SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beattie* [2008] QCA 299
PARTIES:	**R** **v** **BEATTIE, Kenneth John** (appellant)
FILE NO/S:	CA No 314 of 2007 DC No 510 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	30 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2008
JUDGES:	Holmes JA, Wilson J and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Convictions set aside and new trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS – IRREGULARITIES IN RELATION TO JURY – PARTIALITY – where juror made comments in court – where appellant argued at trial that the comment indicated a promise to find the defendant guilty, but did not ask for the jury to be discharged – whether the jury should have been discharged – whether comment would have caused in a fair-minded observer a reasonable apprehension that the juror would not discharge his task impartially CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – where appellant was convicted of one count of attempted indecent dealing with an intellectually impaired person and five counts of indecent dealing with an intellectually impaired person – where learned primary judge in his summing up, emphasised that the jury must deal with each count separately – where

learned primary judge did not summarise the evidence relating to each individual count – whether the learned primary judge's directions were appropriate – whether the learned primary judge sufficiently explained 'attempt'

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where learned primary judge failed to direct as to the meaning of 'attempt' – where learned primary judge, at the commencement of the trial, made comments to the jury about sentencing and costs orders – where irregularities in the identification and retention of documents – where uncertainty as to whether the jury had been given the correct version of transcripts of interviews given under s 93A of the *Evidence Act* 1977 (Qld) – where prejudicial evidence relating to the appellant's drug use inadvertently placed before the jury – whether learned primary judge gave a sufficient warning as to the credibility of the complainant's evidence – whether a miscarriage of justice occurred

Criminal Code 1899 (Qld), s 4, s 671J
Evidence Act 1977 (Qld), s 53, s 93A, s 102

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
R v Dunrobin [2008] QCA 116, distinguished
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
R v Schneiders [2007] QCA 210, cited
R v TQ (2007) 173 A Crim R 385; [2007] QCA 255, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, applied
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, cited

COUNSEL: D C Shepherd for the appellant
M J Copley for the respondent

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

[1] **HOLMES JA**: The appellant stood trial on one count of attempted indecent dealing with an intellectually impaired person under his care and six counts of indecent dealing with an intellectually impaired person under his care. All of the charges related to the same complainant. At the close of the Crown case, the circumstance of aggravation, that the complainant was under the appellant's care, was removed from the jury's consideration. The appellant was convicted of the attempted indecent dealing and all but one of the indecent dealing counts.

The appeal grounds

[2] The appellant appealed against his conviction on four grounds: the first three of which were that the learned trial judge erred in failing to discharge the jury when, during the course of the trial, a juror spoke to the Crown Prosecutor; that the trial judge failed to identify the evidence concerning each individual count and to relate the law to that evidence; and that inadmissible evidence, concerning the appellant's drug use and whether he had indecently assaulted one of the complainant's sisters, was led. The fourth embraced a number of points; it was that errors occurring throughout the trial – the raising of sentencing and costs issues with the jury, a failure to ensure that documents given to the jury were properly identified and placed on record, a failure to instruct the jury about attempt and a failure to instruct in terms of s 102 of the *Evidence Act* 1977 (Qld) – had, in combination, produced a miscarriage of justice.

The Crown case

[3] The complainant, S, was a 15 year old girl. She was, there was no dispute, intellectually impaired. A psychologist who gave evidence said that on psychometric testing, S had an "extremely low" full scale IQ score of 59; which meant that she would have limited cognitive abilities, learning difficulties, and problems with comprehending situations of any complexity. S lived with her mother and two sisters in a cabin at a caravan park. The appellant, a truck driver, was her mother's boyfriend and visited the family at the cabin, occasionally staying overnight.

