SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDL* [2021] QCA 14
PARTIES:	**R** **v** **SDL** (appellant)
FILE NO:	CA No 57 of 2020 DC No 57 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Emerald – Date of Conviction: 2 March 2020 (Barlow QC DCJ)
DELIVERED EX TEMPORE ON:	11 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2021
JUDGES:	Morrison and Mullins JJA and Lyons SJA
ORDERS:	**1. Appeal allowed.** **2. Conviction set aside.** **3. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – OTHER CASES – where the appellant was convicted after a trial before a jury in a small regional centre of one count of maintaining an unlawful sexual relationship with a child – where after the trial commenced the appellant recognised one of the jurors as the brother of an associate of the appellant – where the prosecutor and the appellant's trial counsel applied for the discharge of the jury – where the trial judge discharged the juror for apprehended bias – whether there were grounds for the trial judge to discharge the juror CRIMINAL LAW – EVIDENCE – COMPLAINTS – ADMISSIBILITY OF DETAILS AND FACT OF COMPLAINT – where the appellant was convicted after a trial before a jury of one count of maintaining an unlawful sexual relationship with a child – where two witnesses gave evidence of preliminary complaint had told of them by the complainant – where the complaint was a bare assertion of misconduct alleged against the appellant with minimal detail

of the offending – whether the disclosures to the two witnesses were unambiguously referable to the conduct disclosed by the complainant in the evidence

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A
Jury Act 1995 (Qld), s 56

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Wu v The Queen (1999) 199 CLR 99; [1999] HCA 52, cited

COUNSEL: N V Weston for the appellant
D Nardone for the respondent

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

[1] **MULLINS JA:** The appellant was convicted after a trial that was completed in three days before a jury in a small regional centre of one count of maintaining an unlawful sexual relationship with a child (who was formerly his stepdaughter) between May 2011 and May 2017.

[2] There are two grounds of appeal. The first is that a miscarriage of justice occurred due to the learned trial judge discharging a juror and proceeding with a jury of 11. The second is that the trial judge erred in admitting as evidence of preliminary complaint the respective testimony of witness A and witness B.

Was there a miscarriage of justice when one juror was discharged?

[3] Before the jury was empanelled, the appellant's trial counsel (who is not the counsel appearing on this appeal for the appellant) raised with the trial judge that the appellant recognised the names of 11 members of the panel and requested the trial judge to excuse those persons from the trial. The trial judge declined to do so and left it to counsel to challenge for cause. Of those potential 11 jurors who had already been identified by the appellant, 10 were challenged for cause. The eleventh person on the list was ultimately not challenged for cause and was empanelled as juror number 4. The jury and the balance of the panel were informed of the names of all people involved in the trial and the importance of impartiality, three jurors (but not juror number 4) indicated reasons why they could not be impartial, and replacements were empanelled before the appellant was placed in charge of the jury.

[4] The trial judge made the usual opening remarks to the jury, including the instruction to the jury not to discuss the case with anybody else. The first witness was the complainant and her evidence was given in the form of a recording made pursuant to s 93A of the *Evidence Act* 1977 (Qld). After that recording was played, the jury were given a break, but before they returned, the prosecutor raised a concern about juror number 4. The appellant's counsel had informed the prosecutor that the appellant recognised juror number 4 as the brother of an associate of the appellant. There had been little prior contact between juror number 4 and the appellant and what was conveyed by the appellant through his counsel was that it had occurred some seven years previously and was a passing comment of "G'day" or similar.

[5] The prosecutor applied for the discharge of the jury. The trial judge raised the possibility of proceeding with a jury of 11 members only after discharging juror number 4. The prosecutor raised the concerns that it was early in the trial and the appellant had a right to a trial by 12 jurors. That was also the stance of the appellant's trial counsel who joined in seeking the discharge of the jury. The trial judge then considered that the size of the pool may not be sufficient to provide a fresh panel for a new trial, if those who had been challenged for cause and the present jury members were excused from the pool.

[6] Juror number 4 was brought into the courtroom (in the absence of the other members of the jury) for the purpose of the trial judge asking some questions about his knowledge of the appellant. Juror number 4 said he did not believe he knew the appellant. He was not aware that his brother was an associate or friend of the appellant. He did think that the appellant would know his brother with their ages being about the same. He had two brothers, but he did not know which one knew the appellant. He did not believe there was any reason why he could not be impartial.

