HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

GRAHAME JAMES GATELY APPELLANT

AND

THE QUEEN RESPONDENT

Gately v The Queen [2007] HCA 55
6 December 2007
B15/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

P E Smith for the appellant (instructed by Fisher Dore Lawyers)

B G Campbell with P J Alsbury for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Gately v The Queen

Criminal law – Evidence – Video evidence of the complainant – Appellant charged with sexual offences against a child – Jury shown a videotape of the complainant's evidence in chief and cross-examination given at a preliminary hearing – Whether the videotape itself was admissible into evidence as an exhibit – Whether permitting the jury to replay the complainant's pre-recorded video evidence during its deliberations and in the absence of judge and counsel constituted a miscarriage of justice.

Criminal law – Evidence – Admissibility of prior consistent statements – Whether the complainant's written statement to police was admissible despite the tender of the pre-recorded video evidence.

Criminal law – Jury trials – Directions – Whether a direction that the jury not give undue weight to the complainant's pre-recorded video evidence or written statement to police was required.

Criminal law – Appeals against conviction – Application of "proviso" – Nature of inquiry – Order of consideration of statutory criteria.

Criminal Code (Q), s 668E.
Evidence Act 1977 (Q), Div 4A of Pt 2, ss 93A, 98, 99.

1 GLEESON CJ. The facts of the case are set out in the reasons of Hayne J. The grounds of appeal are as follows:

> "That a miscarriage of justice has occurred in this case:
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> …
>
> (a) The Trial Judge erred in allowing the jury during its deliberations to play a pre-recorded video statement taken under s 21A[M] of the *Evidence Act* (Qld) 1977;
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> (b) That the Trial Judge erred in failing to direct the jury when the complainant's statement was re-read to them that they should not give undue weight to the evidence;
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> (c) The Trial Judge erred in permitting the prosecutor to tender written statements (in particular the statement of the complainant) taken pursuant to section 93A of the *Evidence Act* 1977 (Qld) in circumstances where the complainant and the preliminary complaint witness had already given full pre-recorded evidence."

2 Paragraph (a) refers to the oral evidence of the complainant, which was recorded before the empanelling of the jury. The video recording was then played to the jury at the trial. A transcript of the complainant's evidence consists of five pages of evidence in chief and 22 pages of cross-examination. Paragraph (c) refers to "police statements" (that is, statements made to the police at the investigation stage) which were tendered at the trial as exhibits. The only other evidence at the trial was some formal evidence from a police officer, and some brief evidence from a friend of the complainant and from the complainant's mother and grandmother. The appellant did not give evidence.

3 As to par (a), I agree with Hayne J that, technically, the video recording should have been marked for identification rather than treated as an exhibit and, more significantly, that, when the trial judge decided (as he was entitled to do) to comply with the jury's request to hear again the pre-recorded evidence of the complainant, that should have been done by replaying the recording of the evidence in open court, before the judge, the jury and counsel. I agree with Hayne J's analysis of the relevant statutory provisions. The course that was taken was irregular. The irregularity occurred in the following circumstances. After the jury expressed a desire to hear the complainant's evidence again, the trial judge asked counsel to consider whether they wanted the court to be reconvened while that occurred. He should not have given them the choice. The prosecutor said he did not see any need for the court to be reconvened if the jury watched the video in the courtroom in the presence of the bailiff. He said it would "facilitate their deliberations more openly if legal counsel and other people aren't present." Counsel for the appellant concurred. He said: "Yes, that seems a sensible and practical approach. If they want to play it they can play it while

here in the presence of the Bailiff and not in the presence of other members of the Court." The procedure agreed to by counsel was adopted.

4 An irregularity having occurred, the issue raised by the grounds of appeal, and the statute pursuant to which the Court of Appeal was exercising its jurisdiction, is whether, in the circumstances of the case, there was a miscarriage of justice. I agree with Hayne J that the question should be answered in the negative. The jury had been told to scrutinise carefully the evidence of the complainant. Evidently, they thought listening to her evidence again would help them to do that. Their request was hardly surprising, although it raised a procedural question. This was not a case in which the problem of undue weighting of some evidence at the expense of other evidence was of substantial importance. The pre-recorded evidence included the whole of the cross-examination of the complainant. Apart from the "police statements", there was very little other evidence of significance in the case. There were numerous counts in the indictment, and the jury apparently considered them separately and in detail. Their desire to scrutinise the evidence of the complainant by having it played back to them again does not raise, in the circumstances, any apprehension of inappropriate concentration on part only of the evidence, or of other unfairness to the appellant.

5 Paragraph (b) appears to refer to the complainant's police statement, the contents of which were substantially repeated in her pre-recorded evidence in chief. The jury requested that a copy of the statement be provided for use in the jury room. The trial judge declined the request but, with the agreement of both counsel, re-read the statement to the jury in open court. No direction of the kind referred to in the ground of appeal was requested, and, on a fair reading of the whole of the summing-up, including the directions as to the use that could be made of the statement, none was required. In oral argument in this Court, par (b) seems to have been treated as referring to the pre-recorded evidence of the complainant, although that was not "re-read to [the jury]". If that is what par (b) is about, then for the reasons given above there was not, in this case, any miscarriage of justice arising from the absence of a direction not to give undue weight to the evidence, by comparison with other evidence. For practical purposes, there was very little other evidence. The other possible form of undue weight might have been that which could arise from repetition. Here, the jury necessarily heard the complainant's version of events in her police statement, her evidence in chief, and her cross-examination. Repetition is a common feature of the criminal trial process. Cross-examination itself often elicits multiple repetitions of a complaint. There could be circumstances in which a warning needs to be given to counter the possibility of unfairness arising, but the present was not such a case.

6 As to par (c), I agree, for the reasons given by Hayne J, and the additional reasons given by Heydon J, that the appellant's complaint has not been made out.

The written statements referred to were admissible. There was no error as alleged in the grounds of appeal.

7 I would dismiss the appeal.

8 KIRBY J. This appeal[1] concerns the general principles governing the provision to juries of direct access to pre-recorded evidence of child complainants in criminal trials involving sexual offences.

9 The appeal also concerns a second issue. The appellant claimed that he had suffered a miscarriage of justice at his trial because a written statement that the complainant made to police was received in evidence. That submission turned on the interpretation of s 93A of the *Evidence Act* 1977 (Q) ("the Evidence Act"). That section is set out, and the arguments of the parties recounted, in the reasons of Hayne J[2].

10 On the second basis of appeal, I agree substantially with what Hayne J has written. It is true that there were certain problems in the directions that the trial judge gave (or failed to give) concerning the use that the jury might make of the written statement when it was read to them. However, without more, there is no warrant to conclude that a relevant error or actual miscarriage of justice occurred on that account. The appeal on that ground fails.

Complaints about the use of pre-recorded evidence

11 The issues that remain are nonetheless of some importance. At their heart is a recording made in compliance with provisions of the Evidence Act dealing with the testimonial evidence of young persons (such as the complainant in this matter) in relation to alleged sexual offences.

12 Neither at trial nor on appeal did the appellant challenge the validity of the provisions of the Evidence Act as they operated in his case. Nor did he complain, as such, about the unfairness of their deployment. In particular, he did not contest the presentation of the complainant's evidence (and cross-examination) in the form of a video-recording, so far as it was viewed by the jury in his presence. Instead, the two respects in which, on this point, the appellant asserted that the verdicts of the jury should be set aside were:

1. That the trial judge erred in allowing the jury unsupervised and unrestricted access to the recording during their deliberations; and

2. That the trial judge erred in failing to warn the jury as to the use they might make of the recording and any considerations they should take into account in order to avoid affording it "undue weight".

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1 From a judgment of the Court of Appeal of the Supreme Court of Queensland: *R v GT* [2005] QCA 478.

2 See reasons of Hayne J at [99]-[102].

Authority on jury access to pre-recorded evidence

13 In directing submissions to these matters, the appellant suggested that differences have emerged in the approaches being taken in intermediate courts in Australia, both as between jurisdictions[3] and within Queensland[4]. He also pointed to conflicting authorities on the application of the "proviso" as to the circumstances in which departure from proper procedures would occasion a fundamental miscarriage of justice such as to require an order for a retrial[5].

14 Similar questions have arisen for judicial decision in England[6], New Zealand[7] and Canada[8], countries that share the same conventions of jury trial for serious offences, the same fundamental requirement for fairness in the conduct of such trials[9], and like provisions for the pre-recording of the evidence of child complainants (including cross-examination) in relation to allegations of sexual offences.

