SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBE* [2008] QCA 381
PARTIES:	**R** **v** **MBE** (appellant)
FILE NO/S:	CA No 151 of 2008 DC No 159 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2008
JUDGES:	Holmes and Muir JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Retrial ordered on all counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant convicted on five counts of rape of his de facto wife's daughter – where inconsistencies between evidence of child complainant and evidence of two other child witnesses to whom the complainant had reported the offences – where complainant's account was supported by evidence of complainant's mother – whether verdict unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – where s 21AW(2)(b) and (c) of the *Evidence Act* 1977 (Qld) provide that where a child witness' evidence is pre-recorded, the presiding judicial officer must instruct the jury that such evidence is not of increased or decreased probative value, and is not to be given greater or lesser weight because of its being recorded – where learned primary judge directed the jury that the evidence was not to be given lesser value because of its being pre-recorded, but did not direct against giving it greater value – where

learned primary judge directed the jury that the jury was not to discount the complainant's evidence because of her age – where respondent conceded that the direction did not meet the requirements of ss 21AW(2)(b) and (c) – whether a retrial should be ordered

Evidence Act 1977 (Qld), s 21AW(2), s 93A

R v DM [2006] QCA 79, cited
R v HAB [2006] QCA 80, cited
R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179, considered
R v SAW [2006] QCA 378, cited

COUNSEL: R A East for the appellant
D L Meredith for the respondent

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

[1] **HOLMES JA:** The appellant appeals against his conviction on five counts of rape of his de facto wife's daughter on unknown dates between 1st January 2001 and 28th February 2003. The appeal is on the grounds that the verdicts were unreasonable and that the trial judge failed to instruct the jury in accordance with s 21AW(2) of the *Evidence Act* 1977 (Qld).

The complainant's evidence

[2] The complainant child, S, was born in mid 1995, and was six or seven years old during the period covered by the charges. In 2001, she was living with the appellant and her mother in a house in the suburb of Kelso in Townsville; at the end of February 2003 they moved to another residence. S's account in a police interview given on 11 August 2005, and tendered at trial as a s 93A statement, was that on three separate occasions while they were living at the Kelso house, the appellant forced her to perform fellatio on him and on two of those occasions performed cunnilingus on her.

[3] On the first occasion, S said, she had got up at night for a drink. The appellant was lying on the couch in the lounge room watching television. S had gone back into her room when the appellant came in and took her into the lounge room. He pulled down his underpants and forced her to take his penis in her mouth (count 1). He was seated on the couch, she kneeling on the floor in front of him. He warned her not to tell her mother about it or he would hurt her badly. Then the appellant pulled down S's underpants and licked her genitals (count 2); she said that his tongue "went inside" and was "really stinging".

[4] The next morning, S said, she got up earlier than her mother, to find the appellant sitting naked in a chair in the lounge room. She wanted to watch television; he made her suck his penis before he would allow her to do so (count 3). Late that night, the appellant called her from her bed. Again, he was naked, sitting in a chair. He put some substance which she could not identify, but thought might have been vinegar, on his penis and made her suck it (count 4). Again, he performed cunnilingus on her (count 5; it was described by S in the same terms as for the previous occasion) and then told her to put her pyjamas on and get into bed.

S's preliminary complaint to her cousins

[5] S had been interviewed by the police once before, in January 2005, in connection with an alleged sexual assault by her uncle on her 14 year old female cousin, E; it was thought S might have been a witness. In the course of that interview she was asked general questions about whether anyone had committed any sexual offence against her and answered in the negative. Her first complaints against the appellant emerged in about June 2005, in a conversation with E when she was staying overnight at the latter's house. E's younger brother, J, aged 11, and two other male cousins were also present for part of the conversation; they were aged about 12 or 13.

[6] E's account given in a police interview on 16 August 2005, which also became a s 93A statement, was that the five children were about to get into the pool when S complained about a child at school who touched her bottom. One of the boys asked whether anyone else had done anything like that to her; before S answered, the boys were called away, but S told E there was someone else who did it and it was "a lot worse".

[7] E said that S expressed a reluctance to tell her any more, because she was afraid "bad things" would happen to her, and her young half-brother might be taken away. Finally, she told E that the person woke her up in the middle of the night, and took her out to the lounge room and told her to pull her pants down. He made her "play" with him; E understood that to mean masturbating him. E went on to say that S showed her "with her hands what she was doing". It seems that E demonstrated the action to the police officer, but, unfortunately, the interview was recorded on audio tape, not video tape. According to E, S said she was made to put something on the man's penis. As to what that substance was, E said, "I think it's moisturising cream she said".