[7] It was apparent from the further submissions of counsel that the evidence from all the child witnesses had been pre-recorded and the other two witnesses were given leave to give evidence by video link. On the basis that it was not possible for the trial to take place in that current circuit sittings, it was proposed by the appellant and supported by the prosecutor that the appellant would apply for a change of venue to a larger regional centre, but it would still take more than three months for the trial to be relisted. There was no inconvenience to the appellant as he lived in Brisbane and

had to travel to attend the trial wherever it was held. Both the prosecutor and the appellant's counsel urged the trial judge to discharge the jury.

[8] The trial judge discharged juror number 4 and ruled against discharging the entire jury. In the course of the ruling, the trial judge observed that "there are few, if any, real grounds for an apprehension that this juror could not exercise his duties impartially", but then stated:

> "However, I accept that there is a potential that that might be viewed by the reasonable observer in that way. And as the trial proceeded, of course, the juror may be reminded of a greater connection with the defendant or vice versa. In those circumstances, I accept that this juror, at least, should be discharged."

[9] In then proceeding to balance the factors relevant to whether the entire jury should be discharged, the trial judge took into account the effect on the interests of justice and the community, because it would not be possible for a new trial to commence in that circuit sittings. The trial judge referred to the factors set out in *Wu v The Queen* (1999) 199 CLR 99 at [29] relevant to the exercise of the discretion under an equivalent provision to s 56 of the *Jury Act* 1995 (Qld) in exercising the discretion to continue the trial after discharging a juror in the circumstances permitted by the provision and the usual reason for exercising that power to continue with the trial where "the trial has proceeded for some time and that it would cause significant expense to begin again with a new jury".

[10] The trial judge took into account that the appellant's trial had only just started, but considered there would be additional expense or delay arising from the trial being transferred to the larger regional centre. The trial judge noted that there would be little inconvenience to witnesses and the appellant was prepared to accept any prejudice to himself arising from the delay in a new trial taking place at a later date. The trial judge considered there was prejudice to the complainant, as she first made her accusations in about October or November 2017 and it had been over two years before the trial commenced, and even though the complainant did not attend the trial herself, the trial judge inferred "the presence of the trial causes her some stress". The trial judge had referred to the submission on behalf of the appellant that he had a fundamental right to a trial by a jury of 12 persons, but did not expressly refer to that consideration, or explain how it was taken into account, in balancing the factors that resulted in the decision not to discharge the entire jury.

[11] The trial judge recognised that it was a weak case for discharging juror number 4. At the outset, the appellant's perception of a connection to juror number 4 was not strong, as the appellant had not pursued the challenge for cause in respect of juror number 4. Juror number 4 himself had appreciated by virtue of the appellant's age that the appellant may be known to one or other of his brothers, but juror number 4 did not know the appellant or the details of any association between the appellant and either of his brothers and did not seek to raise that tenuous connection in response to the trial judge's explanation of the necessity for impartiality and request for any jurors to advise of reasons that the juror could not be impartial.

[12] There has to be a basis for apprehended bias. Although the test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] is expressed in terms that a decision-maker "is disqualified if a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question", it was further explained at [8] that there has to be identification of the connection that might lead the juror to decide the case other than on its legal and factual merits and an articulation of the logical connection between that matter and the apprehended deviation from the course of deciding the case on its merits.

[13] It was apparent to the trial judge that juror number 4 had no personal acquaintance or knowledge of the appellant. The jury had been instructed not to discuss the case with anybody else, so the trial judge should have proceeded on the basis that juror number 4 would not have been discussing the case with his brother who was the associate of the appellant. The mere fact that juror number 4 had a brother who was an associate of the appellant was not a sufficient connection in the circumstances to give rise to an apprehension by a fair-minded lay observer that the juror might not bring an impartial mind to the question of whether the appellant was guilty or not guilty of the charge.

[14] There were no grounds for the judge to discharge juror number 4 pursuant to s 56(1)(a) of the *Jury Act* 1995.

[15] Even if there had been grounds for discharging juror number 4, the trial judge erred in ignoring the joint submissions made by the prosecutor and the appellant's counsel to discharge the entire jury. As explained in *Wu* at [28], the discharge of a juror

does not mean that the trial should automatically continue with the remaining jurors, but there must exist a positive reason to make an order that the trial continue with less than 12 jurors as:

> "Conviction by a jury of less than twelve is a denial of a long-standing right of those tried for serious crime under the common law system."