15 There is also a growing body of academic and law reform analysis as to both the practice of (and dangers involved in) interviewing children[10] and the rules that should be observed in jury trials so as to reduce potential unfairness to an accused that might arise from the very use of recording technology[11].

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3 As between the Court of Appeal of Queensland in *R v H* [1999] 2 Qd R 283 and the Court of Appeal of Victoria in eg *R v BAH* (2002) 5 VR 517 on the one hand and the majority of the Court of Criminal Appeal of New South Wales in *R v NZ* (2005) 63 NSWLR 628 on the other.

4 As between the approach of the Court of Appeal of Queensland in *R v H* [1999] 2 Qd R 283 and *R v C* [2000] 2 Qd R 54 and in the present case.

5 cf *R v NZ* (2005) 63 NSWLR 628 at 632-633 [10]-[20] per Spigelman CJ and at 680 [223] per Howie and Johnson JJ (Wood CJ at CL and Hunt AJA agreeing).

6 *R v Rawlings* [1995] 1 WLR 178; [1995] 1 All ER 580 and *Welstead* [1996] 1 Cr App R 59.

7 *R v O* [1996] 3 NZLR 295.

8 *R v F (CC)* [1997] 3 SCR 1183.

9 See *R v NZ* (2005) 63 NSWLR 628 at 631 [4].

10 Wilson and Powell, *A Guide to Interviewing Children*, (2001).

11 Elliott, "Video Tape Evidence: The Risk of Over-Persuasion", (1998) *Criminal Law Review* 159; Corns, "Videotaped Evidence of Child Complainants in Criminal

(Footnote continues on next page)

16 The relevant material (or some of it) was placed before this Court. The applicable legislation varies between jurisdictions[12], but there is a great deal of common ground as between the conclusions reached concerning the approach to be taken to the two issues that remain for consideration in this appeal. Whilst it is doubtless appropriate to recognise and utilise technological advances that might assist juries in performing their task[13], it is self-evident that such assistance must accord with the fundamental requirements, and essential characteristics, of a fair criminal trial. Such a trial is accusatorial and adversarial[14]. In a jury trial, a heavy duty falls on the presiding judge to protect the accused against material risks of unfairness and to direct (and sometimes warn) the jury about any particular dangers of unfairness to which they need to be alert in considering an electronic recording of evidence or a printed transcript based on such a recording[15].

17 The reasons of Hayne J on the outstanding issues are split into two parts. His Honour first deals with whether there was a miscarriage of justice in the trial of the appellant[16]. He examines that question placing emphasis on the manner in which the appellant's counsel conducted his defence. He also considers (amongst other matters) the general principle that decisions of counsel in that context must be attributed to the client.

18 Hayne J concludes that the appellant has failed to establish that his trial involved a miscarriage of justice, such that there is no warrant for quashing his convictions and ordering a retrial. However, having concluded the miscarriage question against the appellant, Hayne J then proceeds to consider the general principles that should govern cases such as the present.

Proceedings: A Comparison of Alternative Models", (2001) 25 *Criminal Law Journal* 75; Corns, "Videotaped evidence in Victoria: some evidentiary issues and appellate court perspectives", (2004) 28 *Criminal Law Journal* 43; Victorian Law Reform Commission, *Sexual Offences*, Interim Report, (2003) at 255-264.

12 See *R v NZ* (2005) 63 NSWLR 628 at 668 [167]-[168].

13 See Kirby, "Delivering justice in a democracy III – the jury of the future", (1998) 17 *Australian Bar Review* 113.

14 See eg *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

15 *R v H* [1999] 2 Qd R 283 at 290-291 [18] per McMurdo P; cf *R v NZ* (2005) 63 NSWLR 628 at 676 [208].

16 Reasons of Hayne J at [76]-[84].

Considering errors before concluding on miscarriage

19 With respect, it is my view that this reverses the approach an appellate court should take in deciding an appeal such as this one. It is first necessary to identify any rules of law or practice that affect the resolution of the complaints made about the trial. Only when any defects in the conduct of the trial have been identified and fully appreciated does the appellate court turn to consider the issue of whether or not an actual miscarriage of justice has occurred.

20 This approach follows from the structure and language of s 668E of the *Criminal Code* (Q) ("the Code"), which governs the determination of appeals in criminal cases such as this. Relevantly, that provision, which is in conventional terms, states:

> "(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
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> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

21 The appellant's submissions presented a clear suggestion that more than one "wrong decision of [a] question of law" had affected the decision of the court of trial. In so far as the reasons of Hayne J[17] suggest that the appellant's complaints were limited to an assertion that a "miscarriage of justice" had occurred in the absence of such a "wrong decision", I respectfully disagree. It is, in my view, mistaken to insist upon a rigid separation of the second and third bases of appeal stated in s 668E(1). In this case, the appellant submitted that the trial judge had misapplied the relevant law, having been prompted to make a decision as to the use of the video-recording by the jury's request and defence counsel's subsequent objection. The appellant further submitted that this error had occasioned a miscarriage of justice. Implicit in his complaint, therefore, was the claim that the trial judge had made a wrong decision on a question of law.

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17 cf reasons of Hayne J at [58], [76].

22 If the appellant's complaints in this respect were to be made out, consideration would then be required as to whether the errors involved had occasioned an actual and substantial miscarriage of justice for the purposes of s 668E(1A) ("the proviso"). The language and structure of s 668E are clear, as is the manner in which it and counterpart provisions have been interpreted since the template was first introduced in England in 1907[18]. The point is as fundamental as it is logical. The appellate court first considers any complaints of error occasioning injustice in the trial. Then, if such error is established, it turns to whether a want of actual miscarriage of justice might nonetheless deprive the appellant of success. In my view, it is a basic mistake to reverse that process of consideration. Without identified error occasioning injustice (whether on evidentiary, legal or other grounds), there is no basis for consideration of the proviso, which is addressed to the substantiality and materiality of the resulting miscarriage of justice[19].

23 Thus, it is necessary at an initial stage to have clearly in mind the nature and extent of any errors of law or procedure that can be shown. Such errors alone potentially open the door to the provision of relief and throw light on the question of the existence and significance of any resulting miscarriage of justice[20]. Indeed, some errors in the conduct of a criminal trial are so fundamental as to be treated as occasioning a "miscarriage of justice" of themselves. Such errors may be so basic to the postulate of a fair trial that the ensuing verdict cannot be saved by the application of the proviso[21].

Application of the orthodox approach

24 The orthodox approach is of particular importance in a case such as the present, which was admitted to appeal, in effect, as a test case concerning general issues as to the conduct of criminal trials before juries in Australia. If an appellate court determines the question of substantial miscarriage against a

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18 *Criminal Appeal Act* 1907 (UK), s 4(1).

19 *Darkan v The Queen* (2006) 227 CLR 373 at 414 [141].

20 See eg *KBT v The Queen* (1997) 191 CLR 417 at 423, 431-437; *Gilbert v The Queen* (2000) 201 CLR 414 at 422-423 [21], 438 [86]; cf *Festa v The Queen* (2001) 208 CLR 593 at 633 [124]-[127], 655-657 [205]-[213].

21 See *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; *Glennon v The Queen* (1994) 179 CLR 1 at 7-8, 11-12; *Green v The Queen* (1997) 191 CLR 334 at 371-372; *KBT* (1997) 191 CLR 417 at 435; *Eastman v The Queen* (2000) 203 CLR 1 at 22 [63]; *R v BAH* (2002) 5 VR 517 at 536 [67]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 358 [115]; *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]; *Darkan* (2006) 227 CLR 373 at 413-415 [139]-[142].

person such as the appellant at the threshold, all that is said after that determination (eg concerning general principles) represents non-binding *obiter dicta*. It may or may not provide rules for subsequent cases. Logically, it is inessential to the disposition.

25 Moreover, I perceive, with respect, a tension between the principles embraced in the latter part of the reasons of Hayne J[22] and the earlier rejection of any miscarriage of justice in the appellant's case. It would be of little comfort to a person in the position of the appellant to read the first part of such judicial reasons and find that he has failed for want of a miscarriage of justice, only to discover that the second part proceeds to determine the questions of principle advanced in his complaints, generally in the manner that he pressed them.

