SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABB* [2013] QSC 359
PARTIES:	**R** **v** **ABB** (Defendant)
FILE NO/S:	BS No. 500 of 2012
DIVISION:	Trial Division
PROCEEDING:	Pre-Trial Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2013
JUDGE:	Ann Lyons J
RULING:	**1. Evidence of the s 93A statement of the complainant made on 23 April 2012 from page 15, line 11 to page 18, line 24 and from page 19, line 27 to page 20, line 21 of the Transcript of Police Record of Interview is excluded.** **2. The reference in the s 93A statement of the complainant's friend, made on 30 April 2012 that "and he put his finger in it" at page 10 of the Transcript of Police Record of Interview is excluded.**
CATCHWORDS:	*Criminal Code Act* 1899 (Qld), s 590AA *Evidence Act* 1977 (Qld), ss 93A, 98, 130 *R v FQ* [2008] QCA 68 *R v ABV* **(**2005) QDC 426
COUNSEL:	T Ryan for the Applicant/Defendant JD Finch for the Respondent
SOLICITORS:	Howden Saggers Lawyers for the Applicant/Defendant Director of Public Prosecutions (Qld) for the Respondent

This Application

[1] This is an application by ABB, for a ruling pursuant to s 590AA of the *Criminal Code Act* 1899 (Qld). He seeks the exclusion of certain parts of the statements of the complainant and the complainant's friend made under s 93A of the *Evidence Act* 1977 (Qld) ("s 93A statements") and the complete exclusion of the statement of Ms [D]. The Crown has agreed to the exclusion of the statement of Ms [D] and no ruling is now required in relation to that aspect of the application. The Crown, however, opposes the exclusion of any part of the other s 93A statements.

The Indictment

The applicant has been indicted on a five count indictment. The complainant, who was eight years old at the time of the alleged offences, is the daughter of the applicant's partner.

[2] The applicant is currently charged with the following offences;

(i) Count 1 is engaging in sexual activity (other than sexual intercourse) outside Australia with a circumstance of aggravation. It is alleged that an act of cunnilingus occurred on a date between 30 November 2011 and 26 December 2011 when the Complainant and the Applicant were staying in a Hotel in Chicago, USA;

(ii) Count 2 is that on a date unknown between 22 January 2012 and 6 April 2012 the applicant raped the complainant by an act of digital penetration of the Complainant's anus;

(iii) Count 3 is that between the same dates, the applicant unlawfully and indecently dealt with the complainant by an act of cunnilingus on the same occasion as the act, the subject of Count 2. The circumstance of the aggravation is that the child was 12 years of age and under the applicant's care at the time.

(iv) Count 4 is that on 17 April 2012 the applicant raped the complainant by an act of penile vaginal penetration.

(v) Count 5 is that on 17 April 2012 the applicant raped the complainant by an act of penile vaginal penetration on the same occasion as the act, the subject of Count 4.

[3] The complainant was born on 4 May 2003 and whilst she was eight at the time of the alleged offences, she was almost nine at the time she was interviewed. She will turn ten in May this year.

[4] On 17 April 2012, the complainant made certain complaints about her stepfather to some of her friends at school. One of the complainant's friends repeated the statements that had been made to her mother who contacted the class teacher. The class teacher then made the appropriate referrals to police. On 23 April 2012, police attended at the complainant's school and she was accompanied to the Indooroopilly Police Station where she was interviewed by police.

The Interview on 23 April 2012

[5] It is clear from the interview that initially the complainant was not aware of the reason why she had been taken to the Indooroopilly Police Station. She was told that the police were with the Child Protection Investigation Unit and that they "looked after kids".

[6] During the course of the interview, the complainant advised police that sometimes she had a good relationship with her mother's partner, the applicant, and sometimes she did not. She indicated that sometimes he gets really angry at her but described the tickling and wrestling games that she and the applicant used to get involved in. She was asked whether she knew what bad touching was and said it was when "someone touches you inappropriately".[1] She indicated that the applicant had touched her inappropriately. She said "well he touches my vagina and he plays with it and I absolutely hate it but I don't know how to say that".[2]

[7] The complainant was then asked "when was the last time he touched your vagina?"[3] The complainant then outlined the allegations which form the basis of Counts 2 and 3. She stated what had happened five or six weeks ago when she was having a tickle with the Applicant while she was in her knickers saying, "then he told me to take em off and then, and then he started doing that".[4] She continued "well putting his fingers in it and, and he tried to lick it. I felt really, really scared"[5]. She continued

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1 Transcript of Police Record of Interview with the complainant at p 10, line 39.
2 Ibid, at p 10, lines 51-52.
3 Ibid, at p 10, line 54.
4 Ibid, at p 11, lines 8 – 9.
5 Ibid, at p 11, lines 16-17.

