DISTRICT COURT OF QUEENSLAND

CITATION:	*R v MCU* [2019] QDCPR 11
PARTIES:	**THE QUEEN**
	V
	MCU
FILE NO/S:	18/2019
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	27 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2019
JUDGE:	Smith DCJA
ORDER:	**I order the defendant be tried by a judge sitting without a jury.**
CATCHWORDS:	CRIMINAL – PROCEDURE – APPLICATION FOR NO JURY ORDER – whether should be granted
	Criminal Code 1899 (Q) ss 614, 615
	De Jesus v R (1986) 61 ALJR 1
	R v Cranston [1988] 1 Qd R 159
	R v Fardon [2010] QCA 317
	R v Kissier [2012] 1 Qd. R. 353 [2011] QCA 223
	R v Prisk and Harris [2009] QSC 315
COUNSEL:	Ms D Orr for the crown
	Mr M Hibble for the defence
SOLICITORS:	Office of Director of Public Prosecutions for the crown
	Ruddy Tomlins and Baxter for the defence

Introduction

[1] The defendant applies for a no jury order pursuant to section 614 of the *Criminal Code 1899 (Q).*

Charge

[2] The defendant is charged with one count of indecent treatment of a child (AD) under 16 under 12 under care. It is alleged that this offence occurred on 2 May 2015 at Ayr.

Background

[3] The basis of the application is that in order to conduct his trial, the defence wishes to raise the fact that another complainant (ED) made allegations of a sexual nature against the defendant, and as a result of this the present complaint arose. The defence wishes to explore this fact at the trial involving AD.

[4] AD and ED are sisters. The defendant is their grandfather.

[5] The complainant ED complained to her mother that the defendant had been massaging AD. AD was spoken to by her mother but denied at that time (in 2015) that she had been inappropriately touched by the defendant.

[6] The complainant ED provided a section 93A statement to the police on 5 May 2015. In that statement she alleged that the defendant indecently touched her.

[7] AD also provided a section 93A statement to the police on 5 May 2015 denying that any preliminary complaint was made to her by ED. There was no allegation she was indecently touched.

[8] The defendant was charged with indecent dealing offences concerning ED. He was tried in the Townsville District Court in March 2017 and was found guilty of two of the charges.

[9] The defendant appealed the convictions to the Court of Appeal. It was listed for hearing on 1 December 2017. The appeal against conviction was dismissed[1] and he was later sentenced to 12 months imprisonment suspended after three months.

[10] On 17 November 2017, AD for the first time disclosed to a school chaplain that her grandfather was having another court case soon and was "going to say that he was innocent." AD alleged for the first time that the defendant has indecently touched her and ED. As a result of this the defendant has been charged with the present offence involving AD.

Defence submissions

[11] The defence submits that it is inevitable that the ED charges, prosecution, convictions and appeal will be introduced into evidence. It is submitted this creates a particular prejudice as it is inevitable the fact of conviction will become known. It is submitted there would be irreparable prejudice if the matter is tried by a jury. A judge would appropriately direct himself or herself on these issues.

[12] The defence also submits that if there is a trial by judge only there would be no need for ED to be called. Her interviews and evidence could simply be tendered.

Crown submissions

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1 *R v MCU* [2018] QCA 194.

[13] The crown on the other hand submits that directions may be given to cure any prejudice encountered.

[14] It also submits that the fact of conviction will not necessarily emerge at the trial.

[15] The crown submits that the evidence of the counts on which the defendant was convicted concerning ED are admissible on the trial involving AD.

[16] The trial of such allegations should be before a jury as questions of indecency are involved.

Relevant law

[17] Section 614 of the *Criminal Code 1899 (Q)* 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 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."

[18] Section 615 provides:

> "(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."

[19] In *R v Kissier*[2] it was noted by the Queensland Court of Appeal following *R v Fardon*[3]:

1. That the overriding consideration in the exercise of a discretion under s 615 is whether it is in the interests of justice to make the order.
2. A trial on an indictment before a judge without jury is exceptional and an applicant for a no jury order must show cause why the case comes within the exception. In other words the applicant must satisfy the court it is in the interests of justice that this be the mode of trial.

[20] The term "interests of justice" was held by Martin J in *R v Prisk and Harris*[4] to be "… not susceptible of any precise definition and that in itself suggests that it is a concept which is to be assessed according to the type of case, the interests of the community and the imperative requirement of a fair trial."

Disposition

[21] In this case I consider it is in the interests of justice to grant the order.

[22] It is clear the defence case is that it is very curious that the allegations by AD emerged just before the hearing of the appeal.

[23] In my view, to understand the history of the matter fully at trial, it is inevitable the details of the offending concerning ED will need to be disclosed to the court. The fact of conviction will also need to be disclosed to explain what proceedings were before the court and to fully understand AD's disclosure to the school chaplain.

[24] I consider a judge is best placed to examine these issues without being prejudiced by the fact the defendant has been convicted of sexual offences involving ED.

[25] It would be wrong to leave the jury with a false impression of the full circumstances and/or to deprive the defence of its full rights in this case.

[26] It has been previously said that cases involving sexual allegations against children have the tendency to inflame prejudice in a jury.[5] It is my opinion that it is unlikely this prejudice can be lessened by any direction given to a jury, particularly considering that the fact of convictions will inevitably arise.

[27] Further, by a no jury order, ED will not have to give evidence again. The 93A and pre-recording can be tendered to the judge to better understand the contents of the circumstances leading to the complaint by the first complainant. This is regardless of any ruling made as to the cross admissibility of the evidence.

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2 [2012] 1 Qd. R. 353 at [29]; [2011] QCA 223.
3 [2010] QCA 317.
4 [2009] QSC 315 at [25].
5 *De Jesus v R* (1986) 61 ALJR 1 at page 3; *R v Cranston* [1988] 1 Qd R 159 at page 163.

[28] In the circumstances, I am satisfied it is in the interests of justice to make a no jury order. I am satisfied this case is an exceptional one.

[29] I order the defendant be tried by a judge sitting without a jury.