB55; Tr1-39 ll27-31; Count 2: AB58; Tr1-42 ll22-24; Count 3: AB62; Tr1-46 ll36-37; Count 4: AB65; Tr1-49 ll50-51; Count 5: AB66; Tr1-50 ll39-41 and AB68; Tr1-52 ll50-56; Count 6: AB72; Tr1-56 ll55-57.

[25] I acknowledge that the pre-record judge intervened often during the proceedings. Typically, the interventions were to seek the reformulation of question asked by the cross-examiner which were inappropriately worded for a child witness, contained more than one question, or were convoluted. I have extracted the following to illustrate this pattern of intervention.

[26] The complainant was asked about her suspensions from R State High School. The evidence took the following course:

> "You were suspended from R on a couple of occasions, weren't you?-- Yep.
>
> Your behaviour management was - you were demoted on a behaviour management level to deprive you of extra curricular and non-curricular activities at school; do you recall that?
>
> HER HONOUR: Do you understand what that means?-- No.
>
> No, I wouldn't have thought you did.
>
> MR KELSO: You weren't allowed to go and represent the school at any events or on any occasions?
>
> HER HONOUR: The school - the school took some steps in relation to your behaviour and they stopped you doing some things?-- Yeah."[27]

The pre-record judge correctly apprehended that the question asked was not understood. The intervention achieved a reformulation of it that was understood by the complainant.

[27] A little later, the pre-record judge intervened for the purpose of encouraging counsel to ask questions pitched at the complainant's level of understanding. This can be seen in the following exchange:

> "All right. And then do you recall going to the Community Health - sorry, Community Youth and Mental Health Service for behavioural issues? That's not Dr Shamsul, is it?-- No, we went to - in Ipswich we went to a psychologist, my mum and my dad took me to, if that's what you mean.
>
> All right.
>
> HER HONOUR: She probably doesn't know the formal names. You must remember she probably doesn't know that that's the place she went to.
>
> MR KELSO: Yes.
>
> HER HONOUR: You're speaking to a child.
>
> MR KELSO: Yes.
>
> HER HONOUR: Try to make it on her level."[28]

[28] Simplification in questioning was the purpose of the intervention that occurred at a point when the complainant was being cross-examined with respect to a proposition

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27 AB43; Tr1-27 ll46 – AB44; Tr1-28 l3.

28 AB44; Tr1-28 ll12-30.

that she made allegations about the appellant to her mother so that she (her mother) would "get off (the complainant's) back". The intervention took the following form:

> "Right. I see. And you say that you were - well, by saying you were sick of having this grief inside you, is this part of - was this part of the rehabilitative process?
>
> HER HONOUR: She's not going to understand that word.
>
> MR KELSO: Was this part of the-----
>
> HER HONOUR: Was this trying to get better? Was this you trying to get better by saying it?-- By telling my mum?
>
> Yes?-- I don't really understand, like.
>
> Were you trying to get it out so you'd get better; is that what you're trying to say?-- Yeah, it just happened. It just come out. I just told her."[29]

[29] Interventions designed to avoid double questions were in the form of "well, one question at a time",[30] and "ask her a different question and ask one at a time so she understands".[31]

[30] To my mind, these interventions and others of which they are typical, were appropriate. They were for the legitimate purpose of ensuring that the complainant's evidence was comprehensible from the perspectives of the questions asked of her and her answers to them. Generally, neither the interventions themselves, nor the terms in which they were made, nor the tones in which they were spoken, were unfair.

[31] I acknowledge also that, at times, interventions were made in terms which were critical of the cross-examination style. Instances of this are given in the Schedule to which I have referred. Some of those instances were addressed in oral submissions. It is sufficient for present purposes to discuss those which were said to be egregious instances of criticism.