[4] The Crown case was based primarily on S's account in two interviews with a police officer. In those interviews, S said that on one occasion she saw the appellant lying on her mother's bed, with his erect penis obvious beneath his shorts; he and her mother urged her to touch it (count 1, the attempted indecent dealing). S refused and left the room. On another occasion, S was called into the bathroom, where she found the appellant naked. Her mother took her arm and forced her to hold the appellant's penis (count 2). On a third occasion, while the appellant was lying on the bed, S's mother moved S's hand up and down his penis (count 3) until it became erect; then her mother took over the activity. In a fourth instance, the appellant and S's mother instructed her to masturbate the appellant to ejaculation. S began the process (count 4) and then stopped. While S watched, her mother performed oral sex on the appellant (count 5); then S resumed masturbating him until he ejaculated. Count 6 related to the appellant's shaving of S's pubic area; he had told her it was necessary to prevent insects getting in her vagina. Count 7 (of which the appellant was acquitted) concerned an allegation that he had put two fingers between S's buttocks.

The sequence of S's disclosures

[5] In February, 2005 the police and Department of Child Safety received some information concerning possible sexual abuse of S. It led to an interview of her on 11 February 2005 in which she made some complaints of a person named "Ricky" and of her natural father, but when questioned about the appellant made no complaints and said that he treated her very well. At that stage S was removed from her mother's custody and placed into foster care. She was re-interviewed on 22 March 2005 and again made no allegation against the appellant.

[6] From the end of April 2005, S had regular counselling sessions with a Lifeline counsellor. On 5 May 2005, she said that her mother's boyfriend had made her "do

stuff to him" on two occasions. On 2 June 2005 she informed the counsellor that the appellant had assaulted her four times; on each occasion her mother had been present and encouraged her to comply with the appellant's demands. Over the same period, S was enrolled in a special education unit attached to a state high school. On 25 May 2005, she told a teacher's aide at the unit that her mother had twice told her to "wank" the appellant. A week later she said that the appellant had showed her how to shave her pubic hair.

[7] At about the same time, S told the case officer assigned to her by the Department of Child Safety that the appellant had made her have sex with him, so that she was afraid of contracting AIDS, and that he had made her shave her pubic hair off. Shortly after, S informed the guidance officer at the school that she had twice been made to touch the appellant's penis, and on another three to five occasions been instructed by her mother and the appellant to "wank" the appellant. In July 2005 there was another conversation with the teacher's aide, in which S said that she had been made to shave her mother's vaginal area and to touch the appellant's penis and testicles. On four occasions, S said, her mother had put her hand on hers to help her in touching the appellant's penis. The appellant had shaved her pubic area and had said that he wanted to have sex with her.

[8] As a result of those disclosures, S was re-interviewed by the investigating officer on 24 June and 13 July 2005 and made the complaints (summarised in [4] above) on which the counts on the indictment were based. The recordings of those interviews, as well as the earlier interviews in which S made no allegation against the appellant, were tendered at the trial pursuant to s 93A of the *Evidence Act*.

The pre-recorded evidence

[9] S's evidence was pre-recorded at a hearing on 18 October 2007. She was not asked in evidence in chief to expand on what was contained in the records of interview, but was cross-examined, with mixed results. S agreed that she had told the police in the first two interviews that the appellant had never done "anything bad to her", and that was the truth; that the appellant had never sexually interfered with her, and that, too, was the truth. But when the cross-examiner, not content with those concessions, asked why, in later interviews, S had told the police that the appellant did sexually interfere with her, she asserted that he did. Subsequently, though, she agreed with the proposition that the appellant had never made her touch him sexually. S accepted that the shaving incident occurred after she had been given a new pair of togs and the appellant advised her to shave her bikini line; but she maintained that he did not permit her to do so and instead shaved her himself.

[10] S was asked a number of questions about her counselling sessions at Lifeline, commencing in late April 2005. She agreed that she had not made any allegation against the appellant in her first session. In the next counselling session, on 5 May, she had told the counsellor that her mother had falsely told her that she (S's mother) had been raped by S's natural father. S then regarded her mother as a liar and untrustworthy and believed that she had prevented her having a relationship with her natural father, with whom she now wanted to live. It was at that stage, she agreed, that she made complaints to the counsellor about the appellant; but she maintained that her allegations were true. She denied telling her case officer that the appellant had had sex with her, or that she was concerned about AIDS. One of her sisters was living with her father, and S was anxious to prevent her mother regaining custody of that sister because she believed she was happy where she was;

but she reiterated that what she had said about her mother and the appellant was true.