[8] Invited to continue, E said, "I don't really remember most of it". E mentioned that her brother recalled S saying that the appellant made her give him a "head job"; she herself remembered "bits like about her saying something like that". These events happened in the middle of the night, before S's younger brother (who was three years old) was born, and it had stopped. E asked who was responsible, questioning S first about their uncle and about S's older brother, then asking whether a teacher was involved, before finally nominating the appellant. S nodded when the appellant was named. E also said that S told her that when S's younger brother was about six months old (that is, around the beginning of 2003), the appellant would lie down and make her sit on him and (as E put it) "do positions". He had asked S "if he could put anything in"; she had refused.

[9] The boys re-appeared and E made S repeat her account in front of them. E's younger brother, J, made a s 93A statement recorded on video tape, giving his recollection of the incident. He confirmed that the children were at the pool and that S first spoke to E. In his presence, S said that she used to get woken up at night and had to "grab the baby cream". The appellant used to do "all sorts of bad stuff"; he "made her play with his thing". J said he was "not sure if he put anything in". When he was asked why he said that, J responded, "[s]he never said". The police officer went on to ask whether someone had asked S about that topic. J responded that E had asked whether the appellant "put anything in her", but he could not remember the answer. S had not described what happened in any more detail, nor had she demonstrated what she meant. The appellant had threatened that he would

"do something" if she disclosed what had happened. These events happened in the lounge room in the middle of the night.

The pre-recorded evidence of S, E and J

[10] S was cross-examined at a pre-recorded hearing. She was asked some questions about her original interview with a police officer in January 2005 (in relation to E's complaint of sexual assault). She agreed that, in that interview, she had made complaints of the appellant hitting her and fighting with her mother. In response to a question by the police officer, she had said she did not feel safe with the appellant when he was in a bad mood, but this was because he was mean to her, "roused" on her, made her stay in her room and made her go to bed early. S was asked by the cross-examiner why she had not mentioned in that interview any other misconduct by the appellant, and said that she was "still a little bit scared" of him at that time.

[11] S said she did not know what the expression "head job" meant. She did not remember telling E or the boys that the appellant had made her grab hold of his penis and move it backwards and forwards, or that he put moisturising cream on her hand and made her rub his penis; although she thought by "moisturising" she might have meant the vinegar which the appellant put on his penis. She had not told the other children that the appellant lay down and made her sit on him. It would not have been true to say any of those things. S maintained that what she had told her cousins was the same as what she had told the police officer. She did not know anything about the alleged sexual offence against E before she had the conversation in the pool with her cousins.

[12] S agreed that she did not like the appellant. He was a disciplinarian who sometimes smacked her, and on occasions had physical fights with her mother; she was afraid he might kill her mother. She agreed she wanted the appellant and her mother separated and "would have done just about anything to get [the appellant] out of the house". That extended, she agreed, to "making up stories about him that weren't true". On the other hand, S confirmed that everything she had told the police officer was "definitely true".

[13] E and J were also cross-examined in pre-recorded hearings. E agreed that S had described to her "a hand job with some moisturiser". S had described masturbating the appellant using moisturising cream, demonstrating a hand motion as she did so. The motion was consistent with moving a hand around a penis, pulling it backwards and forwards. S had not used the words "hand job" or "masturbation"; she had said that the appellant had made her play with his penis. E confirmed that S said the appellant made her lie down with him and sit on him, but she said S had not demonstrated what happened and the expression "do positions" was E's interpretation. It was put to her, and she agreed, that she had asked S "if he had put anything inside of her", and S had answered in the negative. E did not think S was aware of the sexual assault against her, E. J, in his cross-examination, confirmed that the only incident S told him about was that she had given the appellant a "hand job" (counsel's words) using cream or moisturiser.

Other evidence at trial

[14] S's mother, Mrs R, and S's older brother, B, gave evidence at the trial. Mrs R said that she collected S from the sleepover in June 2005 and had a conversation with

her sister-in-law when she arrived. Driving home, she told S that her aunt had informed her of what S had said to the other children, and asked S to repeat it. S responded by saying that a long time ago the appellant had gone into her bedroom, woken her up and taken her out to the lounge room, where he "made her lick his thing, and then laid down and then he licked her thing". S said the appellant had threatened her that if she told her mother her brother would be taken away. Mrs R turned to look at S who, she said, was not upset or distressed. S smiled and said, "I'm sorry, Mummy, but it's true". Mrs R said that the appellant usually slept naked, although if he got up at night he would slip on a pair of shorts. He was not given to watching TV in the lounge room because the couch was not comfortable; there was a television in their bedroom which he would usually watch.