[32] At one point, after lengthy cross-examination about the layouts of the two residences where the alleged offending occurred, the pre-record judge observed:

> "It would be easier to do a diagram and give it to the child rather than go through this tedious procedure."[32]

[33] In the course of cross-examination about times when adults were present at the house in Mackay, the complainant was asked about their hours of work and work rosters. The pre-record judge intervened in the following way:

> "All right. And Uncle B, he used to work long hours, didn't he?
>
> HER HONOUR: Well, what's long hours mean? It's a very-----
>
> MR KELSO: 10 to 12 hours a day; is that right?-- Not quite sure.
>
> All right. Do you recall he was on a roster?-- I don't know.
>
> Sometimes he would be working the day shift and sometimes he'd be working an afternoon shift-----

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29 AB47; Tr1-31 ll37-52.
30 AB32; Tr1-16 l30.
31 AB33; Tr1-17 ll13-14.
32 AB35; Tr1-19 ll41-48.

> HER HONOUR: How could the child know that? How would the child - the mother might know it, but how would the child know that, that he had a roster? Did he ever discuss having a roster with you?-- No.
>
> MR KELSO: All right. And Jason was working at that time, wasn't he-----?-- Yes.
>
> -----when you were living at Beaconsfield with Grandma L?-- Yes.
>
> He was working long days, wasn't he?-- I'm not sure.
>
> HER HONOUR: I don't know what - just a moment, GA. What does long days mean?
>
> MR KELSO: I'll rephrase-----
>
> HER HONOUR: It's so imprecise. It's not fair to the child.
>
> Do you know what he did? Do you know what he was doing, what work he did?-- He did a couple of - he did a couple of different jobs. Like, I don't remember when - exactly a time or day and that, but I think he was like a spray person, like painter or something like that.
>
> How old were you at this time?-- When we were living there, was this after we come back from my mum being sick?
>
> MR KELSO: Yes.
>
> HER HONOUR: I think that's the time we're talking about, yes. How old were you then?-- I think I was maybe 8 or 9. I'm not quite sure.
>
> Well, Mr Kelso, an eight or a nine year old child is not an adult, and they probably don't know what everyone in the household does and whether they have rosters.
>
> MR KELSO: All right.
>
> HER HONOUR: But there are - will be at least one adult witnesses who was living there at the time who you will have the opportunity to ask questions of."[33]

[34] At a later point, after detailed cross-examination about visits by a friend of the complainant's sister to the house in Brisbane, the following exchanges occurred:

> "HER HONOUR: And what is the relevance of what her sister did to this matter?
>
> MR KELSO: Your Honour, I am just trying to establish who was coming and going from the house at what times.
>
> HER HONOUR: All right. Well-----
>
> MR KELSO: And it's a long period of time.
>
> HER HONOUR: It is a 12 month period. The child was eight. She has conceded that her sister had friends over. Do you want to go through everyone who visited in that 12 months?

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[33] AB49; Tr1-33 l4 – AB50; Tr1-34 l1.

> MR KELSO: No, your Honour.
>
> HER HONOUR: No. Well, don't belabour the point, Mr Kelso, because it I don't think advances the thing very much."[34]

[35] Each of these three instances of intervention is inexplicable in context. The word "tedious" and the expression "belabour the point" added a certain pungency to what was said in order to impress the point of the intervention. To the extent that these interventions implied criticism, their tenor was, in my view, to the effect that the subject matter of the particular cross-examination might have been more expeditiously or effectively pursued by other means. It was not that the cross-examiner was incompetent or that the jury should, on that account, disregard the cross-examination.

[36] In holding this view, I am mindful that on several occasions, the pre-record judge's interventions were bluntly expressed or were accompanied by a facial expression which reflected a degree of exasperation on her part. Given that the complainant had been cross-examined for more than an hour before she was asked a question about any of the counts and the cross-examination had warranted multiple interventions, the exasperation was understandable. It was, however, unnecessary that it have been expressed.[35]

[37] For these reasons, I am unpersuaded that the pre-record judge intervened in a manner or to a degree that was unfair and resulted in a miscarriage of justice. In particular, I reject the proposition that the interventions ran the risk of causing the jury to have little confidence in the contentions made for the defence. I am fortified in this by the thorough directions given to the jury by the learned trial judge with respect to the pre-recorded evidence. They are set out in the considerations of Ground 1(b).