26 For these reasons, I prefer to deal first with the general principles that the appellant's complaints of error make relevant for this Court. Such principles afford both the measure and significance of the miscarriage of which the appellant complains. Moreover, in this case, their clarification helps to demonstrate the importance they bear upon the fair conduct of a criminal trial before a jury. They also help to show the significant extent of the defaults that occurred on this occasion, the existence of an actual miscarriage of justice affecting the appellant, and the resulting need to provide relief to him and to order a new trial.

Principles governing jury access to pre-recorded evidence

27 *Criminal trials: fundamental considerations*: Certain fundamental considerations must guide the derivation of the rules of practice relating to juries' use of pre-recorded evidence:

1. In general, as in Queensland, legislation that obliges or permits the pre-recording of evidence does not attempt to address all possible questions that might arise as to juries' access to, or use of, the physical medium (whether electronic or paper) in which the evidence in question is reproduced. Nor is it usual for such legislation to set out an exhaustive list of warnings or directions necessary or appropriate to such access or use[23]. It is therefore important to derive the practice to be observed from any implications to be drawn from the legislation, the mode of trial into which the evidence is introduced and the judge's general duties in respect of the conduct of the trial. In Queensland, the starting point is s 21AM(1) of the Evidence Act, which renders the recorded testimony "admissible as if the

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22 Reasons of Hayne J at [85]-[96].

23 See eg Evidence Act, ss 21AW, 21AX.

evidence were given orally in the proceeding in accordance with the usual rules and practice of the court". The "proceeding" referred to is a trial in which the oral evidence of witnesses, including (if any) that of the accused, is normally given once and not repeated. In such a trial, on request, a judge may remind the jury of part of the record, usually by reading it or causing it to be read from the written transcript. The judge may also provide the record, or parts of it, in written form. Such steps are normally accompanied by the provision of appropriate warnings or directions. In this context, I agree with Hayne J that s 21AM is to be understood as doing no more than permitting the earlier recorded testimony to be imparted to the jury, if appropriate, by the playing of the recording[24]. On the face of things, that means playing it once. It does not mean providing it to the jury for repeated playing;

2. The type of "proceeding" conducted before a jury in a criminal trial in Australia is distinctive. It follows a general course established by the history of criminal trial in England in such cases. This Court noted in *Butera v Director of Public Prosecutions (Vict)*[25] that the consistent presentation of testimonial evidence in oral form is thought to assist in the "legitimate merging of opinions" as between jurors, which is critical to their reaching a verdict in accordance with judicial instructions on the relevant law. The evidence is not expected to be analysed in a manner equivalent to judicial consideration, for which reasons must be given. In this context, there is an obvious danger in the provision of voluminous printed (let alone electronic) records of oral testimony. That danger is that such material could divert jurors from their proper function. The jury should not be misled into confusing their role with that of a judge deciding the facts. To say this is not to diminish the importance or the expected rationality of a jury's determination. It is simply to insist that the jury perform their function as a jury;

3. In light of the foregoing, there is a need for caution with regard to the supplementation and repetition of oral evidence in a criminal trial conducted before a jury. The court must guard against the danger of distortion and unbalanced "over-persuasion"[26]. It is that danger that requires judicial control over the provision of recordings to juries. Where recordings are provided, warnings or directions will often be required as to the use that the jury may make of them and of the dangers that are

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24 Reasons of Hayne J at [96].

25 (1987) 164 CLR 180 at 189. See reasons of Hayne J at [88].

26 See *R v H* [1999] 2 Qd R 283 at 290 [18].

involved. The resulting rules of practice derive from the "fundamental characteristics of a criminal trial" before a jury[27]. In adapting jury trial to the higher levels of literacy and general education found amongst contemporary jurors and to the increased availability of technology with which jurors will be familiar, care must be taken to avoid distorting the jury's role or turning the jury into a decision-maker of a substantially different kind; and

4. The overriding duty of the judge presiding in a jury trial is to ensure the fairness of the trial and to avoid any miscarriage of justice[28]. The warnings and directions that the trial judge should give to the jury on questions of law and on the rules that should govern the discharge of their functions are those essential to the resolution of the issues necessary to the jury's verdicts. Such issues are defined by the charges laid by the prosecution, any defences that are relied on, the requirements of the law concerning such charges and defences and any evidence that may be relevant to the determination of those issues[29].

28 *Availability of evidence and warnings*: Taking these basic considerations into account, I agree in substance with the conclusions of Hayne J concerning the proper approach to be taken in trials such as that the subject of this appeal:

1. Under the Evidence Act, a recording (whether electronic or printed) is not admissible as "evidence" as such. It is simply a record of the oral testimony it contains. It is not real evidence (as a gun or other weapon or like item might be), available, as such, to the jury[30];

2. A request by a jury for access to pre-recorded testimony is ordinarily to be dealt with in the same way as a request to be reminded of other testamentary evidence. It will seldom, if ever, be appropriate to give the jury unsupervised access to the recording so that they may play and replay the recording as they decide[31];

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27 cf reasons of Hayne J at [89].

28 *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300.

29 See *Alford v Magee* (1952) 85 CLR 437 at 466; cf *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [142]-[143]; *Doggett v The Queen* (2001) 208 CLR 343 at 373-374 [115]-[117]; *Murray v The Queen* (2002) 211 CLR 193 at 205 [37], 219 [78].

30 Reasons of Hayne J at [86]-[93]. See also reasons of Gleeson CJ at [3].

31 Reasons of Hayne J at [94]-[96].

3. A request by a jury to be reminded of evidence should rarely be denied by a trial judge. However, if the request is made, the judge, after affording the parties the opportunity to make submissions on the matter, should consider whether the request can be fulfilled either by:

   (a) Reading the transcript of the evidence requested (and any related evidence) to the jury in open court in the normal and traditional way; or

   (b) If it is considered appropriate to accede to a specific request to view pre-recorded testimony again, permitting this to be done in open court[32]. When this course is taken, the attention of the jury should ordinarily be drawn to the need to take account of any cross-examination or contrary evidence that may exist[33] and the need to guard against selective reinforcement of particular oral evidence received for a second time and out of context; and

4. Because the repetition of pre-recorded oral evidence creates dangers of distortion, loss of balance and unfairness, the judge should consider whether there is a need, in the circumstances, to warn or direct the jury:

   (a) To avoid giving undue weight to evidence that is recorded and thus available for repetition as against the rest of the evidence that is not[34]; and

   (b) To consider the recorded evidence in the context of other, countervailing evidence, whether recorded or not, and of any arguments of the accused relevant to that evidence.

Departures from the principles in the appellant's trial

29 *The trial judge's errors*: Identification of the foregoing principles (about which I am in substantial agreement with Hayne J) renders the appellant's complaint of a serious miscarriage of justice in his case much clearer. In the present case, the trial judge departed from the stated principles. He appears to have treated the video-recording (as distinct from the oral evidence it reproduced) as though it were part of the "evidence" itself. He marked and

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32 See reasons of Gleeson CJ at [3].

33 Reasons of Hayne J at [96].

34 cf reasons of Hayne J at [95].

treated the physical recording as an exhibit in the trial. This constituted an error of law in relation to the interpretation of the Evidence Act.

30 When the jury requested access to copies of the complainant's "two statements" and also a statement by the complainant's friend, it was the trial judge (not the prosecutor and certainly not the appellant's trial counsel) who proffered the suggestion that the jury be given unrestricted access to the pre-recorded evidence. This was proposed by the judge so that "[the jurors] can have that played themselves during the course of their deliberations".

31 Correctly, this course was immediately objected to by the appellant's trial counsel, who alerted the trial judge to the risk that the jury might pay undue attention to the pre-recorded evidence. The trial judge then said: "That is a practice [sic], but of course they are entitled to have resort to them by coming into this room and having those passages played." For the reasons I have given, this represented an incorrect appreciation of the applicable principle. Moreover, it ran counter to earlier rulings of the Court of Appeal of Queensland[35], which by then had been followed, and endorsed, elsewhere in Australia[36]. Those rulings were binding on the judge in the conduct of the trial. Yet they were not observed.

32 *The prosecutor's error*: Compounding the error of the trial judge, the prosecutor then submitted:

> "I don't see that there's any need for [the court] to be reconvened if they're in here watching the video with the Bailiff … It will let them facilitate their deliberations more openly if legal counsel and other people aren't present."

