SUPREME COURT OF QUEENSLAND

CITATION:	*R v Siulai* [2008] QCA 382
PARTIES:	**R** **v** **SIULAI, Malaefou** (appellant)
FILE NO/S:	CA No 148 of 2008 DC No 1169 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2008
JUDGES:	de Jersey CJ, Holmes JA and White AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted on four counts of indecent dealing with a girl in his care under the age of 12 years – where in relation to the girl in his care, the appellant was also convicted of exposing her to indecent films, wilful exposure, and maintaining a sexual relationship – appellant sentenced to concurrent terms of three and a half years imprisonment with respect to the maintaining count, and 18 months with respect to each other count – complainant's evidence pre-recorded – where the jury communicated an express request to re-watch the tapes of the complainant's pre-recorded evidence – whether the learned trial Judge erred in allowing the jury to re-watch the tapes *Evidence Act* 1977 (Qld), s 93A *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55, considered *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60, considered *R v H* [1999] 2 Qd R 283; [1998] QCA 348, considered *R v KS* (2007) 176 A Crim R 419; [2007] QCA 335, applied

R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered

COUNSEL: K A Mellifont 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] **de Jersey CJ:** The appellant appeals against his conviction on a number of counts in relation to a girl under his care and under the age of 12 years, maintaining a sexual relationship, wilful exposure, exposing to indecent films and four of indecent dealing.

[2] The offences were allegedly committed over the period 10 April 2001 to 9 December 2004. Police officers conducted an interview of the complainant under s 93A of the *Evidence Act* 1977 (Qld) on 16 December 2004. The complainant's evidence was pre-recorded on 11 August 2006. The trial occupied the period 6 to 9 May 2008.

[3] Only ground two in the notice of appeal was pursued. It is in the following terms:

> "His Honour the learned trial Judge erred in allowing the jury to watch the video tapes of the complainant's evidence in chief (s 93A tape) and the complainant's cross examination (s 21AK tape) as opposed to having the complainant's evidence read back to them in light of the note sent by the jury to His Honour at the time of retiring for deliberations, such note reading:
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> > 'Your summing up has assisted considerably with the words of (S's) evidence. We should however still like to view the video again. What we are missing is appreciation of the demeanour, the nuances and the context of (S's) interview, given that, at our first viewing:
> >
> > 1. the video is indistinct
> > 2. there was unfamiliarity with the names involved
> > 3. apart from the prosecutor's opening, (which) was our first encounter with the details of the issue, under circumstances that were difficult to follow.
> >
> > thus our difficulty with context. We would like the opportunity to fill in the gaps.'
>
> Allowing the jury to view the tapes of the complainant's evidence again, when the jury had heard all of the evidence and was clearly confused, created unfairness to the (appellant)."

[4] In the course of his summing up, on 8 May 2008, the learned trial Judge referred to a request from the jury to be referred again to the interview between the complainant and the investigating police officers. His Honour observed that that could be accomplished by reading the transcript or by viewing the tape. He noted the importance of impressions at the time of the viewing, and referred to a risk of

imbalance with any refocus on the tape. He mentioned that he would be going on to refer to the evidence, so deferred the issue until the next day.

[5] The Judge went on in his summing up to refer to what the complainant said in the s 93A interview. Then at the end of the day, His Honour heard further submissions about the possible replaying of the tapes. The Crown Prosecutor submitted the jury should be permitted to watch the tapes. Defence Counsel submitted the evidence should be read from the transcripts. The Judge said that he did not like the idea of the jury's watching the tapes again, because the complainant would "go over all her evidence again", but he observed that the jury was "entitled" to do so. The Judge said that his "natural inclination" was simply to read out the transcripts.

[6] The following morning, in the absence of the jury, the Judge heard further submissions on the issue. The Judge referred a number of times to the criterion of fairness. He noted that such trials were emotional events, and mentioned the prospect of the jury's being affected again by seeing the complainant upset on the video recording. Counsel took similar positions to those taken the day before, and the Crown Prosecutor expressed concern at the number of "indistincts" recorded in the typed transcript.

[7] Anticipating a further request from the jury, the Judge expressed a "ruling", including his statement that the "preferred course is that it (the transcripts) be read".

[8] The court adjourned at 10.41 am, so that the jurors might be brought back into the courtroom. The court resumed at 10.53 am in the absence of the jury. In the meantime, the jurors had provided the Judge with the note referred to in the notice of appeal.

[9] His Honour expressed the "preliminary view" that because of the "insistence" of the jurors to view the actual tapes, that should occur. Defence Counsel responded that the criterion of fairness should remain predominant. He said that "the video will remain indistinct", although the Judge had, in his ruling the day before, expressed his view that the transcript reflected the substance of what the complainant had said. His Honour referred to the jury's reference to the nuances of the interview, and said this: "When they come back with a note like that it seems to me that I shouldn't override it when I don't think its an impermissible course."

[10] When the jurors returned the learned Judge, having resumed his summing up, said, referring to the tapes to be played:

> "Before they are played, though, there's something I have to tell you about your approach to the complainant's evidence in the 93A statement and in cross examination before Judge McGill. I warn you, members of the jury, because you are hearing and seeing the complainant's evidence a second time and well after all the other evidence, you should guard against the risk of giving this evidence a disproportionate weight or undue weight and you should bear well in mind the other evidence in the case. So guard against that, members of the jury."

[11] At the conclusion of the summing up, the s 93A tape and the video of the pre-recorded evidence were replayed.