"like he was trying to hurt me".[6] And "then, then that was it, I think".[7] She stated that happened on her mother and the applicant's bed.

[8] She continued that what she meant by "putting his fingers in it" was that the applicant "started sticking his fingers up my bum".[8] She then continued "and that's really all, that's (indistinct) I don't know how to explain it any …".[9] She stated also that "he started trying to get on top of me"…And, and just, just kept, just kept trying to lick it really, (indistinct)".[10] She continued "he started trying to lick my vagina". She stated that he succeeded in licking her vagina and stated "he did once but he did, he done that twice". She stated she could not remember when that happened. She thought it was when she was getting ready to take a shower whilst her mother was at [X]. She stated that the applicant was wearing undies at the time which were black. She thought it had occurred five or six weeks ago because she thought it was before Easter.

[9] The complainant stated that the other occasion that the applicant had licked her vagina was when they were overseas in late 2011 whilst they were in a hotel in Chicago. That allegation forms the basis of Count 1.

[10] The entire interview went for approximately 51 minutes and the first 30 minutes were occupied with the complainant outlining the allegations set out above. After she had described the incidents which make up the first three counts, she was asked "Is there anything else you would like to tell us" and she replied "Nah".[11]

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6 Ibid, at p 11, line 22.
7 Ibid, at p 11, line 26.
8 Ibid, at p 12, lines 17 – 18.
9 Ibid, at p 12, lines 22 – 23.
10 Ibid, at p 12, lines 33 and 37 – 38.
11 Ibid, at p 14, lines 27 – 30.

[11] She was then asked "has the applicant ever put his penis into you on your bed?" She replied "he's done that twice as well".[12] She was asked to describe the first time and said she thought it was a Tuesday night and said one of them was a Tuesday night. She stated one of them was a weekend while her mother was out. In relation to the Tuesday night, she said it was when her mother went to lecture at [X] on a Tuesday night and it happened on mum and the applicant's bed. She was asked "Okay. So did the applicant put his penis in your vagina?"[13] She replied that she knew he had done it "because like I was just giving him a hug and then he just, then he just did it".[14] She stated that she was wearing knickers and that the applicant was wearing knickers as well. She stated she tried to make excuses to get out and then "I did but then when I went back in, he, he started doing it again".[15] She had left because she said she had to go to the toilet. She stated that after she went to the toilet, "then I came back in and I was a, I was just and I was about to say that I was gonna have a shower".[16] She continued "and then he said come back in".[17] She stated "he then he started doing it again".[18] Afterwards, she said she had a shower, ate dinner and went to bed. She described the position that she was in at the time as "I was lying on my side with like one leg on top of the other" and that the applicant was in a similar position. She stated "um, well he was the same, cause I was giving him a hug and"[19] she was unable to give anymore details and immediately after that indicated that she could not remember the occasion when he put his penis in her vagina on the weekend. She stated "I can't remember any of that".[20]

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12 Ibid, at p 15, lines 11 – 14.
13 Ibid, at p 16, lines 11 – 12.
14 Ibid, at p 16, lines 16 – 17.
15 Ibid, at p 16, lines 40 – 41.
16 Ibid, at p 16, lines 51 – 52.
17 Ibid, at p 16, line 56.
18 Ibid, at p 17, line 1.
19 Ibid, at p 17, lines 18 – 28.

[12] When the complainant was then taken back to the Tuesday night incident when it was alleged that the applicant had put his penis into her vagina, she said "that one wasn't at night time, that was in the morning, I came in so I could keep warm, and that was about seven something in (sic) morning".[21] The interviewer said "I thought you said it was at night time because mum lectures at [X]". The complainant replied "yeah, I, I th-, I, I just got a bit confused on that one".[22] In relation to the weekend incident, the only detail she could give was that it was after midday and the blinds were open and it was probably on a weekend.