[15] S's older brother, B, who was in his twenties, did not live with S and her mother. He said that on 24 July 2005 they came to visit him. He was aware at that stage that his sister had spoken to her cousins about the appellant, and took the opportunity to take her aside to ask her what had happened. S described some incidents where the appellant was violent to her mother or her and then told him about "an incident where [the appellant] had entered her room at night and had touched her". She refused to give any more information other than it had happened while they were living at their previous residence, and said the appellant had told her not to tell anybody because she would get into trouble if she did so.

[16] The appellant did not give or call evidence.

Failure to direct in accordance with s 21AW(2)

[17] Section 21AW(2) of the *Evidence Act* 1977 (Qld) applies, *inter alia*, where a child witness' evidence is pre-recorded. It is in these terms:

> (2) The judicial officer presiding at the proceeding 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 guilt 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.

[18] The learned trial judge gave these directions in relation to the pre-recorded evidence:

> "I am required to direct you as a matter of law that the evidence given in the form of recorded statements of the kind you've seen here is not to be regarded by you as a jury as being inferior in any respect to evidence that might have been given before you from the witness box.
>
> Further, I'm required to direct you as a matter of law that you do not discount the weight of the evidence of the complainant simply because of her tender years. Yesterday it was explained that evidence is given in that form commonly; indeed it's the practice in Courts where infant complainants are involved, and it follows from that that no adverse inference is to be drawn against the accused. This protective measure has nothing to do with who's on trial, it's just the

> way things are done nowadays. So you will take into account what I've said by way of direction in that regard."

[19] At the end of the summing up, the prosecutor raised some concerns with the direction, pointing out that the learned judge had mentioned only the prospect that they might afford the evidence lesser weight, and had not cautioned them against giving it greater weight. (Defence counsel, unfortunately, does not seem to have thought it necessary to make any application.) The learned judge did not think, in context, that the jury was likely to be under any misapprehension and declined to redirect.

[20] Counsel for the appellant (who did not appear for him at the trial) raised, in essence, three complaints of the direction: it omitted any reference to the recorded evidence of E and J; it cautioned against regarding recorded statements as "being inferior", but did not mention that they should not be regarded as being superior; and it informed the jury that they were not to "discount the weight of the evidence of the complainant simply because of her tender years", which overlooked the fact that the issue was the form of the evidence, not her age, and failed to warn against giving greater weight to the evidence. Counsel for the respondent conceded that the direction given did not meet the requirements of ss 21AW(2)(b) and (c). That concession, of course, is not determinative of the appeal's outcome, but it was, in my view, appropriately made.

[21] Section 21AW(2) has been the subject of consideration by this court on a number of occasions, with considerable emphasis on the necessity of directing in accordance with it. [1] I agree, with respect, with the analysis of Chesterman and Mullins JJ, with whom McPherson JA agreed, of the section's purpose, in *R v Hellwig*[2]:

> "The manner in which an affected child's evidence is to be given pursuant to s 21AU and s.21AM and, to lesser extent, s.21AV, is a marked departure from the conventional manner in which evidence is presented before a tribunal of fact for its evaluation. Convention may be a slender foundation for the justification or continuation of a practice or procedure, but experience has shown that evidence is best tested, and a true verdict reached, when the evidence in support or defence of a case is put before a court, judge or jury, and is explored for signs of inconsistency or insincerity in the presence of the tribunal of fact. The process is assisted by the solemn requirement that a witness' testimony be given on oath or affirmation and be open to public scrutiny.
>
> Division 4A has provided, for reasons which Parliament deems sufficient, that a different procedure should be followed in cases involving a certain class of witness. The difference is such as is likely to surprise jurors who have some knowledge, whether first or second hand, of ordinary court proceedings. Without the benefit of the instructions required by s.21AW(2) that surprise may well turn into conjecture adverse to an accused. The subsection is intended to dispel the surprise and to prevent the conjecture. That that occurs is clearly of the utmost importance to a fair trial. Parliament cannot

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1 See *R v SAW* [2006] QCA 378; *R v DM* [2006] QCA 79; *R v HAB* [2006] QCA 80.

2 [2006] QCA 179.