This too evidenced a misunderstanding of the character of the testimony contained in the recording. It seriously discounted the risks of its repeated use. It cut across the principle that access to a video-recording in circumstances such as those of the present matter should be carefully considered, appropriately limited, only permitted in open court and then made subject to appropriate judicial warnings or directions. In so far as the prosecutor's comment envisaged that it would be permissible for the jurors to continue their deliberations whilst in the presence of the bailiff (but not legal counsel and other people), it also

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35 *R v H* [1999] 2 Qd R 283 at 290-291 [18] per McMurdo P; *R v C* [2000] 2 Qd R 54.

36 *R v BAH* (2002) 5 VR 517 at 522-523 [10]-[11] per Winneke P; cf at 524 [17] per Callaway JA and 536 [66] per O'Bryan AJA. See also *R v Lewis* (2002) 137 A Crim R 85 at 88-89 [11]; *R v Lyne* (2003) 140 A Crim R 522 at 528 [20]; *R v MAG* [2005] VSCA 47 at [20], [23]; *R v Davies* (2005) 11 VR 314 at 321 [26].

demonstrated a serious misunderstanding of the requirement that those deliberations be wholly private and confidential.

33 *Ensuing course of the trial*: Unfortunately, trial counsel for the appellant then endorsed the foregoing proposal of the prosecutor as a "sensible and practical approach". This too was a mistake, albeit one which was shared with both the judge and the prosecutor.

34 The judge then recalled the jury and told them, in effect, that they would be entitled to unlimited and unrestricted access to the video-recording in the courtroom during the course of their deliberations. Obviously, at the least, this presented the risk just mentioned that the bailiff (who would have to provide access to the courtroom and to the recording and the recording equipment) might overhear juror communications: potentially a significant breach of the secrecy and integrity of the jury's deliberations[37].

35 It was at this point in the trial that the appellant informed the court that he would not be giving, or calling, evidence in his own case. In fact, his case, as indicated in his counsel's address to the jury, relied substantially on the prosecution's obligation to prove the allegations against him beyond reasonable doubt.

36 *Absence of warning to the jury*: Whilst considering their verdict, the jury requested to view the recorded evidence again. The judge told them:

> "[W]e'll make arrangements for you to … come into this Courtroom so at your leisure you can see the evidence alone and I think at this stage I won't take a verdict before 9.30 in the morning."

37 The trial judge gave no warning or direction to the jury, then or later, about the way they should approach such evidence. On the contrary, the jury were permitted unrestricted and unsupervised access to the recorded evidence, otherwise than in open court and after the close of the evidence. It may be inferred that they viewed the whole or parts of it at least once, and perhaps repeatedly. Effectively, it happened in secret. The judge, the accused and the public were unaware of the course that the jury took.

38 When, the following day, the jury also requested to see the complainant's written statement to the police, the entire statement was read to them in open court. Again, no direction or warning was given by the trial judge as to the weight to be accorded to the statement in light of its repetition. The jury requested that part of the statement be read yet a third time Once more, that

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37 cf *R v Jackson and Le Gros* [1995] 1 Qd R 547.

request was complied with, but without any judicial warning or direction along the lines of the governing principles. Verdicts of guilty were subsequently returned by the jury, almost 24 hours after they had been charged to consider their verdicts. The conviction of the accused and his sentencing followed.

Conclusion: a miscarriage of justice is established

39 *Absence of any miscarriage?* In light of the principles that should have been observed and the actual course adopted in the trial, the appellant has demonstrated a miscarriage of justice.

40 In his reasons, Hayne J concludes that there was no miscarriage because:

1. Trial counsel consented to the jury having access to the pre-recorded evidence[38];

2. As a general rule a party is bound by decisions made at trial by his counsel, whose function it is to defend him from any miscarriage of justice[39];

3. The appellant did not give evidence and thus there was no countervailing actual evidence of which the jury might otherwise have been warned[40]; and

4. As presented, the case turned upon the jury's acceptance or rejection of the evidence of the complainant and was thus simple and straightforward enough that the course adopted did not occasion a miscarriage[41].

For similar reasons, Hayne J holds that the trial judge was not obliged to provide a warning to the jury about the use they might make of the pre-recorded evidence, in particular because no warning of that kind was sought by the appellant's trial counsel[42]. I disagree with these conclusions.

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38 Reasons of Hayne J at [77].

39 Reasons of Hayne J at [77].

40 Reasons of Hayne J at [78]-[79].

41 Reasons of Hayne J at [80].

42 Reasons of Hayne J at [82].

41 *The consent of trial counsel*: There are several reasons why the consent of trial counsel to the course adopted is not conclusive for the outcome of this appeal.

42 First, it is the overriding duty of a trial judge to conduct a lawful and fair trial. That duty cannot be delegated to counsel on either side. In this case, trial counsel did initially object to the provision of the recording to the jury. That objection ought to have alerted the trial judge to the problem inherent in the course he was proposing.

43 Secondly, it was the trial judge himself who first suggested the provision of the recording to the jury for unsupervised use during their deliberations. It was the prosecutor who proposed the expedient that avoided the proper course of providing supplementary access to the recording in open court in the presence of the appellant and both counsel, which might have enlivened consideration of the need for appropriate warnings or directions to the jury about the use they might make of the evidence. The consent of the appellant's trial counsel to that course was, as I have said, a mistake. But the fundamental error originated with the trial judge and the prosecutor, each of whom, under our system of criminal justice, had special responsibilities to ensure the fairness of the conduct of the trial.

44 Thirdly, this was not unploughed territory in the law of Queensland. The Court of Appeal of Queensland, in repeated rulings and in clear terms, had correctly called to notice the applicable principles[43] and such authority of this Court as touched on the matter[44]. It had also noted overseas authorities that collected relevant considerations to guide trial judges[45]. It was the duty of the judge in the appellant's trial to advert to, and comply with, those considerations. It was the specific responsibility of the prosecutor to be aware of them and to remind the judge about them. The entire fault cannot fairly be placed at the door of the appellant's trial counsel, still less the appellant himself. I regard this as involving inappropriately the application of games theory to the criminal trial. That theory may have a place in politics and business management, but in criminal trials, where liberty is at stake, the appellate court is concerned with substance, not merely with who was to blame for breaching the applicable rules. I adhere to what I said in *Conway v The Queen*[46]:

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43 *R v H* [1999] 2 Qd R 283 at 290 [18], 295 [47]-[49]; *R v C* [2000] 2 Qd R 54.

44 *Bulejcik v The Queen* (1996) 185 CLR 375 at 386.

45 Especially *Rawlings* [1995] 1 WLR 178; [1995] 1 All ER 580; *Welstead* [1996] 1 Cr App R 59 and *R v Thomas* (1992) 9 CRNZ 113.

46 (2002) 209 CLR 203 at 241 [104] (citation omitted); see also *Heron v The Queen* (2003) 77 ALJR 908 at 912 [22]; 197 ALR 81 at 86.

> "The 'miscarriage of justice' with which an appellate court is concerned in a criminal appeal is addressed to matters of substance and not just procedure … Courts of criminal appeal are not mere referees of a game that can only be played once in accordance with a single game plan. Practical considerations ordinarily necessitate holding parties to the way in which they conducted their trial, normally through the lawyers who represent them. But an appellate court should not allow that principle to divert it from its fundamental responsibility."

45 Fourthly, it was not suggested that the appellant's counsel's oversight of the Court of Appeal authority and acquiescence in the course proposed by the trial judge was based on a tactical or forensic decision, now being disclaimed on appeal because it did not pay dividends at trial. The record clearly shows that there was a common error shared between the judge and counsel on both sides. The reference in the proviso to a "miscarriage of justice"[47] focuses attention on the position of an appellant. In this matter, the appellant was entitled to expect that, in essential respects, his trial would be conducted in his presence in a public court, according to law and without lapsing into potential unfairness[48].

46 *A binding decision of counsel?* I acknowledge that the principle that an appellant is bound by the conduct of his counsel stands against a conclusion of actual miscarriage[49]. However, this is not an inflexible principle, nor is it one that could displace the language and purpose of the Code, a statute entrusting to courts (including this Court) the protection of defendants against the consequences of mistakes in the conduct of criminal trials that occasion a miscarriage of justice.

47 Just as the failure of trial counsel to reserve points or to perceive and raise grounds of appeal is not fatal to the case of an accused person who comes to the judicature of the Commonwealth for protection against injustice[50], so the mistaken acquiescence of trial counsel in the proposals of the judge and the prosecutor is not, in the end, conclusive of this appeal. This is particularly so because trial counsel's initial objection to the course initiated by the judge was correct. That objection should have alerted the judge and the prosecutor to the

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47 The Code, s 668E(1A).

