DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Johnston* [2014] QDC 174
PARTIES:	**THE QUEEN** **v** **CLAYTON GARY JOHNSTON**
FILE NO/S:	118/14
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	22 August 2014
DELIVERED AT:	Rockhampton
HEARING DATE:	8 August 2014
JUDGE:	Smith DCJ
ORDER:	**1. The application to exclude the s93A statement of the complainant is dismissed.** **2. I make a no jury order in this matter.**
CATCHWORDS:	CRIMINAL LAW - Application for no jury order EVIDENCE- Application for exclusion of s 93A statement *Criminal Code 1899 (Q)* ss 590AA, 614, 615 *Evidence Act 1977 (Q)* ss 93A, 98, 130 *Arthurs v The State of Western Australia* [2007] WASC 182 *Mickelberg and Anor v R (No 3)* (1992) 59 A Crim R 288 *R v ABV* [2005] QDC 426 *R v Brown* [2011] QDC *R v Clough* [2009] 1 Qd R 197; [2008] QSC 307 *R v De Jesus* (1986) 61 ALJR 1; 68 ALR 1 *R v FAR* [1996] 2 Qd R 49 *R v Fardon* [2010] QCA 317 *R v Kissier* [2012] 1 Qd R 353; [2011] QCA 223 *R v Morley* [2010] QDC

R v Morris ex parte Attorney-General [1996] 2 Qd R 68

R v *Patel* [2012] QSC 419

R v *Prisk and Harris* [2009] QSC 315

R v SAA [2009] QDC 5

R v WHA [2013] QDC 339

The State of Western Australia v Martinez (2006) 159 A Crim R 380

TVM v The State of Western Australia (2007) 180 Crim R 183

COUNSEL: Ms. S. Hedge for the Crown

Mr. F. Martin for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions for the crown

Mulcahy Ryan lawyers for the defendant

Introduction

[1] This is an application by the defence pursuant to s 590AA of the *Criminal Code* for:
- (a) an order for further and better particulars;
- (b) a ruling as to the competency of the complainant;
- (c) the exclusion of the complainant's s 93A statement;
- (d) a no jury order;
- (e) the exclusion of certain other evidence.

[2] The Crown has provided the particulars sought and no ruling is needed on this point. It was agreed by the parties that a decision should firstly be given as to the 93A statement and the no jury order point first. It may be unnecessary to give rulings on the other points if a no jury order is made.

Background

[3] The defendant is charged with the following counts:
- (a) maintaining a sexual relationship with the complainant child DH at Rockhampton between 1 July 2010 and 16 July 2013.
- (b) one count of rape of DH on a date unknown between 1 December 2010 and 16 July 2013.
- (c) one count of rape of DH on a date unknown between 1 May 2103 and 16 July 2013.

[4] The defendant has pleaded guilty to the maintaining count and not guilty to the two counts of rape.

[5] The complainant was born on 2 June 1998 and is presently 16 years old.

[6] A report of Dr Keane a psychologist has been obtained by the Crown dated 7 July 2014 (Exhibit 1) which states:
- (a) DH's developmental milestones were slow (p 3.25).

(b) He was not able to cope with grade 9 at Rockhampton State High School and was moved to a special school.
(c) He has never had a paid job.
(d) As a child he was diagnosed with an autistic disorder. On 24 December 2013 he was admitted to the Rockhampton Hospital because he was not eating, sleeping or communicating.
(e) His non verbal and full IQ are at extremely low levels (64 and 66).
(f) His verbal IQ is at borderline level (71).
(g) His mental age is the level of 7 years and 10 months.
(h) His writing and arithmetic skills are at an extremely low level. His reading is at below average level.
(i) From December 2013 to February 2014 he reported some visual and auditory hallucinations.
(j) Using DSM5 his condition meets for diagnosis of mild mental retardation, together with an autistic disorder, post traumatic stress disorder and a major depressive disorder.
(k) With reference to s 229F of the *Criminal Code* he may be considered an intellectually impaired person.
(l) He did not have the cognitive capacity to provide free voluntary and informed consent to sex.
(m) He does not appear overly susceptible to suggestion. He has a sufficient understanding of moral concepts such as a lie and the truth.
(n) His cognitive capacity is sufficient to recall the incident.
(o) He has the language skills necessary to convey the evidence.
(p) He is able to provide reliable evidence as he can give an intelligible account of the incident.