[38] As to bias, the appellant sought to rely on a number of factors, namely, a number of instances where the pre-record judge summarised an answer that the complainant had given and the complainant agreed with the summary,[36] two instances where the pre-record judge invited the complainant to indicate whether she wished to have a break,[37] and the pre-record judge's statement in excusing the complainant that "it's over now and you're excused, and you can go".[38]

[39] I am unable to accept any of these factors as evidencing bias on the part of the pre-record judge. The summaries were accurate. They did not venture beyond responses the complainant had intimated. Neither they nor the complainant's subsequent agreements with them produced evidence which might aptly be characterised as evidence suggested by the pre-record judge that the complainant should give.

[40] As to the breaks, one was offered at a point when the complainant was teary-eyed.[39] The other was offered close to 1 pm when the court would customarily adjourn for

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34 AB51; Tr1-35 ll33-50.

35 All the interventions which I have, to this point, mentioned specifically occurred before questioning on the counts.

36 In directing the jury, the learned trial judge also referred to answers having been suggested by the pre-record judge at times. I did not observe the pre-record judge interposing to answer a question for the complainant or framing an answer for her to adopt.

37 There was a break in the proceedings so that the pre-record judge could attend to a sentence matter. That break was pre-advised and no objection was taken to it on behalf of the appellant. It was taken at about 11.30 am, when breaks are often taken.

38 AB73; Tr1-57 ll48-49.

39 This instance is at AB58; Tr1-42 ll44-46 in the Transcript.

lunch. The complainant's evidence finished at 1.16 pm. The offers of the breaks are readily understandable in the circumstances. The statement made when the complainant was excused was also understandable in context. At that point, the complainant was in tears. In summary, the appellant's case of bias lacks any real substance.

[41] For these reasons, I have concluded that Ground 1(a) cannot succeed.

Grounds 1(aa) and (ab)

[42] In rejecting Ground 1(a), I also reject the appellant's contentions, first, that there was a justifiable basis on which defence counsel could have sought and obtained orders that the pre-recorded cross-examination of the complainant be excluded and that the complainant's evidence be taken afresh; and, second, that in performing the duty to act fairly and impartially, the prosecutor ought not to have allowed the trial to proceed with the evidence in that form.

[43] I would add that Ground 1(aa) has additional complexities for the appellant in that a decision not to seek such orders can be rationally explained as a decision made in order to avoid affording the complainant, by then an 18 year old, a "second run" at responding to cross-examination. Further, the submissions made by defence counsel concerning the directions that the learned trial judge should give to the jury about the pre-recorded evidence were to the effect that he would refer to the interventions in his address for the purpose of suggesting to the jury that the complainant's evidence, as summarised by the pre-record judge, was to be given less weight.[40] That course was in due course taken, as her Honour in the summing up reminded the jury.[41]

[44] These grounds of appeal also cannot succeed.

Ground 1(b)

[45] The playing of the pre-recorded evidence continued into the second day of the trial. When that concluded, a break was taken and, in the absence of the jury, the learned trial judge intimated that after the break, she would give the jury directions in relation to the pre-recording. Her Honour observed that in her directions, she should mention the pre-record judge's interruptions. Her Honour stated her reasons for that in these terms:

> " … Because it occurs to me that it probably needs some explanation that part of the responsibility of the judge is to ensure that the level of questioning is appropriate for the level of understanding of the child, but that they should not draw any – conclude from that that the judge had any particular opinion about the case, and that in any event it's a matter for them that the cross-examination is a difficult – cross-examination of a child in these matters is a difficult thing to do, and it's the defence's job to put the case and test the evidence."[42]

[46] It was at that point that defence counsel said that he intended to make some mention of the interruptions in his address.[43] He asked her Honour also to mention the complainant's age at the time of the pre-recording, that the pre-recording was made 18 months after the s 93A interview, and that if the jury thought that any answer had been suggested to the complainant, they might give it less weight.[44]

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40 AB97; Tr2-3 ll38 – AB98; Tr2-41 l9.
41 AB220; P27 ll35-51.
42 AB97; Tr2-3 ll12-18.
43 *Ibid* ll38-40.
44 *Ibid* 144 – AB98; Tr2-4 l19.