48 cf *Darkan* (2006) 227 CLR 373 at 413-414 [139]-[141].

49 *R v Birks* (1990) 19 NSWLR 677; *TKWJ v The Queen* (2002) 212 CLR 124; *Nudd v The Queen* (2006) 80 ALJR 614; 225 ALR 161.

50 *Gipp v The Queen* (1998) 194 CLR 106; *Crampton v The Queen* (2000) 206 CLR 161.

applicable principles expressed and repeated in successive decisions of the Queensland Court of Appeal.

48 What is the practical use of courts of criminal appeal laying down clear rulings to be observed in criminal trials if, when they are not observed by the judge or prosecutor, this Court (whilst substantially endorsing those rulings) does not proceed to afford the accused, who is adversely affected, the relief that he seeks? Apart from the injustice in the particular case, this approach, when it becomes a common practice of this Court, presents a serious question as to whether further appeal to uphold basic principles had any point. The best way that this Court can reinforce principle in such matters, where a miscarriage has occurred, is to order a retrial. That is when principle tends to be learnt and applied.

49 *Failure to give or call evidence*: It is true that the failure of the appellant to give or call evidence removes one consideration that would otherwise have been very important in a case of this kind. Had such evidence been received, it would have been essential for the trial judge to remind the jury of it as a counterweight to the repetition of the complainant's evidence. Moreover, a direction or warning as to the balancing of the competing evidence would have been appropriate.

50 Nevertheless, the failure of the appellant to give or call evidence is not fatal to his complaint. It is an essential feature of the system of criminal justice observed in Australia that it is accusatorial in character. It is no part of the function of this Court to penalise the appellant because he elected to put the prosecution to proof of its charges. In one sense, the appellant's conduct of his case made it more, not less, important that the balance of the trial should be safeguarded through observance of the applicable rules concerning access to the pre-recorded evidence.

51 *Resulting issues for trial*: It is true that the issues presented for the jury's determination were relatively straightforward in that they ultimately revolved around the acceptance or rejection of the complainant's evidence. But in the usual case, the complainant (or prosecution witnesses) would, in our system of criminal justice, have but one chance to convince a jury to return a verdict adverse to the accused. To permit repeated re-presentation of the prosecution's evidence without any judicial supervision or countervailing remarks and otherwise than in open court creates a serious potential for injustice to a defendant. As Spigelman CJ remarked in *R v NZ*[51]:

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51 (2005) 63 NSWLR 628 at 633 [18]-[19]; cf reasons of Gleeson CJ at [4].

> "[T]he videotape evidence, by its very nature, is of greater force than a transcript. Whatever impression a jury may have been left with at the end of the complainant's oral evidence as to her credibility could easily have been altered when the whole of the evidence was reviewed in the jury room, where the videotape had to be compared with the transcript.
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> … [T]he circumstance that the appellant did not give evidence [is not determinative]. There may be a relevant imbalance in the sense of disproportionate weight being given to part of the evidence even though the accused has exercised his right not to give evidence. In the present case the possibility of disproportionate weight existed [in relation to] the evidence on the videotape".

52 *A serious procedural irregularity*: This Court has acknowledged that miscarriages of justice can occur requiring retrial where there has been a serious procedural irregularity in the conduct of a trial[52]. Having reviewed the English and Australian authorities up to 2004, Dr Christopher Corns concluded that a breach of the requirement that a jury should not ordinarily have unsupervised access to pre-recorded evidence "would normally constitute a fundamental procedural irregularity sufficient to quash the conviction"[53]. I agree.

53 Whilst no rigid rule can govern the evaluative decision that the proviso in criminal appeals requires, the wisdom of so many courts that have gone before concerning the serious dangers inherent in the kind of procedural irregularities that affected the appellant's trial suggests that no mechanistic view should be taken with regard to the miscarriages of justice of which he complains. In particular, it would be a misapplication of the proviso to invoke it simply because of mistakes by the accused's trial counsel. Both of the appellant's complaints about the use of the pre-recorded evidence are made out. He should have relief.

54 *Matching principles and outcomes*: The trial judge erred in proposing and then permitting unsupervised use by the jury of the pre-recorded evidence. Having taken that course, he also erred in failing to give the jury a warning or direction of the type required in the circumstances. A rigid application of the rule governing the responsibilities of counsel would defeat the purpose of criminal appeals. It would risk turning such appeals into an instrument of injustice rather than a protection against miscarriages of justice. The appropriate response to the appellant's success in establishing the principles and rules of practice for which he argued, as set out in the latter part of the reasons of Hayne J

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52 *Weiss* (2005) 224 CLR 300 at 317 [45]-[46].

53 Corns, "Videotaped evidence in Victoria: some evidentiary issues and appellate court perspectives", (2004) 28 *Criminal Law Journal* 43 at 52.

(with which I agree)[54], is to apply them to the appellant's case. That is what I would do.

Orders

55 The appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Queensland should be set aside. In place of those orders, the appeal to that Court should be allowed; the appellant's convictions should be quashed; and a new trial should be ordered.

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54 Reasons of Hayne J at [85]-[96].

56 HAYNE J. The principal issue in this appeal concerns the application of particular provisions of the *Evidence Act* 1977 (Q) ("the Evidence Act") governing the giving of evidence by a young person allegedly the victim of sexual offending. Pursuant to those provisions, the complainant's evidence-in-chief and cross-examination were video-recorded. (There was no re-examination.) The recording was played to the jury at the appellant's trial in the District Court of Queensland.

57 In the course of debate between the trial judge and counsel about what material the jury should have available during their deliberations, trial counsel for the appellant agreed that it "seem[ed] a sensible and practical approach" for the jury, when considering their verdict, to be able to play the recording in the courtroom "in the presence of the Bailiff and not in the presence of other members of the Court". The appeal in this Court was conducted on the footing that, during their deliberations, the jury were able to and did play the recorded evidence of the complainant otherwise than in the presence of the trial judge and counsel for the parties.

58 In his appeal to this Court, the appellant alleged that there had been a miscarriage of justice. That is, he invoked the third of the three grounds of appeal provided for by s 668E(1) of the *Criminal Code* (Q) ("the Code")[55]. The appellant did not seek to contend that there had been any wrong decision of any question of law.

59 Two particulars of the allegation of miscarriage of justice related to the jury's access to the recorded evidence of the complainant. First, he alleged that the trial judge erred in allowing the jury, during their deliberations, to play the pre-recorded evidence of the complainant, and secondly that the trial judge should have directed the jury that "they should not give undue weight to the evidence". The appellant placed the chief weight of his argument upon the first of these particulars.

60 The third particular given by the appellant of the alleged miscarriage of justice at his trial was that a written statement made by the complainant to police

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55 Section 668E(1) of the *Criminal Code* (Q) ("the Code") provided:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

was wrongly received in evidence. Whether the written statement was wrongly admitted in evidence turns upon particular provisions of the Evidence Act. It will be convenient to deal with this issue (and the statutory provisions that govern its disposition) separately from the complaints made about the jury's access to the recording of the complainant's evidence.

61 In dealing with the appellant's principal complaint about the access the jury had to the pre-recorded evidence of the complainant, it is first necessary to say something about the charges brought against the appellant and their disposition at trial, next to refer to the relevant provisions of the Evidence Act, and then to refer to some aspects of the course of events at trial and on appeal to the Court of Appeal of the Supreme Court of Queensland. These reasons will demonstrate that the course of events at the appellant's trial is determinative of the appellant's principal complaint (about the access the jury had to the record of the complainant's evidence) and the related issue about the directions to be given to the jury about that evidence. It will be necessary none the less to consider some more general questions about the meaning and application of the relevant provisions of the Evidence Act.

Indictment, pleas and verdicts

62 The appellant was tried, in the District Court of Queensland, on an indictment alleging 12 counts of sexual offences against the one complainant. The complainant was aged 14 at the time of the alleged offences but was 16 by the time of the appellant's trial. There was no dispute at trial, or on appeal, that the complainant was, to the knowledge of the appellant, a person who was the "lineal descendant" of the appellant and there was, therefore, no occasion to consider in this appeal the statutory or other basis upon which that conclusion could be founded.