[7] The defendant at the time of the alleged offences was 38. He lived across the road from the complainant and his family. The Crown case is the defendant visited the complainant's house in the afternoons and engaged in sexual acts with him.

[8] DH's mother in a statement dated 4 August 2008 (Exhibit 4) alleges that on 16 July 2013, DH complained to her about the defendant playing with his "dick" and sucking his "dick" and he would "jack off" on his back and "bum". Police attended that night. It was the next day that she took DH to the police station.

[9] The complainant provided a s 93A statement to the police on 17 July 2013 (Exhibit 2 is the CD and Exhibit 3 is the transcript). In the 93A statement:

(a) He described the special school he attended (p 4).
(b) He described how Clayton lived across the road (p 5.2).
(c) He said "if I act a bit weird its my autism kicking in" (p 5.7).
(d) Clayton "jacked off" to gay porn (p 6).
(e) Clayton "shoved his penis up my bum" or "up by buttocks" (p 6.3).
(f) It happened in "my room" and the "computer room" (p 6.7).
(g) They were playing with the CB radio, he then started "jacking off" and then put his hand "my pants" (pp 6-7).
(h) He then shoved his penis "up my bum" (p 7.3).
(i) Once he "got some cum and put it on my face and I vomited over it" (p 7.4).
(j) "CB" stands for "Citizens Band" (p 8.3).
(k) If mum walks in he stops until the coast is clear (p 8.5).
(l) DH said similar things happened in the computer room (p 9.5).

(m) DH gave a good description of the house (10). They met Clayton has he had to borrow a boat during the flood (p 11.9).
(n) DH described the defendant (pp 12-13).
(o) At his house the accused did similar things to DH but only touched him (p 13).
(p) The "ultimate" is he "jacked off" "put cum in his mouth" or touched him on the penis (p 14.3).
(q) He said "cum" was semen and you make babies with it (p 15.5).
(r) They met when one of the floods happened (p 18.2).
(s) Clayton sucks on DH's penis. This could have been anywhere (p 19.7).
(t) DH was not sure if something happened at the swamp store at Depot Hill (p 20.5).
(u) DH asked if this was going to be used as evidence (p 22.2).
(v) When he speaks of jacking off DH meant the defendant put a penis up his "bum" (p 23).
(w) DH did not describe Clayton's penis as he did not want to sound gay (p 24).
(x) On one occasion Clayton tried to "jack him off" in the toilet but only "urine" came out – this was an "attempt" (p 27.7).
(y) DH described a "boner" as a hard penis (p 28).
(z) He told his mother and his father what had happened.

[10] I watched a part of the tape in court. My clear impression of the tape is that whilst the complainant was able to give an intelligible account of the alleged events it was clear that he suffered a mental disability.

[11] On 17 July 2013 a pretext call was conducted between DH's mother and the defendant (the CD is Exhibit 8 and the transcript is Exhibit 9). In this call:

(a) The defendant denied he forced DH to have sex with him (p 4.31).
(b) He accepted DH would not lie (p 5.20) and he did not know why he did it to him.
(c) He said he didn't know why he did it (p 5.50). He then said it could have been an accident and then he denied he did it (p 5.55).
(d) He again said he didn't know if he did it (p 6.2).
(e) He then asked to call back as he needed his head straight and needed to think (p 6.25).
(f) He denied putting semen on DH's mouth or on his lip (p 6.40).
(g) He didn't know why he did it (p 7.19).
(h) He denied penetrating DH or sucking each other's penises (p 7.30).
(i) He admitted getting his "jollies" off (p 7.42).
(j) He said he had been lonely for many years and had sexual frustration (p 7.55).
(k) It happened a couple of times every now and then (p 8.12).
(l) The defendant never penetrated him. He was going to but changed his mind (p 8.50).
(m) "What have I done fuckin dickhead" (p 9.50).
(n) It had been going on for a couple of months (p 10.10).
(o) The last time was two months ago (p 11.11).
(p) It happened more than once (p 12.1).

[12] It seems to me that are no admissions to the rape counts in this call. There are clearly admissions to elements of the maintaining count.

[13] Dr Eva Stuwe has provided a statement dated 18 July 2013 (Exhibit 5). In this statement she says that she examined the complainant on 18 July 2013. The anus appeared normal and anal tone was in the normal range. There was no evidence of anal trauma. The absence of such findings could not refute or confirm the allegations.

Section 93A Tape

[14] In written submissions the defence submits that the whole of the s 93A tape should be excluded as the complainant said he had been told what to say by his mother (pp 31-32 of the 93A tape).

