SUPREME COURT OF QUEENSLAND

CITATION:	*R v Miller* [2007] QCA 373
PARTIES:	**R** **v** **MILLER, Mark Alan** (appellant)
FILE NO/S:	CA No 183 of 2007 DC No 687 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	Orders delivered ex tempore on 23 October 2007 Reasons delivered on 2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2007
JUDGES:	Williams and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where appellant convicted of sexual assault – whether learned trial judge erred in refusing leave to cross-examine complainant about previous complaints of sexual assault – where trial adjourned for six weeks – whether length of adjournment gave rise to miscarriage of justice *Criminal Code1899* (Qld), s 592 *Criminal Law (Sexual Offences) Act 1978* (Qld), s 4 *R v Hally* [1962] Qd R 214, considered *R v Tichowitsch* [2006] QCA 569; CA No 280 of 2006, 22 December 2006, considered
COUNSEL:	S J Hamlyn-Harris for the appellant B G Campbell for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The circumstances resulting in this Court allowing the appeal, setting aside the convictions, and ordering a new trial of the counts of sexual assault are fully set out in the reasons for judgment of Keane JA. There is nothing I wish to add to what he has written about the refusal of the trial judge to permit cross-examination of the complainant as to prior complaints alleging sexual interference.

[2] I also agree with what Keane JA has written about the consequences of the adjournment for some six weeks in the course of the trial. Because the point is novel it is desirable that I add some observations of my own.

[3] There is no doubt that a trial judge has power to adjourn a criminal trial at any time after the accused has been put in charge of the jury, at least up until the jury retires to consider its verdict. There may be many causes for such an adjournment; illness, unavailability of a witness, and weather conditions not permitting a juror to get to the court are but a few examples of why such an adjournment may become necessary. The only constraint on the length of the adjournment is, in my view, that it cannot be so long as to prejudice the fair trial of the accused. Gibbs J in *R v Hally* [1962] Qd R 214 at 220 said it was "right to emphasise that as a general rule once a jury has been empanelled and the hearing of evidence has commenced it is most undesirable that there should be any prolonged adjournment of a criminal trial." Those remarks were made in the context of an adjournment of two weeks because of the illness of the trial judge. Orality is a fundamental feature of a criminal trial and most, if not all, criminal trials involve at least to some extent an issue as to credibility. Where such an issue is involved it is of critical importance that the jury be in a position to resolve the matter fairly as between prosecution and defence.

[4] Whether an adjournment prejudices the fair trial will be a question to be answered in the context of each case. Where, for example, a trial lasted for about 12 months an adjournment for six weeks at an early stage and before most of the evidence was led may not result in an appellate court ruling that the defendant was deprived of a fair trial. But, in my view, the position would ordinarily be different where the adjournment for six weeks occurred in the course of what would otherwise be a six day trial.

[5] My searches have not revealed any authority on the point. All references to an adjournment in the context of a criminal trial relate to the question whether or not the refusal of an adjournment was prejudicial to the accused. That strengthens in my view the conclusion that an adjournment of six weeks in the course of this trial rendered the trial unfair. There was, at best, the potential danger that the jury would be unduly influenced by the evidence they heard after the adjournment which was potentially damaging to the credit of the appellant.

[6] It is true that the learned trial judge provided the jury with a copy of the transcript of evidence for use during their deliberations. This Court in *R v Tichowitsch* [2006] QCA 569 recognised that in certain circumstances, and subject to conditions, a jury could be provided with some or all of the transcript of proceedings. But nothing in that case authorises trial by transcript and there was a real danger here that, given the length of the adjournment, the jury gave more weight to the recorded evidence than their evaluation of the critical oral evidence, particularly from the complainant.

[7] It was for those reasons that the Court ordered at the conclusion of oral argument that there had to be a retrial on the counts on which the appellant was found guilty.

[8] **KEANE JA:** On 12 July 2007, the appellant was acquitted by a jury of one count of indecent assault with a circumstance of aggravation and one count of rape, and was convicted on the alternative counts of sexual assault in each case. On the following day, he was sentenced to two years imprisonment.

[9] The appellant's trial began on 28 May 2007. On 1 June 2007, the fifth day of the trial, the learned trial judge adjourned the trial to 11 July 2007. At this stage, all available evidence for each side had been given. The adjournment was granted to afford the Crown the opportunity to adduce rebuttal evidence.