[47] Once the jury had returned, the learned trial judge gave the following directions to them:

> "Ladies and gentlemen, just before we move on, I spoke to you at the start of the trial about – or at the start – before GA's evidence was played, about some of the procedures involved for the taking of the evidence of a child. So the evidence that has – was recorded in advance of the trial, and played back to you, was recorded in accordance with the law, and you might have noticed in the course of the playing of that material, some of the measures that were taken to make giving evidence easier for the child witness, or easier than it might otherwise have been if the evidence was given in court in the usual way.
>
> So the evidence of GA, which was just played to you, was taken in March of 2012, or about 18 months after she had been interviewed by the police officer. GA – when that evidence for court was recorded, GA wasn't in the courtroom. She was in another room, and she was questioned through an audio visual link between the remote room and the courtroom. And at the time that she gave her evidence, in that room with her was an adult or a support person, and no one else.
>
> While she was being examined the courtroom was closed, so that means all non-essential people were excluded from the courtroom, and you might have seen in the inset people coming and going. That was court personnel. But the court was closed to members of the public.
>
> The accused was present in the courtroom when the evidence was being taken. So he could see and hear GA on the television, but she could not see him. She would know that he was there, but he was out of range of the cameras, so he couldn't be seen on the monitor in the remote room, except perhaps there might have been a momentary appearance when the – at some point when the cameras were flicking around. I'm not sure. But if GA – and there's no evidence that GA even noticed that, but if she had seen him, it would have only been a very fleeting view, and there's no indication that that had any adverse impact on her evidence.
>
> You would have noticed in the course of that recording that the judge was concerned about breaks – about giving GA appropriate breaks in case she got tired. Whether she was all right to continue. And about halfway through the recording the judge stopped the matter. She said that she would deal with another case, and that was a case that was unrelated to Mr Auchterlonie, so a completely different matter.
>
> In the course of that evidence you might also have observed that the judge was quite protective of GA, intercepting cross-examination and translating or reframing it for her. Now, I will instruct you in relation to those measures and the way in which the evidence was taken, in this way: all of those measures are the routine practice of the court for the taking of the evidence of children in cases of sexual charges.
>
> You must not draw any inference as to the accused's guilt, simply because those measures were used. It is routine – that means it must be done in all cases with these because those routine measures were taken.

> The value of the evidence is not increased or decreased because those measures were used, and that means that it's not better evidence or worse evidence than if the evidence had been given live from the witness box. The evidence is not to be given any greater weight or any lesser weight because of those measures.
>
> You would have noticed that there were a number of interruptions by the judge in the course of cross-examination, and I want to say something about that specifically. The judge has a duty to ensure that questions put are capable of being understood. That is, that the level of questions are appropriate for the age and understanding of the child.
>
> At the time that GA was cross-examined she was 16 – or perhaps just short of 16; perhaps 15 and a half. And you might have thought – or I can tell you whilst some of the questions in cross-examination may have – could have been put in a simpler way, Mr Kelso did nothing improper in the course of his cross-examination.
>
> Cross-examination of a young person about sexual matters is a very difficult job, but it is also fundamental to a fair trial, and Mr Auchterlonie was entitled to defend himself. His counsel was entitled to robustly test GA's version and to put Mr Auchterlonie's case to her, and Mr Kelso was not aggressive. He was endeavouring to test GA's version, and how a witness responds under cross-examination can be important in your assessment of the credibility of the witness.
>
> You ought not consider the judge's interruptions as an indication of her opinion about the case, but even if you thought that the judge did have a view, it would be irrelevant. First and foremost because you are the only judges of the facts. It is for you to determine what is reliable, what is true.
>
> Secondly, the judge had not heard all of the evidence, and the judge's involvement in that pre-recording was limited to just one portion of the evidence. That is, the examination of GA at court. A number of times the judge suggested an answer to GA which she adopted. You might be more cautious with those answers, because they may not have the same force as if GA had answered them independently.
>
> There are or were occasions when the judge gave a summary of what she thought GA meant and then GA adopted that summary. But remember that the evidence is what GA said. The evidence comes from GA's answers, rather than what the judge thought GA meant. So you need to examine what GA said to assess her account. …"[45]