[15] The Crown submits that:

(a) The content of the answers do not indicate the mother supplied him with the content of the allegations.
(b) The statements made by the complainant at pp 31-32 could merely mean what topics his mother told him to speak about.
(c) The child told the police what he was saying was the truth.
(d) The child can be cross-examined on these issues.

[16] Section 98 of the *Evidence Act 1977* (Q) provides:

"**98 Rejection of evidence**

(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 that statement should be admitted.

(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this part.

[17] Section 130 of the *Evidence Act 1977* (Q) provides:

"**130 Rejection of evidence in criminal proceedings**

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 the evidence."

[18] The complainant was called on voir dire. I formed the view that he was competent to give evidence (s 9A of the Evidence Act) and was able to take the affirmation (s 9B of the Evidence Act.) He was cross examined at T1-21-22 about what he meant when he said in the interview that "Mum would have just told me what to say" but he did not remember what he meant by this.

[19] The complainant's mother was also called on voir dire. She gave evidence that when the police came to the house on 16 July 2013, they spoke to her son. He made allegations to them but not in great detail (T1-27.45). They were there for about 1 hour (T1-28.25). She admitted that after the police left she had further conversations

with DH about what Clayton did (T1-29.45). For example he said he was forced to have sex (T1-30.5) and he vomited after semen was put in his mouth (T1-30.25).

[20] She merely told DH to tell the police the truth (T1-31.20).

[21] She also recalled that at the house when the police were there DH said that Clayton "raped" him although she was not sure of the exact words (T1-33).

[22] Officer Cattell in his statement (Exhibit 7) said that he attended DH's house at 8.20pm on 16 July 2013. He refreshed his memory from a police crime report. At the house the mother informed him that she had been told by DH that he had been sexually abused, was forced to have oral sex, to masturbate and possibly engage in anal intercourse (T1-58.30). He did not recall speaking to DH that evening (T1-36.4). He accepted that some of the information he put to DH in the 93A tape had been provided to him by the mother (T1-43.45).

[23] In *R v FAR* [1996] 2 Qd R 49 at 61, it was held that the discretion to exclude a s 93A statement will almost always turn on the reliability of the tape. Other factors such as an inability to cross examine may be relevant.

[24] In *R v Morris ex parte Attorney-General* [1996] 2 Qd R 68 at 75.15 by Dowsett J that circumstances may arise in which the statement is so unreliable "either because of its contents or because of the way in which it was obtained, that it ought not to be received…"

[25] For example in *R v ABV* [2005] QDC 426 Nase DCJ excluded the tape where the investigators inappropriately used coercive techniques on a 6 ½ year old child.

[26] To these considerations I would add the matters mentioned in [39] of this judgment.

[27] In the present matter the defence did not strongly pursue the application to exclude the entirety of the s93A tape in light of the evidence called.

[28] In my view there is no evidence supporting the conclusion that DH was simply telling the police what his mother told him to tell the police. Indeed on one occasion when a leading statement was put the child did not accept the allegations (see T 30.9).

[29] Having considered the totality of the evidence namely the way in which the child answered the questions of the police, the admissions made by the defendant in the pre-text call and indeed the plea of guilty to count 1 I do not consider it inexpedient in the interests of justice to admit the 93A statement nor do I consider it unfair to admit the evidence. A substantial part of the tape is likely to be reliable.

[30] In my opinion the passage at pp 31-32 and its terms is the version the complainant gave from his memory although it was "fuzzy" in parts (p 32.3). He said his brain helped him out.

[31] In my view when considering the s 98 discretion I need to balance the seriousness of the charges as against any potential defect in the relevant statement. In my view on balance it is in the interests of justice to admit the statement. I also have regard to the fact that the defendant has the right to cross-examine on the matters he has raised.

No jury order

Submissions

[32] The defence submits that a no jury order should be made as:

(a) The defendant will not get a fair trial due to the nature of the allegations i.e. serious charges involving an autistic child.
(b) Prejudicial remarks were made in the 93A tape.
(c) Prejudicial comments were made by the mother in the pre-text call.