The Applicant's Submission

[13] It is clear that the question put to the complainant as to whether the applicant had ever "put his penis into [her]" was a leading question. It obviously suggested the answer. It was also unclear what "into" referred to. The question did not actually refer to vaginal penetration. It also involved putting to the complainant two separate leading propositions which the complainant assented to. The first proposition was that the applicant **"**put his penis into [her]" and the second proposition was that it was "on [her] bed".

[14] The complainant's answer was, in fact, not totally borne out by her evidence as at no time did she ever suggest that any inappropriate touching had occurred in her bed but rather, on her mother and the applicant's bed.

[15] I agree with the applicant's submission that the leading question had an influence on the questions and answers that followed in the course of the interview and that the

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20 Ibid, at p 17, line 58.
21 Ibid, at p 19, lines 34 – 37.
22 Ibid, at p 19, lines 39 – 43.

question changed the course of the questioning. The question, in fact, constituted the foundation for an allegation of rape and would not have been permitted to have been asked in a court room by a prosecutor adducing evidence-in-chief.

[16] Counsel for the applicant submits that the answers that follow in the line of questioning from that leading question are irrevocably tainted and relies upon the discretion under ss 98 and 130 of the *Evidence Act* 1977 to exclude those passages of the complainant's s 93A statement. Counsel also relies on the 2008 Court of Appeal decision of *R v FQ*[23] and the decision of Nase DCJ in *R v ABV*[24] to argue that there is a broad discretion to exclude a s 93A statement.

[17] In *R v FQ* Holmes JA set out the ambit of the discretion in the following terms after a review of the authorities;

> [33] The comments set out above from *Morris*, *FAR* and *D* say no more than that reliability often will be the focus of consideration in deciding how to exercise the discretion; they do not suggest that it is the only consideration. Some care must be taken, too, with the word "reliability" itself; it may be used in a narrow sense, in reference to the reliability of the evidence to be admitted *per se*, or more broadly, in reference to general issues affecting reliability. As to the first sense, a statement or statements whose content is manifestly unreliable may well, it seems to me, be more safely and fairly left to a jury than evidence whose reliability is potentially affected by external factors less obvious and less capable of being explored. Hayne J observed in *Gately v The Queen* that s 93A made a
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> > "..special rule for children and intellectually impaired persons … for the evident purpose of preserving the integrity of the evidence of such persons, by allowing evidence of an account of relevant events that was made before, sometimes well before, the trial of the relevant proceeding."
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> That preservation of the integrity of the evidence, in the sense of maintaining it as a whole, may work for or against an accused; it may, for example, make inconsistencies apparent in a way that selective presentation would not.
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> [34] But s 98 uses a breadth of expression which goes well beyond questions of reliability, extending to exclusion where it appears to the court

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23 [2008] QCA 68.

24 **(**2005) QDC 426.

> "inexpedient in the interest of justice" to admit the material. It would embrace exclusion for reasons of unfairness (which may still, of course, have some bearing on reliability) or public policy. For example, a deliberate choice by investigating police officers not to use available recording facilities in order to impede examination of their interviewing techniques might well provide a basis for exclusion in the interests of justice."

[18] It is obvious therefore that there are many factors which go to a consideration as to whether the discretion should be exercised. I also accept that some of the factors relevant to the exercise of the discretion include the age of the child, the consequences of the leading question as well as the reliability of the disclosures following the leading question.

[19] In the present case, the complainant was almost nine years of age at the time of the interview and, as such, she would be susceptible to suggestion due simply to her age. Having viewed the entire interview, however, I do not think she was overly suggestible and certainly did not agree with all the propositions put to her. She was thoughtful and careful.

[20] In terms of the consequences of the leading question, I accept that the answers given by the complainant to the leading question led to the establishment of *prima facie* allegations of rape.

[21] I do have some significant concerns about the disclosures that were made following the answer to the leading question. Of primary concern to me is whether the complainant actually understood the question put to her and whether she fully comprehended what the term "into" her actually meant. The complainant never gave any detail of an act of penile vaginal penetration after she agreed that the applicant had put his penis "into" her. There is no explanation of what she thought the term

"into" her meant. There is no detail of what actually occurred, how the act occurred, what the act consisted of or even the surrounding circumstances.

