SUPREME COURT OF QUEENSLAND

CITATION:	*R v AJH* [2018] QCA 86
PARTIES:	**R** **v** **AJH** (appellant)
FILE NO/S:	CA No 362 of 2016 DC No 575 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 2 December 2016 (Harrison DCJ)
DELIVERED ON:	9 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2018
JUDGES:	Sofronoff P and Philippides JA and Daubney J
ORDERS:	**1. Appeal allowed in part.** **2. Conviction on count 1 quashed.** **3. Retrial ordered on count 1.** **4. Otherwise, appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of a number of offences against the same complainant – where the appellant was convicted of a count of maintaining an unlawful sexual relationship with a child under the age of 16 years – where the appellant was also convicted on one count of indecent dealing with a child under 16 under care and one count of rape – where the jury was directed by the learned trial judge that they could rely on the indecent dealing count and/or the rape count, if they were satisfied beyond reasonable doubt of those counts, in proof of the maintaining count – where on the evidence given by the complainant at trial it became apparent that the rape count could only have occurred when she was 16 years old – whether the direction by the trial judge that the jury could rely on the rape count in proof of the maintaining count was a misdirection that occasioned a substantial miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR

CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the complainant gave evidence at trial – where the complainant was declared a special witness under s 21A *Evidence Act* 1977 (Qld) – where the court was closed during the giving of the complainant's evidence under s 5 *Criminal Law (Sexual Offences) Act* 1978 – where the only special measure taken under s 21A during the giving of the complainant's evidence was the provision of a support person who sat in the public gallery – where it was not apparent to the jury that a support person was present in the courtroom – where no warning under s 21A(8) was given – whether the failure to give a warning under s 21A(8) in the circumstances occasioned a miscarriage of justice

Criminal Code (Qld), s 229B
Criminal Law (Sexual Offences) Act 1978 (Qld), s 5
Evidence Act 1977 (Qld), s 21A

R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, distinguished
R v Samson (2011) 221 A Crim R 295; [2011] QCA 112, discussed

COUNSEL: M J Copley QC for the appellant
J A Wooldridge for the respondent

SOLICITORS: McGinness & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was charged with seven counts including one of maintaining an unlawful sexual relationship with a child under 16 years. In addition, he was charged with three counts of unlawfully and indecently dealing with the same child, she being a child under the age of 16 years. Two other counts alleged that he unlawfully and indecently assaulted the same complainant on 3 October 2011. Finally, and relevantly for the purposes of this appeal, he was charged with having raped the complainant "on a date unknown between 31st day of December 2010 and 8th day of July 2012". The complainant turned 16 years of age on 2 October 2011, that is to say, during the period in which the rape was said to have happened.

[2] Section 229B of the *Criminal Code*, which creates the offence of maintaining an unlawful sexual relationship with a child, provides in subsection (2) that:

> "An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period."

[3] The Crown relied upon two categories of evidence in order to satisfy s 229B(2). The first category, according to evidence given by the complainant, was that during the relevant period, the appellant would come into her room and touch her in ways that constituted indecent dealing. This conduct escalated to a point at which he

began to take her clothes off. On still later occasions he began to insert his fingers into the complainant's vagina and to perform other sexual acts upon her.

[4] The second category of unlawful sexual acts relied upon for subsection 229B(2) were those constituted by count 3 and count 5. The period within which the offence in count 5 was said to have been committed was, as I have said, one that included a period when the complainant was no longer a child under the age of 16.

[5] In respect of the charge of maintaining, and the offences in counts 3 and 5, the learned trial judge directed the jury:

> "All of you must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sex acts existed. It is not necessary that all of you be satisfied about the same unlawful sexual acts. Now, it is important that you look at what the prosecution are relying on for the purposes of establishing this offence of maintaining a relationship of which you must be satisfied, obviously, beyond a reasonable doubt. Firstly, they are relying on the allegations for counts 3 and 5. They are not relying on count 2 and so I understand the prosecution case, count 2 happened some time before the others but that the continuity or habituality of conduct started to occur later on at [Redacted] Street, following the incident which constitutes count 3.
>
> Now, if you are satisfied beyond reasonable doubt of the guilt of the accused in relation to either or both of counts 3 and 5, they can be used in your consideration of the count of maintaining."

[6] A little later, after dealing with evidence of uncharged acts, his Honour told the jury:

> "If you have any doubts about the specific offences in counts 3 and 5, and we have already gone through what they relate to, then you should only convict the accused on the basis of evidence of the other alleged acts which I have summarised if after carefully scrutinising the evidence of the complainant, you are satisfied beyond reasonable doubt that he did do those acts during that period alleged in the indictment, i.e., up to her 16th birthday."

[7] His Honour had earlier explained to the jury that the charge of maintaining "cuts off at the 16th birthday" because the prescribed age for the purposes of the offence is 16.