> have intended that the new procedures should prejudice the fair trial of an accused. It has enacted that, to ensure a fair trial, the jury must be instructed how to evaluate evidence led in this way.
>
> To exclude an accused from the complainant child's presence, or to protect the child from the accused's presence is likely to give rise to speculation by a jury that the measure has been undertaken because of some particular characteristic of the accused which is likely to be associated with his guilt. It is essential that that speculation be quashed and directions specified in s.21AW(2) are designed for that purpose".[3]

[22] In *Hellwig*, the Court observed that it was not necessary that the instructions be given in the precise terms of s 21AW(2). But in the present case, the instructions were not given according to the sub-section, either in form or in substance. It was made clear to the jury that recorded evidence was a routine practice, but that instruction was confined in its application to the complainant's evidence. The instruction that evidence given in the form of recorded statements was not to be regarded as "being inferior" might, given its generality, be regarded as extending to the evidence of all three children. But the exhortation not to regard it as inferior does not seem to me to carry as a necessary corollary that it is not to be regarded as of *greater* value. Accordingly, an element of the second direction required, to the effect that the probative value of the evidence is not increased because of the recording measure, was not given. That was a matter of considerable importance given the section's purpose described in *Hellwig*.

[23] The third aspect of his Honour's direction, in which he told the jury that they were not to discount the weight of the complainant's evidence simply because of her youth, did not meet the requirements of the section in any respect. It introduced an extraneous element in the form of the complainant's youth, did not make the necessary link to the measure (of recording), and did not make the point that the evidence was not to be given greater weight because of it. It did not afford the protection intended by the section, and was capable of suggesting to the jury that S's evidence had some particular status, in circumstances where the critical issue was whether her account was to be believed.

[24] The directions given did not accord, in significant respects, with the requirements of s 21AW(2). Had the error been confined to a failure to give the prescribed instructions in respect of the other children's evidence, it might have been a case for applying the proviso. Given the apparent inconsistency between their evidence and S's, there was some real advantage in the jury's accepting their evidence. But where the case turned on acceptance or rejection of S's evidence, proper instructions in terms of s 21AW(2)(b) and (c) were crucial. There is no occasion for application of the proviso. A retrial must be ordered, subject, of course, to the success of the remaining ground of appeal, that the verdict was unreasonable.

Unreasonable verdict?

[25] For the defence, it was submitted that E gave evidence logically consistent with J's, and both of those versions were completely inconsistent with S's version. Taking that into account, together with the admitted animosity of S towards the appellant to

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3 At [21]-[23].

such an extent that she would be prepared to make up stories about him, the jury ought to have been left in a state of reasonable doubt.

[26] Reaching a clear view as to whether the evidence of E and J should be preferred to that of S would not have been a straightforward exercise for the jury, because J's s 93A statement was recorded on video tape, whereas those of E and S were confined to audio tape; and even as between audio tapes the recording of E was much clearer and more audible. But having examined the evidence with some care, I do not think it necessarily followed that if E and J were accepted as truthful, S could not be believed.

[27] It seems to me entirely possible that E and J misunderstood what S was trying to convey when she demonstrated movements she made with the appellant's penis; and if there were any such misunderstanding it is likely to have been reinforced by their discussions afterwards with each other as to what S had said. Some of the areas of inconsistency relied on are not so evident when one listens to the s 93A tapes. The cross-examination in the pre-recorded hearings was designed to produce agreement in much firmer terms to propositions about which E and J had been relatively tentative when interviewed. (That is a legitimate tactic, but the value of what is thus obtained may be less where, as here, a witness is young and suggestible.) It seems too, that counsel cross-examining E may have conflated two sets of incidents: those the subject of the charges, which happened before S's brother was born, and the later description of S being made to sit on the appellant, after her brother was born, which was not the subject of any charge. It was in respect of the latter, according to E, that the appellant asked S if he could "put anything in" and S answered, "No". Both E and J conceded that their recollection of what S had said was incomplete. The jury was entitled to take a view that they had misunderstood some of what she said or indicated, and did not recall other parts.

[28] Having listened to the audio tape recording which became S's s 93A statement, and watched the video tape of her pre-recorded evidence, there is nothing obvious to me about S's demeanour or the way she spoke of the events which would raise a concern as to her truthfulness. Her account was internally consistent and logical; it was also consistent with what she told her mother very shortly after she spoke to her cousins. When cross-examined, S seems to have been extremely frank and forthcoming as to her animosity towards the appellant and her desire to get rid of him, even to the extent of saying that she would be prepared to make things up about him. On the other hand, she denied having done so; and it did not follow from those concessions that her account of sexual assault was an invention.

[29] It seems to me that a jury could accept S as a witness of truth and could reasonably have convicted on her evidence, given some slight degree of support by its consistency with her account to her mother. The "unreasonable verdict" ground has not been made out, and there should be a re-trial.

Orders

1. Appeal against conviction allowed.
2. Retrial ordered on all counts.

[30] **MUIR JA:** I agree with the reasons of Holmes JA and with her proposed orders.

[31] **CHESTERMAN J**: I agree with Holmes JA.