[33] In oral submissions the defence submits:

(a) Defence counsel was not aware of the identity of the trial judge until he saw the crown submissions.
(b) This is a case in which the jury will be prejudiced against the defendant. This is particularly so where the complainant is clearly mentally impaired and the defendant has entered a plea to count 1.
(c) The issues to be decided at trial are very narrow ones- consent and penetration. The issue of consent would be very hard to run in front of the jury.
(d) The crown wishes to have left alternative verdicts of attempted rape, sodomy, attempted sodomy and indecent treatment. The directions on these and as to any potential admissions would be confusing.
(e) There is an R v S problem with count 3.
(f) There were leading questions asked by the police at pp19 and 30 which clearly show that more information than that disclosed was given by the child before the 93A tape. There were also allegations made in the pre-text call by the mother which are very prejudicial and which were not supported by the evidence.
(g) The defence relied on the decision of *R v SAA* [2009] QDC 5.

[34] The Crown in written submissions submits:

(a) The identity of the trial judge is known to the parties and 'special reasons' must be shown to make the order (see s 614(3) of the *Criminal Code*.
(b) The Crown relies on *R v Prisk and Harris* [2009] QSC 315; *R v Kissier* [2012] 1 Qd R 353*;* [2011] QCA 223; *R v Clough* [2008] QSC 307 and *R v WHA* [2013] QDC 339 and *R v Fardon* [2010] QCA 317.
(c) The Crown submits the starting point should be trial by jury.
(d) It is submitted none of the reasons mentioned in s 615(4) are relied on by the defence.
(e) The case is not complex and there is no adverse pre-trial publicity. The case is no more prejudicial than other cases involving sexual offences against children.
(f) A jury is capable of excluding from its consideration emotional statements made by the mother after direction.
(g) The issues in this case are classic jury issues.
(h) For the maintaining count an objective community standard will need to be applied.
(i) The interests of justice do not support a jury order.
(j) In any event there is no special reason for such an order to be made.

[35] In oral submissions the Crown submitted:

(a) That the defence could not establish it was in the interests of justice to have a no jury order nor could special reason be shown.
(b) There was nothing exceptional about this case.
(c) Directions can be given to cure any prejudice arising from the relevant statements made in the 93A tape and the pre-text call.
(d) *R v SAA (supra)* may be distinguished.
(e) Consent is a classic jury question.

Applicable law

[36] Sections 614 and 615 of the *Criminal Code 1899 (Q)* provide:

"**614 Application for order**

(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.

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."

[37] It is clear in this case that the test to be applied is whether it is in the interests of justice to make a no jury order (s 615(1)). Further as the identity of the trial judge is known, the defence must establish special reasons (s 614(3)).

[38] The term "special reasons" was discussed in *Prisk and Harris (supra)* by Martin J at [9] as inter alia:

> "… 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."

[39] As to the term "interests of justice" this may include a variety of considerations relevant to the particular case and should not be narrowly defined (see *TVM v The State of Western Australia* (2007) 180 Crim R 183 at [22] to [38] per McKechnie J; *R v Fardon* [2010] QCA 317 at [73]- [74]). Malcolm CJ in *Mickelberg and anor v R (No 3)* (1992) 59 A Crim R 288 noted at 302.9 that "*The interests of justice in a criminal trial are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a fair trial. The interests of justice also extend to the public interest in the due administration of justice*."

[40] I note that the defendant's case does not fall within any of the sub-paragraphs (s 615(4)) but I also note that these are not exhaustive.

[41] There is a degree of conflict in some superior court decisions as to whether there is a particular starting point when considering such an application.

[42] In *The State of Western Australia v Martinez* (2006) 159 A Crim R 380 EM Heenan J at 389 expressed the view the starting point should be a neutral one. This view was endorsed by Martin CJ in *Arthurs v The State of Western Australia* [2007] WASC 182 at [171]. On the other hand McKechnie J in *TVM* (supra) thought that the starting point was trial by jury.

[43] In *R v Fardon* [2010] QCA 317 Chesterman JA at [81] adopted the view of McKechnie J and indeed held that trial without a jury was exceptional. This view

however was not adopted by the majority. Muir JA at [44] noted that the overriding consideration in the exercise of the discretion is whether it is in the interests of justice to make the order. McMeekin J agreed with Muir JA.

[44] In *R v Kissier* [2012] 1 Qd R 353; [2011] QCA 223 Mullins J with whom the other members of the court agreed favoured the view that Chesterman JA expounded on the question of starting points (see [30]). However it might be said that this conclusion was obiter as Her Honour held that it was not strictly necessary to contribute to the debate on whether there is any starting point.

[45] I do not consider I need to resolve this issue in this case. In this case the defendant has the additional hurdle of showing "special reason" which makes it a different case to *Fardon* and *Kissier*.