[8] The problem that has been uncovered since the appellant's conviction arises from two pieces of evidence. The first piece of evidence is that which was given by the complainant to identify the approximate date upon which the rape alleged in count 5 took place. She placed the offending by reference to where she was living at the time. Her evidence was, relevantly:

> "Okay. So what is the next occasion you can remember?--- I can remember that [Redacted] Street, when he came into my room. Oh. No, he asked me to go into his room.
>
> Okay. In [Redacted] Street?--- Yes.

> Okay. Do you remember how old you were when you moved there?--- I was in year 11.
>
> Okay?--- But I can't remember how old I was."

[9] The examination in chief then diverged into other matters. The prosecutor then brought her back to count 5:

> "Okay. And when you got to [Redacted] Street, you started to talk about a specific occasion you remember there?--- Yes.
>
> Yes. Do you - and do you remember when you moved to [Redacted] Street?--- 2011, yes.
>
> You don't sound very sure about that. Are you remembering it by something in particular or ---? --- I – I just started going to school from there, 2011."

[10] The complainant then gave evidence of the act of rape. After doing so, the prosecution asked:

> "And this particular occasion that you remember at [Redacted] Street, did that type of thing ever happen any other times or was that the only time that you remember?--- Yeah, it happened a couple of times."

[11] A document entitled "Admissions" was tendered by the Crown but it was treated by both sides as containing agreed statements of fact. One of the statements of fact was that the complainant's parents' tenancy where the complainant said that the offences had taken place commenced on 21 November 2011. This was after the complainant had turned 16. It follows, therefore, that the offence charged in count 5, the offence of rape, must have been committed upon the complainant after she had turned 16. The point had been overlooked at trial but no submission to the contrary was advanced by the respondent on this appeal.

[12] Although s 229B does not state in express terms that the two distinct unlawful sexual acts required by subsection (2) must have taken place during the period of the alleged maintaining of the relationship, that must be so, for proof that an accused has committed an unlawful sexual act at some time after the relationship ceased to be unlawful, because the complainant ceased to be a child under the prescribed age, could hardly constitute proof of the charge of maintaining.

[13] It follows that count 5 could not have been used by the jury in its consideration of the count of maintaining and it also follows that the learned trial judge was led into the error of directing the jury incorrectly that count 5 could be used by the jury in its consideration of the count of maintaining.

[14] The respondent submits that if the Court were to conclude that there had been a misdirection in that respect then, in any event, there has not been a substantial miscarriage of justice. This is because, it is submitted, there was ample other evidence upon which the jury would nevertheless have been satisfied beyond a reasonable doubt that the appellant had committed more than one unlawful sexual act over the relevant period.

[15] There was indeed such evidence. However, the obstacle to a conclusion by this Court that there has not been a substantial miscarriage of justice lies in the emphasis given in the summing up to the significance of counts 3 and 5. Because nobody at the trial had adverted to the timing issue concerning count 5, it is understandable that counts 3 and 5, being offences about which the complainant gave specific detailed evidence, would have constituted the simplest path of reasoning for the jury and one they would be invited to consider first. It is only if the jury had not been satisfied in relation to one or both of those counts that it would have become necessary for the jury to consider the question raised by the evidence of uncharged acts.

[16] The emphasis given to the significance of those counts is perfectly understandable and, once the defect in the reliance by the Crown on count 5 is revealed, that emphasis makes it impossible to conclude that the misdirection could have had no effect.

[17] In this respect, the appellant points to the fact that the complainant's evidence in relation to counts 4 and 6 did not come up to proof and that, as a consequence, the Crown entered a *nolle prosequi* in relation to those counts. Further, there was evidence that the complainant had falsely told her grandfather that the appellant had given her a sexually transmitted disease. This was untrue. Accordingly, the appellant submits that the complainant's credit was in issue and so it is not possible for this Court to conclude, on the basis of a review of the transcript, that a conviction was inevitable based on the rest of her evidence.

[18] I cannot be satisfied that the misdirection did not have a significant effect upon members of the jury in concluding that the appellant was guilty of count 1 and I would therefore reject the submission that the proviso applies. I would uphold this ground of appeal.

[19] There is another ground of appeal. Section 21A of the *Evidence Act* 1977 makes provision for special arrangements to be made when a "special witness" is required to give evidence. Section 21A(1) defines a "special witness" relevantly to mean a person who, in the court's opinion, would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court. Section 21A(2) provides that where a special witness is to give evidence the court may, on application made by a party, make a direction that all persons other than those specified by the court be excluded from the room in which the court is sitting. In addition, under that provision the court can order that a person approved by the court be present while the special witness is giving evidence in order to provide emotional support to the special witness.

[20] On the first day of the trial, an order was made by consent declaring the complainant to be a special witness and approving Ms Liza Barr to be present while the complainant gave evidence in order to provide her with emotional support. That order having been made, the Crown prosecutor opened her case. Then, upon calling her first witness, who was the complainant, the court was closed with the exception of the parties, the legal representatives and, of course, Ms Barr.