63 Each count in the indictment alleged that the relevant offence occurred between 22 July 2002 and 4 August 2002. The counts were described on the face of the indictment as 11 counts of "[i]ndecent treatment of a child under 16 years who is a lineal descendant" and one count of "[i]ncest". That summary description of the counts, though broadly accurate, did not identify the particular statutory provisions that were said to be engaged. Ten of the offences were identified in the counts of the indictment as offences under s 210(1)(a) or (b) of the Code[56] and further alleged, as a circumstance of aggravation, that the

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56 Section 210 of the Code, as it stood at the time of the alleged offences, provided, so far as presently relevant:

"(1) Any person who—

(Footnote continues on next page)

complainant was, to the knowledge of the appellant, his lineal descendant; one count alleged an attempt[57] to commit an offence under s 210(1)(b) and further alleged that the complainant was, to the knowledge of the appellant, his lineal descendant; the last count alleged an offence under s 222 of the Code of having carnal knowledge of the complainant, his lineal descendant, knowing that the complainant bore that relationship to him.

64 The appellant pleaded not guilty to all counts. The count alleging an attempt to commit an offence under s 210(1)(b) was withdrawn from the jury's consideration upon the prosecutor entering a nolle prosequi in respect of that count. The appellant was convicted of each of the 11 remaining counts.

Evidence of "affected children"

65 Division 4A of Pt 2 of the Evidence Act (ss 21AA-21AX) made provision for the evidence of what it referred to as an "affected child". An "affected child" was defined[58] as "a child who is a witness in a relevant proceeding and who is not

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> (a) unlawfully and indecently deals with a child under the age of 16 years;
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> (b) unlawfully procures a child under the age of 16 years to commit an indecent act;
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> ...
>
> is guilty of an indictable offence.
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> ...
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> (4) If the child is, to the knowledge of the offender, his or her lineal descendant ... the offender is guilty of a crime, and is liable to imprisonment for 14 years.
>
> ...
>
> (6) In this section—
>
> ***deals with*** includes doing any act which, if done without consent, would constitute an assault as defined in this Code."

57 Section 4 of the Code makes provisions relevant to identifying what constitutes an attempt to commit a crime. It is not necessary to examine the operation of those provisions.

58 s 21AC.

a defendant in the proceeding". A "relevant proceeding" included[59] "a criminal proceeding for a relevant offence" and a "relevant offence"[60], in relation to a proceeding, included "an offence of a sexual nature". A "child" was defined[61] for the purposes of a criminal proceeding (and so far as is now relevant) as an individual under 16 years when the first of a number of events, by which criminal proceedings could be initiated, occurred. The complainant in the present matter was a "child" within the meaning of this definition, even though aged 16 years at the time of the trial. The proceedings against the appellant were a "relevant proceeding".

66 The Evidence Act described[62] the purposes of Div 4A as being:

> "(a) to preserve, to the greatest extent practicable, the integrity of an affected child's evidence; and
>
> (b) to require, wherever practicable, that an affected child's evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence."

Section 21AB recorded that "[t]o achieve the purposes of this division" the division prescribed various measures for an affected child when giving evidence. Section 21AB(a)(i) recorded the effect of the division as being that, for a criminal proceeding, "the child's evidence is to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding". The Evidence Act distinguished between taking an affected child's evidence at a committal[63] and taking an affected child's evidence (otherwise than as a witness for the defence[64]) at a trial on indictment for a relevant offence[65].

67 For present purposes, two provisions of subdiv 3 of Div 4A – ss 21AK and 21AM – are of critical importance. Section 21AK provided that:

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59 s 21AC.

60 s 21AC.

61 s 21AD(1)(a).

62 s 21AA.

63 Subdiv 2 (ss 21AE-21AH).

64 s 21AI(2).

65 Subdiv 3 (ss 21AI-21AO).

"**(1)** The affected child's evidence must be taken and video-taped at a hearing under this section (a '**preliminary hearing**') presided over by a judicial officer.

(2) The video-taped recording must be presented—

...

(b) if taken for a trial—to the court at the trial.

...

(9) In this section—

...

'**evidence**' means evidence-in-chief or evidence given in cross-examination or re-examination."

Section 21AM provided that:

"**(1)** A video-taped recording of the affected child's evidence made under this subdivision for a proceeding, or a lawfully edited copy of the recording—

(a) is as admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court; and

(b) is, unless the relevant court otherwise orders, admissible in—

(i) any rehearing or re-trial of, or appeal from, the proceeding ...

(2) The admissibility of the recording or copy for a proceeding is not affected only because the child turns 18 before the evidence is presented at the proceeding."

It was these provisions that provided for the video-taping of the complainant's evidence and for the use that was to be made of the recording at the appellant's trial. And because these provisions of subdiv 3 of Div 4A were engaged, the trial judge was obliged[66] to give (and in this case did give) certain instructions to the

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66 s 21AW.

jury about evidence given in this way – in effect that the measure was a routine practice from which no inference as to guilt might be drawn, that the probative weight of the evidence was not increased or decreased because of the measure, and that the evidence was not to be given any greater or lesser weight because of the measure.

The course of trial and the appeal to the Court of Appeal

68 After a prosecutor had presented the indictment against the appellant (a step that had to occur[67] before evidence could be taken under subdiv 3 of Div 4A) the complainant's evidence (both evidence-in-chief and cross-examination) was taken and video-taped. A little over a month later, the appellant was arraigned on the indictment, and a jury was empanelled.

69 The prosecutor opened the case to the jury. Evidence was adduced, in the ordinary way, from the investigating police officer. The prosecutor then, without objection, provided the members of the jury, and the trial judge, with a transcript of the recorded evidence of the complainant. The prosecutor did not tender the tape as an exhibit but the trial judge, of his own motion, marked it as an exhibit. He directed the jury that the transcript was "merely an aid for you" and that "the evidence in the proceedings is what is contained on the tape itself, the sounds, what you hear and, indeed, what you see". The recording of the complainant's evidence was then played to the jury. (The transcripts provided for the use of the jury were recovered before the jury commenced their deliberations.)

70 As the trial came towards an end, there was some discussion between counsel for the parties and the trial judge, about what directions should be given to the jury, and about what material the jury should have access to in the jury room. Trial counsel for the appellant indicated that he would be "asking that the statements – and I mean not only the written statements, but the pre-recorded evidence of the complainant ... not be taken into the jury room". The prosecutor said that he supported that request.

71 Next morning, the jury sent a message to the trial judge saying, among other things, that "our deliberations would be assisted by having copies of [the complainant's] two statements". In the ensuing discussion about the response that was to be made to this message, the trial judge expressed doubts about what the jury meant by the reference to the complainant's "two statements". But without resolving those doubts, counsel for the parties and the trial judge discussed what material should be made available to the jury. During that discussion, the trial judge suggested that, in the course of their deliberations, the jury could themselves play the pre-recorded evidence of the complainant (as well

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67 s 21AJ.

as a record of some evidence given by another child witness). Trial counsel for the appellant submitted that the pre-recorded evidence should not go into the jury room. The trial judge said that the jury "are entitled to have resort to [the recordings] by coming into [the courtroom] and having those passages played". He asked counsel for both parties to consider whether the Court should be reconvened for that to be done. The prosecutor responded at once, and suggested that there was no need to reconvene the Court if the jury were in the courtroom, watching the video with the Bailiff. And trial counsel for the appellant agreed that this seemed "a sensible and practical approach".

72 When the jury came back into court, the trial judge dealt with the message that had been sent. The jury's speaker said that what the jury wanted was the transcript of the recordings that had been played in court. The trial judge told the jury that the transcripts had been no more than an aid to understanding but that the jury could have access to the recordings "by simply asking the Bailiff, and during the course of your deliberations you can listen to those videotapes again". That was to be done in the courtroom; the tapes "won't go with you into the jury room". The use that might be made of the pre-recorded evidence of the complainant was not the subject of any further submission during the trial.

73 The appellant appealed to the Court of Appeal against his convictions. That Court (Williams JA, Muir and Atkinson JJ) dismissed[68] the appeal.

74 One of the several grounds advanced by the appellant, in the Court of Appeal, was that there had "been a miscarriage of justice on the basis that the jury were permitted to view tapes of the pre-recorded evidence of the complainant during the course of their deliberations in the courtroom and not in open court". In dealing with this ground, the Court of Appeal proceeded on the footing that the jury had watched and listened to the pre-recorded evidence of the complainant late on the afternoon of the first day on which they retired.

75 The principal reasons of the Court were given by Atkinson J, who said[69] that "[t]here is no general rule that video recordings made under s 21AM of the [Evidence Act] cannot be taken by the jury into the jury room for their consideration". Noting[70] that counsel for both parties had "consented to the jury having the capacity to watch the s 21AM video recordings" her Honour concluded that there was no merit in the ground advanced by the appellant.