[16] It had already taken some two years and three months for the trial to commence, so that a delay of an additional three to four months was not an overwhelming factor. The trial had only just commenced before the trial judge, when the issue in relation to juror number 4 was raised. Because most of the witnesses were children whose evidence was pre-recorded and the other two witnesses had already been given leave to appear by video-link, as they no longer lived near the centre where the trial commenced, there was little inconvenience to witnesses, if the trial could not start again in the current circuit sittings. When the appellant's fundamental right to a jury by trial of 12 persons for a serious charge for which the maximum penalty is life imprisonment was factored into account, the circumstances could not support the trial judge's refusal to discharge the entire jury.

[17] There was a miscarriage of justice in denial to the appellant of the right to be tried by a jury of 12 persons. The appeal should be allowed, the conviction set aside and a retrial ordered.

Should the testimony of witness A and witness B been admitted?

[18] Even though it is not necessary to consider the second ground of appeal, as it may affect the course of the new trial, I will make some brief observations on this ground.

[19] The complainant who was born in May 2002 described in the s 93A interview on November 2017 that she was molested by the appellant from when she was about the age of nine or 10 years until midway through 2016. She said that in the last year, it happened a lot when she was on school holidays. She said that whenever the appellant would go down for a sleep for work during the day (as he did shift work), he would tell her to come and lay with him and he would touch her in inappropriate places. The first time she could remember anything happening was when the appellant came home drunk and he came into the complainant's bed and

started rubbing his knee up against her vagina. She described the offending as progressing over time. When the appellant was lying down, he would ask her to rub his back. He would roll over and gradually put his hand down her pants. It went from touching over her underwear to putting his hand under her underwear and rubbing and then he started digitally penetrating her vagina which she estimated occurred about 50 times from when she was 13 years old.

[20] Witness A was at school with the complainant and about the middle of term 4 in 2017, A said the complainant told her that her stepfather "used to molest her continuously over a period of years" from when she was seven, eight or nine until Year 8, but "she didn't really want to say details or anything".

[21] Witness B was also at school with witness A and the complainant, when witness B had a conversation with the complainant in term 4 in 2017 in which the complainant told witness B that "her stepdad would make, force her to sleep with him when her family was not there and he was able to do whatever he wanted". The complainant told witness B that it stopped when the complainant was in Year 8. When witness B was questioned further about what the complainant told her about her stepfather forcing her to sleep with him, witness B said the complainant said "he would do stuff to her".

[22] Pursuant to s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld), evidence of preliminary complaint in relation to the alleged sexual offence is admissible. The evidence of each of witness A and witness B is a reporting of a bare assertion of misconduct by the complainant alleged against the appellant with minimal detail of the offending which could be used for assessing the complainant's credibility. Each witness identified the period the complainant told her when the misconduct was committed which largely accorded with the period identified by the complainant in her interview. In respect of witness A, the connotation from the use of the word "molest" is that the appellant's conduct had a sexual element. Similarly, in respect of witness B, the connotation from the description that the appellant forced the complainant to sleep with him and would do "stuff" or "whatever he wanted" was that the conduct involved a sexual element.

[23] Despite the minimal detail of the offending disclosed by the complainant to each of witness A and witness B, the disclosures are "unambiguously referable" to the

conduct disclosed by the complainant in her s 93A interview which was the subject of the charge. As explained by Philip McMurdo JA in *R v BCZ* [2016] QCA 232 at [38], the generality of the complaints does not preclude the admissibility of the preliminary complaint evidence that is referable to the alleged offence, as it is a matter for the jury to take that generality into account when assessing the credibility of the complainant.

[24] The evidence of witness A and witness B is therefore admissible as preliminary complaint about the alleged offence.

Orders

[25] I therefore propose the following orders:

1. Appeal allowed.
2. Conviction set aside.
3. New trial ordered.

[26] **MORRISON JA:** I agree.

[27] **LYONS SJA:** I agree.

[28] **MORRISON JA:** The orders of the court therefore are:

1. Appeal allowed.
2. Conviction set aside.
3. New trial ordered.