[10] The appellant appealed against the convictions and against the severity of his sentence. The appeal was heard on 23 October 2007. After hearing argument, the Court allowed the appeal and set aside the convictions and ordered a new trial of the counts of sexual assault. I now proceed to give my reasons for this decision. I shall discuss the grounds of appeal against the convictions after first setting out briefly the circumstances of the trial.

The evidence

[11] The complainant's evidence was that she had known the appellant and his wife, who were her next door neighbours, for a couple of months before the alleged offences occurred. The appellant and his wife owned two Maltese terriers, and the complainant would, from time to time, play with the dogs and take them for walks.

[12] On 31 January 2005, the complainant took the dogs for a walk. Afterwards, she watched TV in the appellant's lounge room. She was playing with the dogs and put one of the dog leads on her dress strap. According to her, the appellant grabbed the lead and said to the dogs: "look, I'm taking [T] for a walk." She walked a bit and then took the dog lead off her dress strap. She said that she noticed that he then "started to become a sexual monster". He said: "Let me see your boobies." She said: "No." He was pulling at her dress while she tried to push him away.

[13] According to the complainant, the appellant then carried her into his bedroom and dropped her on the bed. At this point, she was saying: "No, stop it." He took her dress off and pulled her underwear down to her ankles. He touched her vagina and breasts. He bit her on the breast. She said: "He was trying to get his fingers up inside and rubbing the clitoris area." She kept saying: "Don't. No, Stop it." She also said that he "had his mouth down there sucking the vaginal area as well." The circumstance of aggravation of indecent assault to which I have referred was the alleged bringing part of the complainant's genitalia into contact with the appellant's mouth. He stopped suddenly when he heard a noise. He got up, threw her dress at her and said: "Here, get dressed".

[14] The complainant said that she put her dress on, and then found the appellant outside on the patio with his wife's son. They spoke to him for a while before he left. After the wife's son left, the appellant said that he had to go to the toilet. While he was in the toilet the telephone rang, and the appellant told the complainant not to answer it. She did not answer it.

[15] The complainant said that the appellant asked if he could come to her unit to borrow some videos. At her unit, he started to turn into "a sexual monster again". He

picked her up, carried her to her bedroom and dropped her on the bed. He tried to rip her dress off. He pulled her underpants off. He grabbed her breasts. She said that he put two fingers up inside her which hurt her "because he had really long nails and he was really rough".

[16] The complainant said that he "all of a sudden" stopped what he was doing. She got off the bed and he said that he was sorry and should not have done it.

[17] After the appellant left her unit, the complainant went to the house of her friend, J, and told J and B what had happened.

[18] At about 8.15 pm on 31 January 2005, the complainant was examined by Dr Roslyn Loudon. Dr Loudon made a note that the complainant told her that she had jokingly put a dog's lead around the strap of her dress and told the appellant that he could take her for a walk. Dr Loudon noted that the complainant was a little tender and sore in the breasts, at the right lower rib margin and just above the pubic area. There was no visible evidence of injury to these areas. There were some minor abrasions and bruises which the complainant did not think were related to the assault. A genital examination found a very superficial laceration just outside the right labium minus, and a six millimetre laceration in the fossa navicularis.

[19] Dr Loudon said that the six millimetre laceration was consistent with the forceful penetration of the vagina by a finger or fingers. Dr Loudon could not be certain that these abrasions had been caused that day, and could not exclude the possibility that they were the result of masturbation.

[20] J and B each gave evidence that, on the afternoon of 31 January 2005, they were walking past the appellant's house and saw the complainant, the appellant and another man on the veranda of the appellant's house. They said that later in the afternoon the appellant, in a distressed state, told them that she had been assaulted by the appellant. They called the police.

[21] One of the investigating police officers said that the complainant told her that the appellant "put his penis inside [her]".

[22] The appellant did not participate in an interview with the police.

[23] The appellant gave evidence. He denied all suggestion of sexual contact, but said that the complainant had taken her clothes off in his house without warning prior to the arrival of his wife's son.

[24] The appellant's wife gave evidence that she made a phone call to her residence on her mobile phone from a bus which she said she boarded at 3.57 pm on 31 January 2005. This call was not answered. She got off the bus a couple of minutes after 4.00 pm and made a further phone call to her residence a couple of minutes after that. It seems to have been common ground that the second call was made at 4.06 pm on 31 January 2005. The appellant answered this call, and about a minute later picked her up from a friend's house. This evidence was led on the basis that it tended to show that it was improbable that the appellant was in the complainant's unit with her as she alleged.