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68 *R v GT* [2005] QCA 478.

69 [2005] QCA 478 at [18].

70 [2005] QCA 478 at [18].

Miscarriage of justice at trial?

76 It is important to recognise the statutory basis underpinning the appellant's submissions to the Court of Appeal about the access the jury had had to the pre-recorded evidence of the complainant. The ground of appeal which the appellant advanced invoked the third of the three grounds stated in the criminal appeal provisions of the Code. Those provisions, which substantially follow the common form of appeal provisions derived from the *Criminal Appeal Act* 1907 (UK), require the Court of Appeal to allow an appeal against conviction if it is of the opinion, first, that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or second, that the judgment of the court of trial should be set aside on the ground of any wrong decision of any question of law, or third, that "on any ground whatsoever there was a miscarriage of justice"[71]. The appellant's complaint was that there had been a miscarriage of justice[72], not that there had been any wrong decision of any question of law.

77 Trial counsel for the appellant consented to the jury having the access they did to the pre-recorded evidence of the complainant. Great weight must be attached to that consent in considering whether there was a miscarriage of justice. So much follows inevitably from the adversarial nature of a criminal trial[73]. As was said in *R v Birks*[74], "[a]s a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted". It is for the parties, by their counsel, to decide how and on what bases the proceeding will be fought[75]. Consent by counsel for a party to a course of conduct is usually an important indication that that party suffers no miscarriage of justice by pursuit of the intended course. But, as the cases[76] concerning allegations of incompetent representation illustrate, the miscarriage of justice ground may yet be established despite the course that is taken by an accused person's counsel at trial. In the present case there was no allegation of incompetent representation. The circumstances surrounding trial

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71 s 668E(1).

72 *Nudd v The Queen* (2006) 80 ALJR 614 at 622 [24]; 225 ALR 161 at 170.

73 *Ratten v The Queen* (1974) 131 CLR 510 at 517; *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *TKWJ v The Queen* (2002) 212 CLR 124 at 158 [106].

74 (1990) 19 NSWLR 677 at 683.

75 *Ratten* (1974) 131 CLR 510 at 517; *Re Ratten* [1974] VR 201 at 214.

76 For example, *R v Birks* (1990) 19 NSWLR 677; *R v Miletic* [1997] 1 VR 593; *TKWJ* (2002) 212 CLR 124; *Nudd* (2006) 80 ALJR 614; 225 ALR 161.

counsel consenting to the course that was followed require the conclusion that there was no miscarriage of justice.

78 The appellant did not give evidence at his trial. He did not call any evidence in his defence. There was no evidence that he had made any out-of-court admission, whether to police or otherwise. There was no evidence led of the appellant having been interviewed by police about the matters alleged against him.

79 The appellant advanced no positive case in answer to the allegations made. In final address, his counsel submitted to the jury that the prosecution had not established its case beyond reasonable doubt and sought to persuade the jury to that view by reference to what were said to be "very grave inconsistencies" in the complainant's account of events.

80 It follows that the critical evidence to be considered by the jury (and in one sense the only evidence about which they had to be satisfied) was the evidence given by the complainant. No doubt the jury would have had to assess the veracity of the complainant's evidence in the light of the other evidence adduced as part of the prosecution's case (including evidence of a complaint made about the appellant's conduct and some evidence of previous accounts the complainant had given of the relevant events). But in the end, both the prosecution's case, and the appellant's answer that the prosecution had not proved its case beyond reasonable doubt, depended entirely upon what the jury made of the complainant's evidence. Competing arguments were put to the jury by the parties, but the evidence that the complainant had given was not controverted otherwise than by the appellant's cross-examination. To allow only the complainant's evidence to be re-examined by the jury presented no risk of an unbalanced consideration of competing accounts of what was alleged to have happened.

81 In those circumstances, there was no miscarriage of justice occasioned by the jury having the access they did to the complainant's pre-recorded evidence.

82 The appellant further contended that the trial judge should have directed the jury that they should not give undue weight to the pre-recorded evidence of the complainant. The argument was advanced under cover of a ground of appeal which directed attention to "the complainant's statement [being] re-read" to the jury. It may be that the reference to "the complainant's statement" should be understood as referring to the complainant's written statement to police but the appellant's arguments were directed largely to the need to warn about misuse of the video-recorded evidence. No direction of this kind was sought at trial. For the reasons that lead to the conclusion that, in this particular case, there was no miscarriage of justice occasioned by the jury having the access they did to the complainant's pre-recorded evidence, this contention should also be rejected.

83 The grounds of appeal asserting error in connection with the jury having the access they did to the complainant's pre-recorded evidence were not made out.

84 It is as well, however, to say something further about the operation of the relevant provisions of the Evidence Act and, in particular, about the proposition[77] that "[t]here is no general rule that video recordings made under s 21AM of the [Evidence Act] cannot be taken by the jury into the jury room for their consideration".

Pre-recorded evidence

85 Whether a jury may have access "[in] the jury room" to recordings of evidence made under subdiv 3 of Div 4A of the Evidence Act is a question about whether a jury may have unsupervised access to the recording. It is not, as some statements made at the trial of the appellant may appear to have supposed, a question about geography. Thus, when it was said[78] that "[t]here is no general rule that video recordings made under s 21AM of the [Evidence Act] cannot be taken by the jury into the jury room for their consideration", the proposition should be understood as denying the existence of a general rule that a jury may not have unsupervised access to recordings of the kind now in question.

86 The unstated premise for the proposition that a jury may have unsupervised access to recordings of evidence made under subdiv 3 of Div 4A of the Evidence Act is that the record of that evidence is a piece of real evidence, properly received in evidence as an exhibit. That premise is not right. The record of evidence given under these provisions is no more a piece of real evidence receivable at trial than is the written or electronic record of oral evidence given at the trial in the ordinary way.

87 It may be accepted that, divorced from its context, s 21AM of the Evidence Act might suggest that when the evidence of an affected child is pre-recorded, the record itself is admissible evidence. Section 21AM(1) says that a "video-taped recording of the affected child's evidence ... is as admissible as if the evidence were given orally in the proceeding" and that the recording is "admissible in ... any rehearing or re-trial of ... the proceeding". When regard is had, however, to some fundamental considerations about the nature of the trial process, and to some particular textual indications found in the relevant division of the Evidence Act, it is evident that the record itself is not ordinarily admissible as a piece of real evidence.

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77 [2005] QCA 478 at [18].

78 [2005] QCA 478 at [18].

88 First, there are some fundamental characteristics of Australian trial processes, particularly at a criminal trial, that must be borne at the forefront of consideration. Subject to whatever statutory modifications may have been made to applicable rules of procedure, a criminal trial in Australia is an accusatorial and adversarial process[79]. It is essentially an oral process[80]. Subject to exceptions, the hearsay rule excludes evidence of out-of-court assertions when tendered as evidence of the truth of the assertions. As a result, the focus of the trial falls chiefly upon what is said in the evidence given in the courtroom. As three members of this Court said in *Butera v Director of Public Prosecutions (Vict)*[81]:

> "The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence."

89 The whole of the oral evidence of an affected child, adduced by the prosecution at a relevant proceeding, is pre-recorded. (In this and in other important respects the Evidence Act differs from some generally similar provisions made in other jurisdictions[82].) The record is then played before the jury and the jury both hear and observe the child giving evidence. The evidence that the affected child gives, although given at a "preliminary hearing", is given subject to all applicable rules governing relevance and admissibility. It is pre-recorded in accordance with, and for the achievement of the purposes described in, s 21AA – to preserve the integrity of the evidence and to limit the

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79 *TKWJ* (2002) 212 CLR 124 at 158 [106]; *RPS* (2000) 199 CLR 620 at 630 [22]; *Ratten* (1974) 131 CLR 510 at 517.

80 *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180 at 189-190.

81 (1987) 164 CLR 180 at 189 per Mason CJ, Brennan and Deane JJ.

82 Many of those provisions were examined in *R v NZ* (2005) 63 NSWLR 628 at 649-664 [105]-[154].

distress and trauma that the child might otherwise experience when giving evidence. None of those considerations suggests that the record itself is to be treated as an item of real evidence. All point only to the conclusions that the evidence is what the child says, and that the record itself is not evidence. Those conclusions are reinforced by the fundamental characteristics of a criminal trial that have been mentioned earlier.