[22] Furthermore, the circumstances she described make an act of penile vaginal penetration improbable. In particular, on her account, they both still had their underwear on. She also described the fact that she was lying on her side with one leg on top of the other, giving the applicant a hug and that he was lying on his side straight in front of her. She does not refer to her pants being removed or to him getting on top of her. She simply refers to him doing something whilst they were hugging in the position where they were both lying on their side. Was she really agreeing to vaginal penetration by a penis or an erect penis touching her on the outside of her underwear? Was she agreeing to actual penetration or was she agreeing to the fact that the applicant's penis had been "against" her?

[23] The complainant can give no elaboration about the second alleged occasion of penile penetration and when asked again about a second occasion, she was unable to recall anything at all about it other than it was in the afternoon on a weekend.

[24] Furthermore, at the very commencement of interview, the complainant made it clear that she understood what was meant by the term "inappropriate touching" and tearfully explained how the applicant "touches [her] vagina and plays with it" and how much she hated him doing it. She refers only to the cunnilingus and the digital anal penetration. She made no reference of her own accord to penile vaginal penetration. Also, when she was asked when the last act of vaginal touching occurred, she stated it was five or six weeks previously. She made no reference to

penetration of her vagina by a penis which is alleged to have occurred one week before the interview.

[25] It is also concerning that when she was asked to confirm the details she had initially given of penile vaginal penetration occurring at night before she went to bed, the complainant stated that the event had in fact occurred in the morning. She simply stated that she "got a bit confused". It would also seem clear to me that once there is real questioning about the detail of "vaginal" penetration, she starts to back track and say she was confused about the occasions she previously described.

[26] In my view the complainant agreed to a leading question that she did not fully understand. The consequences of the complainant's agreeing to a leading question about penile vaginal rape has lead to a series of answers which I consider are unreliable. It is clear that there is a discretion to exclude parts of the s 93A statement pursuant to ss 98 and 130 of the *Evidence Act* 1977 (Qld).

> "**98 Rejection of evidence**
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> (1) The court may in its discretion reject any statement or representation notwithstanding that the requirements of this part are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.
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> (2) This section does not affect the admissibility of any evidence otherwise than by virtue of this part."
>
> **"130 Rejection of evidence in criminal proceedings**
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> Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[27] The complainant was almost nine years of age at the time she was interviewed. No reference was made to a penile rape until after more than 32 minutes into the

interview and the only information that she offered in relation to penetration by the applicant's penis was in response to the leading question. It is also clear that the explanation she gave was very vague and that the circumstances that she elaborated upon are not suggestive of any penetration. She then indicated later on that the occasion she was speaking about had in fact not occurred when she originally suggested but had occurred in the morning when she had come into the applicant's bed because she was cold. That, therefore, puts in doubt the whole explanation of the alleged incident and needing to leave the room to go and have a shower as an excuse to get away from the applicant.

[28] In my view, pursuant to s 98 *Evidence Act* 1977 (Qld), it would be inexpedient in the interests of justice to permit the passages of evidence following the inadmissible question to be led. I also consider that pursuant to s 130 of the *Evidence Act* it would be unfair to the applicant to permit such evidence to be adduced at his trial. I therefore exclude the material in the complainant's interview from page 15, line 11 to page 18, line 24 and from page 19, line 27 to page 20, line 21.

[29] In relation to the application for the exclusion of the evidence in relation to the passages from the s 93A statement by the complainant's friend, following discussion between Counsel, it is clear that only one passage remains in contention. That passage is at page 10, lines 43 to 49 and relates to a leading question. In my view, if the reference to "and he put his finger in it" is removed, then the rest of the passage can remain despite the fact it is the product of a leading question. I do not consider that the discretion has been enlivened in the circumstances.

[30] There are rulings in the following terms:

1. Evidence of the s 93A statement of the complainant Piva made on 23 April 2012 from page 15, line 11 to page 18, line 24 and from page 19, line 27 to page 20, line 21 of the Transcript of the Police Record of Interview is excluded.

2. The reference in the s 93A statement of the complainant's friend made on 30 April 2012 that "he put his finger in it" at page 10 of the Transcript of the Police Record of Interview is excluded.