[46] The parties relied on a number of decisions where the discretion has been exercised one way or the other.

[47] In *R v Brown* [2011] QDC Griffin SC DCJ made a no jury order where it was almost inevitable that the cross examination of the complainant would involve the disclosure of other sexual offences. Substantial prejudice was considered very relevant at [12].

[48] In *R v Clough* [2009] 1 Qd R 197;[2008] QSC 307 Mackenzie J ordered a no jury trial where the trial had the potential to be unusually complex due to psychiatric evidence on the question of unsoundness of mind.

[49] In *R v Morley* [2010] QDC Britton SC DCJ dismissed the application where the only basis of the application appeared to be the serious nature of the allegation and significant concerns as to the quality of the crown case.

[50] In *R v Patel* [2012] QSC 419 Douglas J dismissed Dr Patel's application which was based on alleged unfair publicity and complexity.

[51] In *R v Prisk and Harris* [2009] QSC 315, the application was dismissed. It was based on the fact unpleasant photographic evidence of a deceased toddler would be presented and that evidence admissible against the father would be tendered when it was not admissible against the mother.

[52] In *R v WHA* [2013] QDC 339 O'Brien DCJA dismissed an application in a case involving sexual offences where as his honour noted at [30] the case was one which was regularly determined by way of juries. The trial would involve the application of objective standards of indecency.

[53] Finally in *R v SAA* [2009] QDC 5 Robertson DCJ made a no jury order. In that case the defendant pleaded not guilty to maintaining but pleaded guilty to four discrete sexual offences. The central issue was whether he did maintain the alleged sexual relationship. Also the offence covered two versions of the offence. His Honour thought there was considerable merit in the submission that there was a danger the jury would be overcome by the admitted conduct.

[54] At the end of the day whilst these cases are of some assistance to me, each case depends on its own facts and the discretion is to be exercised on the features of the particular case.

Conclusions

[55] In this case I consider it is in the interests of justice to make a no jury order and special reasons have been established by the defence.

[56] First I consider the plea of guilty to count 1 to be a determining factor here. There is no doubt that sexual offences are ones which likely to inflame prejudice (see *R v De Jesus* (1986) 61 ALJR 1 at [4] where Gibbs CJ stated "*Sexual cases, however, are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard. For that reason, I adhere to the view which I expressed in Sutton v. The Queen*" and *R v SAA* (supra) at p 7).

[57] In this case not only is a child involved but also one who is clearly mentally disabled. In my view despite any direction it would be very difficult for a jury to not be prejudiced against a defendant who has pleaded guilty to maintaining an unlawful sexual relationship with a clearly and obviously mentally impaired boy. It is clear he has substantially abused the trust the family reposed in him. This fact would in my view overwhelm the case. This alone in my view constitutes a very unusual feature of this case and amounts to a special reason. It is highly unusual for a defendant to enter a plea of guilty to the count of maintaining and yet maintain his innocence on 2 charges of rape.

[58] Secondly the crown wishes to have a variety of alternative verdicts left to the jury. There will be some complexity as to the direction particularly as to whether admissions in the plea and the pretext call have been as to rape as distinct from the alternatives such as indecent treatment.

[59] Thirdly it is clear from hearsay statements put in both the 93A tape and in the pre-text call the complainant may have engaged in out of court discussions with the mother- particularly on the issue of penetration- one of the key issues. It would be very difficult for the jury to exclude such matters from consideration consciously or sub consciously despite directions to the contrary.

[60] Fourthly it is in the interests of justice to have a judge only trial where the very narrow focus will be on the narrow issues of penetration and possibly consent. The trial would in my view be far more efficient than one involving a jury.

[61] Finally I have had regard to the affidavit of Ms Mulcahy. It seems arguable that the disclosure of the penetration by the complainant at the conference on 6 August 2014 was produced in answer to a suggestive question by the prosecutor- a matter which may be very adequately dealt with by a judge in his or her reasons for judgment.

[62] It is the combination of factors which has lead me to the conclusion that the defence has established both special reasons to make the order and that it is in the interests of justice to make such an order.

[63] It may be accepted that issues of indecency are classic jury questions (see *WHA* (supra) at [30]) but that is not the point in issue here.

[64] In the circumstances I will make a no jury order in this case.

Orders

[65] The application to exclude the s 93A statement of the complainant is dismissed.

[66] I make a no jury order in this matter.