[25] This evidence was, it was common ground, alibi evidence for which no previous notice had been given to the prosecution. As a result, leave of the court was

necessary to enable it to be led by virtue of s 590A of the *Criminal Code*. Leave was granted, but the Crown Prosecutor sought an adjournment to enable further enquiries to be made in relation to telephone records relating to the timing of the telephone calls. The length of the adjournment was dictated largely by the convenience of jurors. This adjournment was not opposed by counsel for the appellant; and no application was made by the defence to discharge the jury because of the length of the adjournment.

[26] When the trial resumed on 11 July 2007, the Crown called further evidence the effect of which was that no calls had been made on the appellant's wife's mobile phone or received at the appellant's house anywhere near the relevant time on 31 January 2005. This evidence did not account for the unanswered phone call which both the complainant and appellant agreed occurred on that day. Further, the evidence of the bus schedule showed that, even if the appellant's wife did call home as she alleged, there was a period of 15 minutes when the second offence could have occurred.

The grounds of appeal

[27] At the hearing of the appeal, the appellant was given leave to amend his grounds of appeal. Those grounds are as follows:

> "1. The convictions are unsafe and unsatisfactory and not according to law;
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> 2. The learned trial judge erred in not permitting the appellant's counsel to cross-examine the complainant about prior complaints by her of sexual offences.
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> 3. The adjournment of the trial for almost six weeks gave rise to a miscarriage of justice and was not authorised by law."

[28] In relation to ground 1, the appellant advanced only the arguments agitated under grounds 2 and 3, and relied upon those arguments to support ground 1. I turn now to consider the arguments advanced in relation to those grounds.

Cross-examination of the complainant

[29] At the beginning of the trial, counsel for the appellant sought leave under s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) ("the Act") to cross-examine the complainant about two previous complaints of sexual assault by the complainant. These complaints were said to have been made in 2000 and 2002. Neither complaint resulted in a prosecution; but, in the first complaint, the perpetrator could not be identified, and, in the second case, the complainant did not wish to proceed after speaking with police. The application was refused by the learned trial judge on the footing that there was no material to suggest that the complaints were false.

[30] On the following day, after the complainant's evidence had been completed, the jury sent a note to the trial judge in which they asked whether the complainant suffered a mental or physical disability. The Crown Prosecutor observed that it was obvious that the complainant suffered from some form of disability.

[31] On the third day of the trial, counsel for the defence renewed the application to cross-examine the complainant about previous complaints. This application was based upon medical material newly obtained on subpoena by the defence relating to previous complaints of rape by the complainant. The complainant was then examined on a *voir dire* in relation to the application. The complainant maintained

that her complaints were genuine. She was unable to recollect the details of some of the incidents in question.

[32] The appellant's renewed application to cross-examine the complainant in respect of her past complaints was refused again on the bases that, to the extent that the complainant could not remember details of the complaints, her lack of recollection was genuine, and that, in any event, there was no suggestion that the complaints were false. The complainant was described by the learned trial judge as a mildly intellectually disabled woman, and her Honour concluded that the line of questioning which the defence wished to pursue could not materially impair confidence in the reliability of the complainant's evidence.

[33] After the learned trial judge's second ruling, the jury sent a further note enquiring about the complainant's mental capacity.

[34] The appellant argues that the learned trial judge erred in failing to allow the complainant to be cross-examined in relation to allegations of rape previously made by her. The appellant contends that the jury may have had unresolved concerns about the complainant's credibility based on concerns about her mental state. It is said that the appellant's counsel should have been allowed to cross-examine the complainant to enable the jury to come to a better view of the complainant's reliability.

[35] Section 4 of the Act provides as follows:

> "**Special rules limiting particular evidence about sexual offences**
> The following rules shall apply in relation to any examination of witnesses or trial in relation to a sexual offence whether or not the examination or trial relates also to a charge of an offence other than a sexual offence against the same or any other defendant—
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> 1. The court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity.
> 2. Without leave of the court—
> (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person;
> (b) evidence shall not be received as to the sexual activities of the complainant with any person.
> 3. The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.
> 4. Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons must not be regarded as having substantial relevance to the facts in issue only because of any inference it may raise about general disposition.
> *Example of inference about general disposition—*
> An inference that the complainant, because of having engaged in conduct of a sexual nature, is more likely to have consented to the conduct involved in the offence.

> Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in which such an offence was committed shall be regarded as having substantial relevance to the facts in issue.
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> 5. Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons is not proper matter for cross-examination as to credit unless, because of special circumstances, the court considers the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.
> The purpose of this rule is to ensure that a complainant is not regarded as less worthy of belief as a witness only because the complainant has engaged in sexual activity.
>
> 6. An application for leave under rule 2 shall be made in the absence of the jury (if any) and, if the defendant so requests, in the absence of the complainant and shall be determined after the court has allowed such submissions or evidence (sworn or unsworn) as the court considers necessary for the determination of the application."

[36] It may be noted that this provision has nothing to say about a line of questioning directed to establishing that a complainant has previously made complaints of sexual offences where no sexual conduct occurred at all. A line of questioning to the effect that a complainant has in the past made complaints about imaginary incidents offends neither the spirit nor the letter of s 4.[1]

[37] In the present case, however, the complaints about which the defence sought to cross-examine the complainant concerned sexual activities involving the complainant which had occurred, the issue being whether that activity was consensual. Accordingly, the line of questioning which the defence wished to pursue could be pursued only by leave.

[38] In the absence of some basis on which it could have been suggested to the complainant that her complaints of non-consensual sexual activity were false, the questioning would not tend to impair the jury's confidence in the testimony of the complainant. In saying this, I am not suggesting that the defence needed to be in a position to lead evidence to prove the falsity of her earlier complaints; rather, I am saying that the material which gave rise to the proposed line of questioning did not support the making of such a suggestion to the complainant, and no such suggestion was made to her. Accordingly, the learned trial judge did not err in refusing leave to pursue the line of questioning which the appellant's counsel wished to pursue. This line of questioning was simply not shown to be apt rationally to impair the confidence of the jury in the complainant's credibility.[2]

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1 Cf *R v MAG* [2004] QCA 397 at [20] – [25].

2 *R v Tribe* [2001] QCA 206 [31] – [35]; *R v MAG* [2004] QCA 397 [24] – [26].

[39] Accordingly, in my respectful opinion, the learned trial judge did not err in refusing leave to cross-examine the complainant in respect of her previous complaints.

The adjournment of the trial

[40] The learned trial judge took the view that s 592 of the *Criminal Code* empowered her to grant such an adjournment. That section permits a trial to be adjourned whether or not evidence has been given. The length of the adjournment was explained by the learned trial judge's concern to meet the convenience of jurors.

[41] The appellant's counsel at trial did not oppose the adjournment of the trial from 1 June until 11 July or seek an order discharging the jury by reason of the length of the proposed adjournment.

[42] The appellant contends that an adjournment of the length granted was not authorised by s 592 of the *Criminal Code,* and that it gave rise to a serious risk of prejudice in this case because of the possibility that jurors would either suffer a loss of recall of the evidence or come to a firm view about the guilt of the appellant without the benefit of the learned trial judge's instruction and without the benefit of an address from defence counsel.

[43] The language of s 592 is not confined to any particular time frame; it expressly contemplates an adjournment after the giving of evidence has commenced. Generally speaking, of course, once evidence has been given, it is most undesirable that there should be a lengthy adjournment of a criminal trial.[3] In the present case, however, it was obviously a matter of some significance that the occasion for the adjournment was a breach by the appellant of the requirements of s 590A of the *Criminal Code* in relation to notification of evidence of alibi. It was undesirable that all the witnesses who had given evidence should be called to give evidence again. It is understandable that these considerations weighed heavily with the learned trial judge. The further evidence which the Crown sought to obtain was unlikely to be contentious and was likely to show whether or not the alibi evidence given by the appellant's wife was reliable. It was desirable, in the interests of justice, that the alibi issue, having been raised by the defence, should be resolved on the basis of all available evidence, and that the defendant should not be allowed to steal a march by failing to comply with the law.

[44] Insofar as the appellant's objection is put on the basis of a risk of prejudice to the appellant by reason of the length of the adjournment, it was agreed that the jury should be provided with an indexed transcript of the evidence.[4] The learned trial judge was, no doubt, strongly influenced by the absence of objection from the appellant's counsel at trial. The appellant's counsel could have sought to have the jury discharged when the length of the proposed adjournment became apparent. The appellant's counsel at trial did not do so, apparently on the basis of a forensic judgment that the balance of forensic advantage lay with the continuation of the trial. That judgment was not unreasonable. If no rebuttal evidence could be obtained by the Crown, the defence would have had the advantage that the last evidence the jury would have heard was the evidence in the defence case, and, in those circumstances, the evidence of alibi would have been compelling.

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3 *R v Hally* [1962] Qd R 214.