The evidence of S's mother

[11] S's mother, Ms T, pleaded guilty to six charges, based on the same events as Counts 1-6, and gave evidence at the appellant's trial. She said that she had seen the appellant on a visit to the cabin tickling S and asking her what aroused her. On one occasion he had taken S's hand and made her touch his groin while giving her instructions on how to masturbate him. On another occasion he had told S to shower, and had then started to shave her groin before giving her instructions on how to complete the process.

[12] Under cross-examination, Ms T agreed that when she was questioned by the police in February 2005 she said that nothing had happened between the appellant and S. She said, by way of explanation, "I probably blanked everything all out". Ms T admitted that over a long series of sessions with the Lifeline counsellor she had denied that anything untoward had taken place between the appellant and S. She had made similar denials of knowledge of any abuse of S by the appellant in an interview with a psychiatrist in May 2007 and another interview with a psychologist in August 2007. She agreed that during the counselling sessions, S had threatened to end contact with her unless she gave evidence against the appellant.

[13] Ms T conceded that in her statement to the police, made some six weeks before the trial, she did not claim to have actually seen the incident of S showering and being shaved; rather she had said she heard S protesting that she could shave herself. But she maintained under cross-examination she had seen the events described in her evidence in chief. She was adamant, however, that she had never herself participated in any sexual assault by the appellant on S; she denied telling her daughter to touch the appellant's penis, forcing her hand on to his penis, showing her how to masturbate him, or herself performing fellatio on or masturbating him.

The juror's comment

[14] At the close of the Crown case, the appellant was called on, and his counsel indicated that he would not give or call evidence. The trial judge then adjourned the court at 12.52 pm, a little before the usual lunch break. Immediately after the jury left the court room, defence counsel advised the judge that one of the jurors had "just directed a comment to this side of the Bar table", the comment being "we will pay the favour back". The prosecutor suggested that the comment was really directed at him and was about the early break; he observed that every time the juror walked past him, he seemed to say something. At the previous adjournment (during Ms T's cross-examination) he had made "a comment … about cruel inhumane treatment".

[15] Defence counsel observed that the last comment must have been directed at the defence, since it was made during cross-examination. The comment immediately before the lunch break suggested, he said, a promise to find the appellant guilty; but he did not contend that the jury ought to be discharged. The trial judge indicated that he did not think the juror's comment was of real moment. He proposed only to emphasise to the jury the importance of listening to counsel's addresses and the summing up.

[16] Counsel for the appellant contended that the later comment demonstrated a bias towards the Crown which would have led a fair minded and informed observer to have a reasonable apprehension of a lack of impartiality. The trial judge ought, it was submitted, to have discharged the jury.

[17] In my view, the trial judge was right to regard the juror's comment as trivial. Any notion that the comment amounted to a promise to convict the appellant was rather given the lie by his acquittal on the last count; but in context, it seems to have been nothing more than a flippant response to an early lunch break. I am reinforced in that view by the responses of those who heard it, including defence counsel at trial, who did not regard it as of sufficient consequence to seek to have the jury discharged. It was not, in my view, a comment which would have caused a fair-minded observer a reasonable apprehension that the juror would not discharge his task impartially.[1]

The failure to deal with the evidence and law in relation to each count

[18] Before commencing his summing up, the learned trial judge provided the jury with a document which set out, in point form, many of the standard directions given at the outset of a trial and identified the matters not in dispute. Under the heading "The real issues", it formulated the question for the jury as whether the prosecution had proved beyond reasonable doubt that the appellant had done the things alleged against him. The offences were referred to by count number. Count 1 was identified as an attempt to get the complainant to touch the appellant's penis; counts 2, 3 and 4 as the appellant forcing or allowing the complainant to masturbate him; count 5 as the appellant participating in oral sex in her view; count 6 as shaving her pubic hair; and count 7 as placing his fingers between her buttocks. In his summing up, the trial judge referred to the counts "particularised" in the document as the allegations to be considered, emphasising the need to deal with each separately. He did not traverse the evidence in relation to each. As to the law, his Honour instructed the jury as to the meaning of indecency in terms which are not controversial here.