[21] Section 21A(8) of the *Evidence Act* 1977 provides:

> "If evidence is given, or to be given, in a proceeding on indictment under an order or direction mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding must instruct the jury that—

(a) they should not draw any inference as to the defendant's guilt from the order or direction; and

(b) the probative value of the evidence is not increased or decreased because of the order or direction; and

(c) the evidence is not to be given any greater or lesser weight because of the order or direction."

[22] No such direction was given by the learned trial judge.

[23] The appellant submits that this omission was an error of law and constitutes a miscarriage of justice.

[24] Neither counsel sought a direction under s 21A(8) and that is understandable for the following reasons. Unlike in some cases, the support person sat in the public gallery and not by the side of the supported witness. The application to have the complainant declared a special witness and for Ms Barr to remain in court despite its closure was made in the absence of the jury. Consequently, the jury would have been aware only that, the court having been closed, there was a woman sitting in the public gallery whose interest in the case was unknown and whose presence was unexplained. She might have been associated with the prosecution or she might have been associated with the defence. There was simply nothing remarkable about her presence in court that could have given rise to any conclusions adverse to the appellant being drawn by the jury.

[25] In *R v Michael*,[1] the Crown prosecutor at the trial had applied for the complainant to be allowed, as a special witness, to have a support person sit next to her while she was giving her evidence.[2] The learned trial judge directed that the support person sit in the chair beside the witness box while the complainant gave evidence. Otherwise the court was closed. The direction required by s 21A(8) was not given.

[26] Keane JA, with whom Holmes JA and Mullins J agreed, held that the terms in which s 21A(8) is expressed meant that a failure to give the required direction constituted an error of law which rendered the trial irregular whether or not counsel for the accused had sought a direction in conformity with the provision.[3] His Honour said that the legislation was concerned to ensure that it was made unequivocally clear to the jury that the special arrangements made to assist the complainant should not be taken to reflect adversely upon the accused. His Honour said:

> "The risk of such adverse pre-judgment is at least as strong where a complainant is seen to be afforded support while giving evidence – which might be thought to reflect a justified fear of the accused – as it is in the case where a young complainant is seen to give pre-recorded evidence."[4]

[27] The failure to give the direction was an irregularity but it gave rise to no miscarriage of justice in this case. That is because the unexplained presence of Ms Barr (and

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1 (2008) 181 A Crim R 490.
2 Supra at [21].
3 Supra at [36].
4 Supra at [37].

subsequently a substitute support person) sitting in the public gallery would not be capable of giving rise to any inference adverse to the accused person. This case is unlike *R v Michael* in which the presence of the support person sitting next to the witness while she was giving her evidence was capable of giving rise to such an inference. The appellant did not point to any fact or matter to the contrary.

[28] A similar situation arose in *R v Samson*.[5] In that case a support person was permitted to remain in the closed court while the complainant gave evidence. The distinction between that case and the present case is that the order permitting the support person to be present had been made under s 5 of the *Criminal Law (Sexual Offences) Act*. No application had been made to declare the complainant a special witness under s 21A. Defence counsel at the trial had urged the judge not to give a direction in terms of s 21A(8) for fear that such a direction might have "dangerously strengthened the complainant's evidence" in the jury's eyes. McMurdo P, with whom Muir and Chesterman JJA agreed, held that the direction required by the *Evidence Act* 1977 did not have to be given.

[29] That is not this case. In this case, although an application for orders had been made and granted under the *Evidence Act* 1977 declaring the complainant to be a special witness and Ms Barr to be appointed a support person, when it came time to apply for an order closing the court it was s 5 of the *Criminal Law (Sexual Offences) Act* 1978 which the prosecutor invoked when inviting the learned trial judge to close the courtroom. That section empowers the court, in a case such as this, to order that all persons be excluded from the courtroom when the complainant is giving evidence other than, relevantly, the defendant, the defendant's lawyers, the prosecution lawyers and any person whose presence will provide emotional support to the complainant. Ms Barr satisfied that description. Section 5 was appropriately invoked. The same order closing the court might have been made under s 21A(2)(b).

[30] Nothing turns upon this choice of statute upon which the closure order was based because, although the *Criminal Law (Sexual Offences) Act* 1978 does not contain any requirement for a direction to be given to the jury of the kind required by s 21A(8) of the *Evidence Act* 1977, nevertheless that subsection applied to this case because "an order or direction mentioned in subsection (2)(a) to (e)" had been made.

[31] However, *Samson* is a case that demonstrates that there may be circumstances in which an inference adverse to the accused might not be open where a support person is present in a closed court.

[32] For present purposes *Samson* is relevant only because it supports the view urged by the respondent that, in the circumstances of this case, the irregularity did not amount to a miscarriage of justice. I agree and would reject this ground of appeal.

[33] I would allow the appeal on ground two and order that the conviction on count one be quashed and that there be a new trial on that count.

[34] **PHILIPPIDES JA:** For the reasons given by Sofronoff P, I agree with the orders proposed by his Honour.

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5 [2011] QCA 112.

[35] **DAUBNEY J:** I respectfully agree with the President.