DISTRICT COURT OF QUEENSLAND

CITATION:	*R v AM* [2015] QDC 157
PARTIES:	**THE QUEEN**
	v
	AM
FILE NO/S:	Indictment no. 720 of 2015
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	Ex tempore reasons delivered on 12 June 2015
DELIVERED AT:	Bundaberg
HEARING DATE:	12 June 2015
JUDGE:	Smith DCJA
ORDER:	**I make a no jury order.**
CATCHWORDS:	CRIMINAL LAW – PRACTICE AND PROCEDURE – whether no jury order should be made
	Criminal Code 1899 (Q) ss 208, 216, 590AA, 614, 615
	R v Kissier [2011] QCA 223
	R v Prisk and Harris [2009] QSC 315
	R v SAA [2009] QDC 5
	R v WHA [2013] QDC 339
COUNSEL:	C W Wallis for the Crown
	K T Bryson for the defendant
SOLICITORS:	Director of Public Prosecutions for the Crown
	Legal Aid Queensland for the defendant

[1] This is an application by the defendant pursuant to section 590AA of the *Criminal Code* for a no jury order. AM is charged with very serious sexual offences against CJ. There are five counts of carnal knowledge of a person with an impairment of the mind as a guardian, two counts of indecent dealing with a person with an impairment of the mind as a guardian and two counts of sodomy of an intellectually impaired person as a guardian.

[2] The facts of the case appear to be that the defendant commenced a relationship with the mother of the complainant in or about March or May of 2012. The complainant at that stage was 16 years of age. The complainant and her mother moved in with the defendant at Bundaberg, in May 2012. There were issues between the complainant's mother and the defendant's mother.

[3] Throughout 2012, the defendant was on parole for the offence of rape and was subject to the provisions of the *Child Protection (Offending Reporting) Act* 2004 (Q). In September 2012, he had heard rumours that people were saying he was having a sexual relationship with the complainant. One of the conditions of his reporting obligations was to report any contact with children, i.e. the complainant. He took her to the police station because of these rumours. She was then tape recorded and, at that stage, denied any sexual contact. But because he had not notified the police she was residing with him, that was a breach of his obligations under the Act and, as a consequence of that, the Department of Corrective Services breached his parole and returned him to custody. He was also charged with an offence under s 50(1) of the Act.

[4] Whilst he was in custody, as I understand it, the complainant made a preliminary complaint to the mother and then provided a s 93A statement making these sexual allegations against the defendant. Important to the Crown case are telephone calls made by the defendant over the Arunta telephone system, which is the phone system the prison system uses. Those calls were recorded and are relied upon by the prosecution to show a sexual interest by the defendant in the complainant. I have listened to the first call. Having listened to the recording, it seems it is a very important part of the Crown case and potentially shows a sexual interest between them. In my view, it would not be possible to exclude references to jail, getting out, running out of money and the like without losing the context and flavour of the calls. So, inevitably, evidence of his being in jail will be before the court.

[5] Aside from the jail issue, it seems to me this is an unusual case. I am told by defence counsel this is a case where the defendant denies the offending but an alternative case will be run. Section 216(4) of the Code provides a defence to some of these charges. There is a similar provision in s 208 of the Code. That subsection provides:

> "It is a defence to a charge of an offence to find in this section to prove—
>
> (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of mind; or
>
> (b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the person with an impairment of the mind."

[6] I am told that it is likely expert evidence will be called by both parties in this trial, firstly as to the complainant's intellectual disability and secondly as to the defendant's intellectual disability. It seems to me it is an unusual case because the court will firstly have to consider whether the offences occurred at all, i.e., the acts alleged. And then, secondly, if they did, will need to assess expert evidence on these important issues.

[7] Now, of themselves, each of these points could be addressed but this is a case of combination and added into the mix is the complainant's disability. We know that the crown alleges she is intellectually impaired and there is a risk of nonresponsive answers if evidence is given before a jury in the ordinary way, although it may be there is an application for her to be recorded as a special witness. So perhaps less weight can be attributed to that point.

[8] However I am also told that the preliminary complaint really came about because the police played the Arunta calls to the mother who then questioned the complainant at which point a disclosure was made. There is a real risk of the reason for the defendant's jailing to come out in the mother's evidence.

[9] But I think the issue of the Arunta calls and the unusual nature of the issues are very relevant matters to the disposition of this application.

[10] With that background in mind, I now turn to the law relevant to this application. Section 614 of the *Criminal Code* provides:

> "(1) If an accused person is committed for trial on a charge of an offence or charged on indictment of an offence, the prosecutor or the accused person may apply to the court for an order (no jury order) that the accused person be tried by a judge sitting without a jury.
>
> (2) The application must be made under section 590AA before the trial begins.
>
> (3) If the identity of the trial judge is known to the parties when the application is decided, a no jury order may be made only if the court is satisfied there are special reasons for making it.
>
> (4) Subsection (3) does not limit section 615 or any other restriction on making a no jury order imposed by this chapter division.
>
> (5) The court may inform itself in any way it considers appropriate in relation to the application.
>
> (6) For subsection (2), the trial begins when the jury panel attends before the court."

[11] Section 615 provides:

> "**615 Making a no jury order**
>
> (1) The court may make a no jury order if it considers it is in the interests of justice to do so.
>
> (2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.

> (3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.
>
> (4) Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply—
> (a) the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
> (b) there is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury;
> (c) there has been significant pre-trial publicity that may affect jury deliberations.
>
> (5) Without limiting subsection (1), the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness."

[12] In this case the identity of the trial judge is known to the parties. So, firstly, it must be in the interests of justice for the order to be made. But, secondly, the court needs to be satisfied there are special reasons for making the order. Martin J in *R v Prisk and Harris* [2009] QSC 315 at [6]-[8] noted as to the meaning of "special reasons" that:

> "The expression must always be construed in light of its context. The application of the expression is not to be confined by precise limits or rules. Circumstances which are routine and consequences that are a normal or inevitable result of those circumstances are unlikely to give rise to special reasons. Special reasons are reasons that are out of the ordinary, that relate to something that is distinct or particular about the case, and that carry particular weight. There must be some factor over and above the interests of justice. But that does not mean that the case must be extremely unusual, uncommon or exceptional."

[13] In reaching my decision, I have regard to the statements of principle expressed by the Court of Appeal in *R v Kissier* [2011] QCA 223. I have also been assisted with some single judge decisions: *R v SAA* [2009] QDC 5 and *R v WHA* [2013] QDC 339. Of course, each case depends on its own facts and it's up to the judge hearing the application to make the determination on the facts of the given case.

[14] It seems to me that this is an unusual case. It is unusual because the Arunta calls exist and, in my view, cannot be edited. When one couples that fact with the unusual nature of the issues, particularly the fact that the tribunal of fact will need to carefully analyse the expert evidence as to impairment, to my mind, special reasons have been established in this case. I throw into the mix, of course, the possibility of a non-responsive answer given by the complainant, although less weight is attached to that aspect than the other two issues, as there is a possibility she may be pre-recorded. I also factor into the equation the fact that the mother of the complainant

will also be giving evidence and the Arunta calls were played to her, and the fact that the applicant was in jail will no doubt arise through her and there is a possibility of a non-responsive answer being given by her as to the reason he was in custody. It is also a case where it may be raised in evidence because of the fact he took her to the police station and because he has been charged with a breach of the Act.

[15] In the circumstances, in the exercise of my discretion, I make a no jury order in this matter.