[19] Counsel for the appellant submitted that it was incumbent on the learned judge to identify the evidence relating to each count, not merely to refer to the particulars provided by the prosecutor. He relied on this statement by McHugh J in *Fingleton v The Queen*[2]:

> "The key term is 'instruct'. That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts."

Counsel also referred to *R v Dunrobin*[3]. In that case Muir JA referred to McHugh J's statement in the context of a rape case, in which the trial judge had summed up on mistake without relating those instructions to the evidence which might support the defence. Here, counsel argued, the trial judge had failed to identify the law and evidence in relation to each count, an oversight which had caused a miscarriage of justice.

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1 *Webb v The Queen* (1994) 181 CLR 41.
2 (2005) 227 CLR 166 at 197.
3 [2008] QCA 116.

[20] The circumstances of this case were rather different from those in *Dunrobin*; there was no question of a failure to identify the evidence to support an excuse or defence. The prosecutor had in this case outlined the evidence relevant to each count in his address, and the judge sufficiently identified the relevant incidents to make it clear what each count concerned. There was no requirement for him to recount S's evidence on each count, and it is difficult to see how it would have been to the defence's advantage had he done so. That, no doubt, was also the perception of defence counsel at the trial, because no re-direction was sought. The case was one which turned on the credibility of S and her mother; that much was made clear to the jury. (Whether the issues were adequately identified in that regard is another question, better dealt with in the context of a later appeal ground.) The law relating to indecent dealing was identified; it was not incumbent on his Honour to reiterate seven times what constituted an indecent dealing. In respect of counts 2-7, I do not consider that any injustice was done by the form of the direction given.

[21] However, the first count on the indictment was the count of attempted indecent dealing, constituted by the appellant's urging S to touch his penis. The trial judge did not give the jury any instruction, in terms of s 4 of the *Criminal Code* 1899 (Qld), as to what constituted attempt. The circumstances of the alleged offence were not so clear and unequivocal that one could be confident that the jury must have convicted of the attempt, properly directed or not. It was conceivable, for example, that the jury might have thought the appellant's intention was to be provocative, rather than to procure any actual touching, yet considered that close enough to indecency to amount to attempt. The direction as to the elements of attempt was a necessary one; in light of the omission to give it, the conviction on count 1 cannot stand.

Cumulative errors leading to a miscarriage of justice

[22] The final ground complained of a number of individual matters which, it was said, in combination produced an unfair trial. Some can be shortly dealt with.

Failure to give attempt direction

[23] The first was the failure to direct on attempt. While I regard that omission as fatal to the conviction on count 1, I do not consider it to have had any consequence in respect of the remaining counts.

The checklist

[24] At the commencement of the trial, the judge gave the jury a checklist of points. It contains four headings "The basic principles", "The indictment", "The course of the trial" and "Being a juror". It is under the last of those headings that some curious points appear. The first five are:

> "The committal;
> The different roles of the Judge, Prosecutor and Defence Counsel;
> Sentencing by the Judge;
> Each Juror's role;
> Questions of law;
> No orders about costs".

In his introductory remarks, the learned judge advised the jury that it had no role in the sentencing process, unlike juries in some American states, and that whether there was an acquittal or conviction, there would be no costs order. I doubt the

need to make any mention of sentencing or orders about costs, or, indeed, of the committal, in the absence of any expressed anxiety by the jury about those matters; but I do not think his Honour's comments were at all likely to have had any adverse effect on the jury.