[12] A trial Judge has a discretion to allow the replaying of such tapes. See *R v KS* (2007) 176 A Crim R 419, para 58. As observed in *R v H* [1999] 2 Qd R 283, 291, the overriding considerations in the exercise of the discretion are matters of fairness and balance. The warning given here by the learned Judge just prior to the replaying of the tapes was that suggested in *R v H* at p 291.

[13] The care which a judge should exercise in approaching the discretion to permit a replaying of such material was emphasized in *Gately v The Queen* (2007) 232 CLR 208, paras 15-16, by Kirby J, but His Honour recognized that, in an appropriate case, the judge may allow the replaying of the tapes (para 28):

> "A request by a jury to be reminded of evidence should rarely be denied by a trial judge. However, if the request is made, the judge, after affording the parties the opportunity to make submissions on the matter, should consider whether the request can be fulfilled either by:
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> (a) reading the transcript of the evidence requested (and any related evidence) to the jury in open court in the normal and traditional way; or
>
> (b) if it is considered appropriate to accede to a specific request to view pre-recorded testimony again, permitting this to be done in open court."

[14] Counsel for the appellant emphasized the Judge's preference, expressed earlier during his summing up, that any refreshing of the jury's recollection be accomplished by re-reading the transcripts rather than re-viewing the tapes.

[15] Then subsequently the jury communicated its express request to re-view the tapes, and expressed its reasons for making that request, which included a wish better to appreciate "the demeanour, the nuances and the context" of the complainant's interview. That sat in the context of His Honour's directions, during the summing up, based on both *R v Markuleski* [2001] NSWCCA 290 and *Longman v The Queen* (1989) 168 CLR 79, which included the cautions that the jury should scrutinize the complainant's evidence, that its truthfulness and accuracy were crucial and pivotal, and that the truthfulness and reliability of her evidence fell to be assessed "by reference to her demeanour or for any other reason…"

[16] Recalling then no doubt His Honour's reference to the jury's "insistence" on the replaying of the tapes, and his statement, having received the note, that he "shouldn't override it", Counsel for the appellant submitted that "His Honour seems to have felt constrained to acquiesce to the request of the jury merely because they had made it." The submission continued: "The trial judge is responsible for ensuring fairness at the trial. That fundamental duty cannot be subjugated to a perceived 'insistence' by the jury as to a particular course, yet that is precisely what occurred in this case." Hence the submission that the Judge's exercise of discretion miscarried, and that the verdicts should be set aside.

[17] The Judge was circumspect in his consideration of the initial request from the jury to be reminded of the evidence, and when anticipating a further request that the tapes be replayed. He canvassed the issues comprehensively with counsel, and on more than one occasion. In light of his view as to the accuracy of the transcripts, were the jury concerned only with what was said, reference to those transcripts alone may have been sufficient. Following the directions the Judge gave in his summing up, the jury, having been reminded of the potential importance of observing the complainant's demeanour during the interview, sought the replaying of the tapes. The landscape had changed, and it was then reasonable for His Honour to accede to the jury's request, subject to the administration of an appropriate warning, which was done.

[18] A reasonable assessment of the jury's note would be to regard the jury as saying to the Judge: "We appreciate what you have reminded us about, in relation to what was said, as recorded in the transcripts, but we still feel we need to re-view the tapes."

[19] Ms Mellifont, who appeared for the appellant, submitted that little could be gathered from a further viewing of the video, in relation to matters of demeanour etc. But that must have been left as a matter for the jury's assessment. Indeed, if the effect was "flat", consistently with her own assessment, then the jury may have regarded that of itself significant to the assessment of credibility.

[20] This was not a case of the Judge acceding to the jury's request simply because it was made. The request expressed a particular justification for the request which would have rendered it unreasonable for the Judge not to have complied with it. The Judge did not take the course he did because of some blind or irrational "insistence" on the part of the jury. The Judge felt obliged to accede to the request plainly because he saw it as reasonably based.

[21] It was the content of the note which led the Judge to that position. As His Honour said: "It's the nuances and the context of the interview that they also refer to…when they come back with a note like that it seems to me that I shouldn't override it when I don't think its an impermissible course."

[22] My resolution of the case is made, of course, in its particular circumstances. My approach should not be interpreted as saying that where a jury requests a re-play of the video, that should be denied unless a reason is assigned. Prima facie, if the jury makes that request, a trial judge should assume it is rationally based, and it would not necessarily be appropriate for the Judge to quiz the jury about its motivation. The relevant safeguard is the warning, as was administered appropriately in this case. As was observed during argument, had this request been denied, and had the jury then convicted, the denial would have been a primary, and obvious, ground of appeal.

[23] There is one remaining point worthy of mention. In relation to the matter of balance, and the risk of over emphasizing the complainant's evidence through a replay, it is important to note that the appellant did not himself give evidence, and

there was no interview of the appellant by police officers tendered in evidence. The only evidence for the defence was from the appellant's wife, which was to the effect that because she was present in the house at relevant times, there was little or no chance the events could have occurred as alleged.

[24] Because of the absence of evidence from the appellant himself, or evidence of any account given by him to the police, replaying the tapes would not have led to such an imbalance as may otherwise have occurred.

[25] The appeal should be dismissed.

[26] **HOLMES JA:** I agree with the reasons of de Jersey CJ and the order he proposes.

[27] **WHITE AJA:** I have read the reasons for judgment of the Chief Justice and agree with his Honour for the reasons that he gives that the appeal should be dismissed.