[48] These directions accorded with defence counsel's submissions. They were appropriate. As to any criticism the jury may have inferred from the interruptions, the direction reinforced that defence counsel had not acted improperly. It was also made clear that if the jury gained an impression that the pre-record judge had a view of the case, that was irrelevant because they were the sole judges of the facts. As well, they were directed that the pre-record judge had not heard all the evidence.

[49] The summing up by the learned trial judge was fair and balanced. No objection has been taken to it. Her Honour reminded the jury that they were the sole judges of fact

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45 AB101; Tr2-7 l3 – AB102; Tr2-8 l43.

and that her own opinion was irrelevant.[46] She recounted the appellant's arguments in a manner that allowed the jury to understand the matters relied on in support of the appellant's case.[47]

[50] In my view, the jury were adequately and properly directed. No miscarriage of justice arises from the manner in which the jury were directed on this subject. This ground of appeal has not been established.

Ground 2

[51] Where an affected child's evidence is taken in accordance with s 21AK, s 21AW(2) of the *Evidence Act* provides that the judicial officer presiding "must instruct the jury that –

> "(a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilty 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."

[52] The directions which I have set out were evidently given by the learned trial judge in intended compliance with s 21AW(2). The appellant does not contend that there was a failure to comply with the section.

[53] The essence of the complaint underlying this ground of appeal is that her Honour, in referring to the child's absence from the courtroom, to the reduction of the level of stress and discomfort for the child, and to allegations of sexual offences "conveyed that the different procedures are adopted because the defendant is charged with sexual offences". Those references suggested that there was a need to keep complainant children away from alleged offenders and "carried the risk that the jury might speculate that the measures were in place for these types of complaints because their complainants were likely to be true".[48] It is said that the risk was enhanced here because of the observation by her Honour that whilst there is a possibility that the complainant caught a momentary glance of the appellant, "there was no indication it had an adverse impact on her evidence".[49]

[54] I am unable to accept the appellant's complaint as a valid one. In order for a judge to instruct in terms of s 21AW(2), it is necessary, in my view, to explain to the jury the measure the subject of the instructions. In so doing, it is in order to outline what the measure entails, why it is taken, and the circumstances in which it is taken. That information is appropriate and necessary to give context and relevance to the three matters on which the jury must be instructed under the section.

[55] In this case, the information about the measure that was given, was accurate. Importantly, clear and simple instructions were given which accurately addressed each of the three matters set out in s 21AW(2)(a), (b) and (c) respectively. In light of these instructions, it cannot be reasonably said that the jury, in disregard of them,

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46 AB195.
47 AB196, 197, 216-218 and 221-222.
48 Written submissions paragraph 73.
49 *Ibid*, paragraph 74.

might have speculated in the way suggested by the appellant. Further, the reference to a possible momentary sighting of the appellant is explained by his fleeting appearance on the s 21AK recording and a concern on the part of the learned trial judge to link that event to the instructions she was about to give.

[56] This ground of appeal lacks substance.

Disposition

[57] As no ground of appeal has succeeded, this appeal must be dismissed.

Order

[58] I would propose the following order:

1. Appeal dismissed.

[59] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

[60] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Gotterson JA.