Failure to identify and retain documents

[25] Counsel argued that Rules 54 to 57 of the *Criminal Practice Rules* (which deal with custody and inspection of exhibits and ensuring that anything received in evidence at a trial is available for the appeal), s 53 of the *Evidence Act* (which provides, *inter alia*, for a document presented in a Court to be proved by its production) and s 671J of the *Criminal Code* (which requires documents and exhibits connected with proceedings to be held in the Court's custody) created a scheme for the protection of integrity of Court records; the obtaining of copies of documents from outside sources was an unsatisfactory substitute. If the fairness of a trial could not be tested because documents given to the jury were not retained, the trial could not be said to be fair.

[26] The way in which a number of documents shown to the jury were dealt with at the trial caused a good deal of confusion on the appeal. Some of the irregularities were of less consequence than others. The document given to the jury at the commencement of the summing up by way of written instructions was not marked for identification, but a copy was retained on the Court file. No copy of the checklist given to the jury at the onset of the trial was retained on the file. However, a copy of what was regularly given by the trial judge to juries was available and there was no dispute that its content reflected what, from the transcript, appears to have been in the document given to the jury here. A copy of the indictment was provided to each juror. Its form is unknown, because again a copy of it as provided to the jury was not retained on the file, but it is probable that it contained the charges without the formal parts.

[27] Presenting much more difficulty is the way in which the transcripts of the s 93A interviews were handled. There were four audiotapes, each with a corresponding transcript. Each member of the jury was provided with a copy of the transcript of the interview as it was being played, but was not permitted to take it into the jury room. In relation to each, another copy of the transcript was marked with the same exhibit number as the audiotape to which it related and was retained on the Court file. One at least, that for the interview of 13 July 2005 (marked Exhibit 4), did not correspond with the transcript which the jury was given. Some indication of that could be gleaned from a reference to it, in discussion between counsel and the trial judge, as a 59 page transcript, whereas the transcript marked as Exhibit 4 and placed on the file, subsequently finding its way into the appeal record book, consisted of 61 pages.

[28] Counsel made two points in relation to passages contained in the transcript marked as Exhibit 4. It contained this remark by S: "He is taking the white powder stuff. He was on drugs …". The Crown had sought to lead that allusion, together with another statement made by S to the teacher's aide to the effect that the appellant had tried to get her to use a small amount of drugs. The learned judge ruled against the admission of those references, and they were edited out of the audiotape which was Exhibit 4, but the transcript marked Exhibit 4 was not correspondingly amended. In a similar vein, the appellant complained that the same transcript contains a number of questions and answers about whether S saw the appellant having any kind of

sexual interaction with her sister. Again, the exchange does not appear in the audiotape which was played to the jury.

[29] At the Court's request, counsel for the respondent obtained an affidavit from the prosecuting counsel who appeared on the trial. He was able to locate an amended transcript on his office computer, and confirmed with his instructing clerk and defence counsel at the trial that it was the product of the negotiations between the defence and Crown. He expressed his belief that it was the transcript given to the jury. The reference to the appellant's having attempted to have sex with S's sister, which appears in the transcript in the appeal record and on which the appellant relied in arguing that inadmissible evidence was placed before the jury, has been deleted from that transcript, as has the reference to the appellant "taking the white powder stuff" and being "on drugs".

[30] Counsel for the appellant accepted what was contained in the prosecutor's affidavit, but pointed out that it was nonetheless a concern that a copy of the edited transcript given to the jury was not placed on the Court file and that a different document was marked as an exhibit and retained. The resulting inaccuracy of the Court record should, he said, be taken into account in considering whether a miscarriage of justice had occurred.

[31] In my view, the way the various documents were dealt with was unsatisfactory. Even after investigation there remained a level of uncertainty as to precisely what the jury had. In the result, the deficiencies in management of the documents, once explored and explained, clearly had not produced a miscarriage of justice. But the doubt engendered, and the effort required to dispel it, were unnecessary, and could have been avoided, had care been taken to ensure that the judge's associate was given an exact copy of anything the jury was given and also that a copy of every document given to the jury was marked (preferably for identification, to avoid confusion with the evidence) and retained.