4 Cf *R v Tichowitsch* [2006] QCA 569 at [2] – [18].

[45] All this having been said, however, the period of delay in the trial occasioned by the adjournment was without precedent in the experience of counsel who appeared on the appeal and, for that matter, in the experience of any member of this Court. One notes that in *R v Hally*,[5] Gibbs J regarded an adjournment for a period of 10 days as so long as to give rise to a real concern as to the integrity of the process of trial by jury. In my respectful opinion, in this case, the dislocation of the trial process by an adjournment of six weeks, and the likelihood that the members of the jury would be affected, so far as their recollection and appreciation of the evidence is concerned, by the lapse of time and their intervening absorption in their own affairs, is such as to oblige this Court to hold that the adjournment was an irregularity in the trial process so serious as to warrant the conclusion that the appellant did not receive a fair trial.

[46] An essential feature of criminal trial by jury is that the jury should, so far as is practicable, focus its attention on the question as to the guilt of the accused and the evidence relating to that question without extraneous distractions from the time that the accused is put in charge of the jury until they are discharged from that important constitutional function. In cases where the accusations made against an accused person fall to be determined as a contest of word on word, the jury's decision will largely depend upon the impression made by the witnesses in giving their evidence. Where there has been a gap of six weeks between the completion of the evidence and the commencement of the jury's consideration of the evidence, some deterioration in the impression made on the jury by the witnesses is inevitable.

[47] Sometimes, in long trials, adjournments of several days may be inevitable, but, even in such cases, the essential character of the jury's role in listening to the evidence uninterrupted by outside concerns and weighing the evidence, in accordance with the trial judge's instructions, is preserved. In this case, there was a gap of six weeks between the completion of most of the evidence and the resumption of the hearing when the evidence was completed and the jury were instructed by the learned trial judge as to the legal parameters within which their consideration of the evidence was to take place.

[48] This Court's decision in *R v Tichowitsch*,[6] recognised that, in some circumstances, it may be desirable to provide the jury with transcripts of the evidence as an aid to recollection and comprehension. Nothing in that decision offers any support for the view that the provision of transcripts of evidence can be regarded as a substitute for the impressions made by the witnesses upon the jury.

[49] It is also of importance in this case that the only evidence the jury heard after the six week break was the evidence which was largely destructive of the appellant's alibi. It can be said that the destruction of the alibi was no more than justice required, but, on the other hand, after a delay of six weeks, the jury could well have regarded the destruction of the alibi as decisive of the case. In this respect, the delay was apt to prejudice the fair trial of the appellant because the evidence of the complainant, and any questions which the jury may have had as to its reliability, had long receded from their focus as they went about their daily lives. In this way, it seems to me the accusatory character of the criminal trial was compromised by the length of the adjournment.

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5 [1962] Qd R 214 at 220.

6 [2006] QCA 569.

[50] I emphasise that I am dealing solely with the circumstances of the present case. While one must accept the force of the considerations which led the learned trial judge to adjourn the trial rather than discharging the jury, the principal concern of this Court must be to ensure that the appellant was not convicted otherwise than following a fair trial. In the end, I am constrained to conclude that the lapse of time between the giving of evidence of the complainant and the appellant and the verdict of the jury is so inconsistent with the essential character of a criminal trial as a meaningful confrontation before the jury of the accuser and the accused, that the appellant did not receive a fair trial.

[51] Because this was not, and could not be said to be, a case in which it is open to this Court to uphold the conviction by reference to s 668E(1A) of the *Criminal Code*, the convictions must be set aside and a new trial ordered.

[52] For these reasons, I considered that the appeal should be allowed, the convictions set aside, and that there should be an order for a new trial of the charges of sexual assault.

[53] **PHILIPPIDES J**: I agree with the reasons for judgement of Keane JA and the orders proposed. As regards the question of the adjournment of the balance of the hearing of the trial, while the issue of what is appropriate in terms of an adjournment so as to ensure a fair trial is a matter to be determined on the facts of each case, I agree that in the present case, the lengthy adjournment in the circumstances that appertained inevitably had the effect of altering the essential accusatory nature of a criminal trial, with its focus on oral evidence and the impression gained of the witnesses, to one where there was a real prospect that the transcript of evidence would be resorted to in substitution of the oral evidence and that the jury's impression of the witnesses would be obscured. This is of particular concern in a case such as the present one where credibility featured prominently and had the effect that the integrity of the criminal trial process was so disrupted that a fair trial could not be ensured.