Admission of prejudicial evidence

[32] Of greater consequence was the appellant's complaint about prejudicial evidence, in the form of another reference to drug use, inadvertently placed before the jury. In the argument as to the admissibility of the "taking the white powder stuff" remark, both counsel gave the trial judge to understand that it was the only reference in the interview of 13 July 2005 to drugs. In fact, it is common ground now that S made a further reference in the interview to "white powder stuff" in the context of describing a trip with the appellant to Sydney. It is agreed that on the audiotape which became an exhibit, she says:

> "… to have a taste of the white powder stuff in the truck … half way down to Sydney … had a problem with him taking it. He took it. He asked me if I want a little bit. I said No. He thinks I had a problem with it and I never did".

[33] That evidence plainly was prejudicial, suggesting as it did that the appellant not only took drugs but offered them to an intellectually impaired minor; although, surprisingly, it seems to have escaped the attention of counsel. Counsel for the respondent here did not seek to argue that it would have been properly admitted on any basis.

Failure to warn re S's evidence

[34] Counsel for the appellant argued that the trial judge ought to have instructed the jury in accordance with s 102 of the *Evidence Act*, which provides:

> "**Weight to be attached to evidence**
>
> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[35] The learned judge discussed his proposed directions with counsel before the summing up by reference to a draft of the document subsequently provided to the jurors. Counsel for the defence asked for a *Robinson*[4] warning in relation to S's evidence: that the jury be cautioned as to the need for care, given her intellectual impairment and the delay in and sequence of her disclosures, which came after two statements favourable to the defendant, and a number of interactions with persons in authority: police, Family Service officers and school personnel. Defence counsel also reminded the judge that in his cross-examination he had suggested to S that she had a motive to invent stories about the appellant in order to hurt her mother, who, she believed, had lied to her about her father. He asked the judge to direct the jury that it was not incumbent on the defence to establish a motive to lie. The learned judge, having considered the matter, indicated his view that no such direction was necessary.

[36] In his summing up, the learned judge reminded the jury that the conversation which S had with the school guidance officer and teacher's aide, the counsellor and the Family Services officer could be used in judging the credibility of her evidence and whether it was consistent or inconsistent. He drew the jury's attention to the written instructions, which said,

> "[S] is the key witness for the prosecution. Consider her evidence (and her mother's evidence) with particular care. Is it honest and reliable?"

He reiterated the need to take particular care in assessing S, who had an intellectual impairment and her mother, who "perhaps, was not too bright as well". He finished on the topic –

> "So all I am saying is in judging the evidence on them, because it is important, you will just take a lot of care about it and it is up to you, of course, what you make it."

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4 *Robinson v The Queen* (1999) 197 CLR 162.

His Honour then gave a *Markuleski*[5] direction, to the effect that a doubt as to S's truthfulness and reliability on any particular count should be taken into account in assessing her evidence on the remaining counts.

[37] Those were the only directions the trial judge gave about assessing S's evidence. He did remind the jury of counsel's submissions: that the prosecutor had pointed out that it was difficult for S, given her impairment, to give her evidence clearly and in the correct order, and that the amount of detail she had provided was not consistent with invention by someone with her intellectual limitations. Any inconsistency in her accounts was a product of her mental impairment rather than any dishonesty or unreliability. His Honour then traversed defence counsel's submissions: that the denials to the police in the first place cast doubt on S's reliability; it was possible that with multiple repetitions of a story in counselling and discussions with others, S had framed a story which she had come to believe; particular inconsistencies in her evidence cast doubt on her reliability; it was possible that the sexual detail she provided came from other sources; and there was a question as to whether she was manipulating her mother to force her to be a witness. Although the directions given did not seem to meet what defence counsel had asked for, no re-directions were sought.

[38] In *R v TQ*[6] Jerrard JA described the matters in s 102 as –

> "a statutory expression of the sort of matters relevant to the reliability and accuracy of a complainant's account, and requiring a warning to a jury, as referred to in *Robinson v The Queen* (1999) 197 CLR 162."

What s 102 required, he continued, was "directions to a jury to matters relevant to judgments by a jury on the reliability of a critical witness".[7]

[39] In *Robinson*, the High Court identified a number of features – the age of the complainant, the long period that elapsed before complaint, inconsistency in some aspects of the complainant's evidence and some aspects of the case which indicated a degree of suggestibility on the complainant's part – which, taken with the absence of corroboration

> "created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt".[8]

As Keane JA has observed,

> *"Robinson v The Queen* is authority, binding on this Court, for the proposition that a strong warning may be necessary to ensure fairness to the accused [in appropriate circumstances] even though the ramifications of these circumstances for the jury's assessment of the

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5 *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290.
6 (2007) 173 A Crim R 385.
7 (2007) 173 A Crim R 385 at 398.
8 *Robinson v The Queen* (1999) 197 CLR 162 at 171.

> reliability of the complainant's evidence may be as apparent to the jury as they are to the judge."[9]

[40] In the present case, there was some corroboration of S's testimony, in the evidence of Ms T. Her evidence, though, was of doubtful support, not least because her denial of any involvement in the offences was entirely at odds with S's account of the events (and also with the basis on which she had pleaded guilty to the same charges). In the absence of "objective, reliable confirmatory evidence to support the complainant's testimony"[10], a number of aspects of S's history and evidence did, in my view, require a strong and specific warning in this case: the way her complaint emerged, with initial denials of any wrongdoing by the appellant; the strong animus against her mother manifested in the counselling sessions; the inconsistencies in the complaints that she had made, such as her assertion to her case officer that the appellant had had sex with her, causing her to fear AIDS; and her apparent concessions in cross-examination.

[41] In the circumstances, I do not think it was sufficient for the learned judge merely to advise the jury to take particular care with S's evidence in light of her intellectual impairment, a broad direction which was capable of being regarded as an injunction to make allowances for her intellectual limitations, as the prosecutor had suggested. Nor was it enough to remind the jury of counsel's submissions. The learned judge ought, rather, to have brought the specific matters of concern to the jury's attention in warning them about the need closely to scrutinise S's testimony before relying on it to convict.

Proviso

[42] Counsel for the respondent submitted that, notwithstanding the placing of inadmissible evidence as to the appellant's drug use before the jury and the failure to warn in relation to S's evidence, the Court should apply the proviso and refrain from setting aside the convictions. He pointed out that the jury had acquitted on one count, so that it might be inferred that the reference to drugs had caused no prejudice. The Court in any case ought to be satisfied of the appellant's guilt. It was in as good a position as the jury to assess S's evidence, since it was available in video-taped form. That evidence was corroborated by Ms T's evidence, to some extent at least.

[43] But the value of that corroboration, was, as already mentioned, doubtful. I do not think, in any case, that this Court, not having seen Ms T, is in any position to judge whether a properly instructed jury would in fact have regarded her evidence as supporting S's account, or whether instead it might have been inclined to give some credence to the appellant's contention that she was influenced by S's threat to cut off contact if she did not give evidence.

Conclusion and order

[44] In my view, the placing of inadmissible and prejudicial material before the jury and the failure to give a warning to the jury of the need to scrutinise S's evidence with great care, in light of the features I have identified, resulted in a miscarriage of

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9 *R v Schneiders* [2007] QCA 210 at [15].

10 The expression used by Kirby J in his dissenting judgment in *Tully vThe Queen* (2006) 230 CLR 234 at 251-2.

justice. There is no occasion for application of the proviso. I would set aside the convictions and order a new trial.

[45] **WILSON J:** I respectfully agree with the reasons for judgment of Holmes JA, and with the orders she proposes.

[46] **DUTNEY J**: I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders she proposes.