90 Two textual considerations support those conclusions. First, there is the reference in s 21AM to the recording being admissible in any appeal from the proceeding. To speak of the record as an item of evidence *in* an appeal (as distinct from a record of evidence that is to be considered in an appeal) is incongruous. It follows that the reference in the same section to the recording being "as admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court" is not to be understood as requiring the reception of the recording as an item of real evidence. Rather, it is to be understood as doing no more than permitting the child's evidence, taken earlier, to be imparted to the jury by the playing of the recording.

91 Secondly, the directions that s 21AW requires a trial judge to give are consistent only with the relevant evidence consisting of what the child says, as distinct from whatever electronic record may be made of the questions and answers. Those directions make little sense if the relevant evidence is the record rather than the information that is conveyed when the recording is played.

92 Several of the steps taken at the trial of the appellant in relation to the recorded evidence of the complainant were of a kind similar to those that would be taken in dealing with recordings of out-of-court statements made by an accused person, tendered at trial as admissions. In particular, the provision of a transcript of the recording as an aid to understanding what was said, coupled with a direction that the recording not the transcript was the relevant evidence, reflect principles of the kind discussed in *Butera*[83]. But the critical difference between *Butera* and cases of the kind now under consideration is that *Butera* concerned the admission of evidence of out-of-court assertions as an exception to the hearsay rule. The relevant evidence in *Butera* was what the accused person had said on an earlier occasion. In cases like the present, the affected child gives evidence of what he or she knows, saw, or did. The evidence that the child gives is direct evidence, not hearsay. Unless some exception to the hearsay rule is engaged, the child may not give evidence of an out-of-court assertion as evidence of the truth of its content.

93 When the effect of the relevant provisions of the Evidence Act is thus understood, it becomes evident that seldom, if ever, will it be appropriate to

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83 (1987) 164 CLR 180.

admit the record of that evidence as an exhibit. (That is not to say that there may not be evident good sense in marking the record for identification; but that is a step that is distinctly different from receiving the record in evidence and marking it as an exhibit.)

94 Moreover, when the effect of the relevant provisions is understood in the manner described, it also follows that a request by a jury for access to evidence pre-recorded in accordance with those provisions should ordinarily be dealt with in the same way as any request by a jury to be reminded of evidence that has been led at the trial. Seldom would it be appropriate to meet a request of that kind by giving the jury unrestrained access to the recording to play and replay. The reasons for not allowing access of that kind lie in the need to preserve fairness and balance in the conduct of the trial.

95 Replaying the evidence given by one witness, after all the evidence has been given, carries risks. First, there is the risk inherent in the form in which it is presented. As was said in *Butera*[84], there is the risk that undue weight will be given to evidence of which there is a verbatim record when it must be compared with evidence that has been given orally. Secondly, there is the risk that undue weight will be given to evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.

96 The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. Of course the jury as a whole, or individual jurors, may attach determinative significance to only some of the evidence that has been given. And if that is the case, the jury, or those jurors, will focus upon that evidence in their deliberations. While a jury's request to be reminded of evidence that has been given in the trial should very seldom be refused, the overriding consideration is fairness of the trial. If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the Evidence Act and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence.

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84 (1987) 164 CLR 180 at 189-190.

The admission of the complainant's statement to police

97 Although the prosecution played the complainant's pre-recorded evidence to the jury, the prosecution also tendered a written statement the complainant had made to police describing what the appellant had done. The prosecution tendered the statement relying upon s 93A of the Evidence Act.

98 There was an issue in the Court of Appeal about the form of the legislation that was to be applied. After the trial, but before the appeal to the Court of Appeal was decided, s 93A had been amended[85]. The amendment altered the age requirements for engaging s 93A. There was room for debate whether the complainant, being 16 years old at the time of the trial, met the age requirements stated in the section as it stood before the amendment. The amendment was expressed[86] as having retrospective effect. In the Court of Appeal, the appellant argued that the relevant form of the section to apply was as it stood at the time of the trial. That argument was resolved against the appellant in the Court of Appeal[87] and it was not maintained in this Court. It was accepted that the relevant form of the legislation to be considered is as it stood after those amendments.

99 In this Court the appellant alleged that the trial judge erred "in permitting the prosecutor to tender written statements (in particular the statement of the complainant) taken pursuant to [s 93A of the Evidence Act] in circumstances where the complainant ... had already given full pre-recorded evidence". This argument was not made at trial, or in the Court of Appeal. The appellant's argument in this Court extended to the reception in evidence of a written statement made by another young person to whom the complainant had first made a complaint about the appellant's conduct. That other young person had also given pre-recorded evidence. No separate question arises about the reception of that statement and it is convenient to proceed by reference only to the written statement of the complainant.

100 Section 93A, so far as presently relevant, provided that:

> "(1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if—

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85 *Justice and Other Legislation Amendment Act* 2005 (Q), s 93.

86 *Justice and Other Legislation Amendment Act* 2005, s 95.

87 [2005] QCA 478 at [1], [3], [33].

> (a) the maker of the statement was a child or an intellectually impaired person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
>
> (b) the maker of the statement is available to give evidence in the proceeding.
>
> ...
>
> (3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) ... the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.
>
> (3A) For a committal proceeding for a relevant offence, subsections (1)(b) and (3) do not apply to the person who made the statement if the person is an affected child."

The expressions "relevant offence" and "affected child" used in s 93A(3A) were defined[88] by reference to the definitions contained in s 21AC referred to earlier in these reasons in connection with the pre-recording of evidence of an affected child.

101 Section 98 of the Evidence Act gave the court discretion to reject any statement notwithstanding that the requirements of s 93A (or other provisions of the same part of the Act) were satisfied. That discretion was exercisable "if for any reason it appears ... to be inexpedient in the interests of justice that the statement should be admitted". And s 99 of the Evidence Act permitted the court to direct that a statement in a document be withheld from the jury during their deliberations if it appeared that "if the jury were to have the document with them during their deliberations they might give the statement undue weight".

102 The essence of the proposition advanced by the appellant on this issue was that a party cannot tender an out-of-court statement as evidence of the facts, and at the same time call oral evidence from the maker of the statement upon the same subject. That proposition should be rejected.

103 The stated premise[89] upon which s 93A is engaged is that the maker of the statement which it is sought to tender in evidence is available to give evidence.

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88 s 93A(5).

89 s 93A(1)(b).

Any other party may require that the party tendering the statement "call as a witness the person whose statement is so admitted"[90]. Nothing in the text of the section suggests that the party tendering the statement may not choose to call the maker of the statement as a witness. If the tendering party is required by an "other party" to "call as a witness" the maker of the statement, nothing in the text of the section suggests that the tendering party may not adduce evidence-in-chief from the maker about the matters that are the subject of the statement. The maker of the statement is to be called "as a witness", not only "made available for cross-examination"[91]. And if the tendering party chooses to call the maker of the statement as a witness, nothing in the text of the section suggests that some different rule applies such that the tendering party is precluded from adducing evidence-in-chief from the maker about the matters dealt with in the statement.

104 These textual considerations point against the proposition advanced by the appellant. They are reinforced by other considerations. First, the statutory rule enacted by s 93A does not have universal application. The section makes a special rule for children and intellectually impaired persons. That rule is made 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. But if the party relying on the account of a child or intellectually impaired person is able to and wishes to have that person give their account orally, as well as in the form of the statement that has previously been made, there is no reason to prevent that being done.

105 Secondly, a statement admitted under s 93A is admitted as evidence of the facts that the statement tends to establish; it is not admitted to bolster the credit of the maker of the statement. The general rule[92] that prior consistent statements of a witness are not admissible to bolster the credit of the witness is not engaged. Because the statement is admitted as evidence of the facts it tends to establish, the hearsay rule is engaged. But the statute provides an exception. It operates according to its terms. Whether or not the maker of the statement is called to give evidence, the statement of a child is admissible as evidence of the facts that the statement tends to establish, if the conditions specified in s 93A are satisfied.

106 This third ground of appeal fails.

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90 s 93A(3).

91 Compare, for example, Uniform Civil Procedure Rules 1999 (Q), r 439(3), concerning making the deponent of an affidavit "available for cross-examination".

92 *Cross on Evidence*, 7th Aust ed (2004) at 497-498.

Conclusion and orders

107 For these reasons the appeal should be dismissed.

108 HEYDON J. I agree with Hayne J that the appeal should be dismissed.

Playing the pre-recorded video evidence

109 *Method of approach.* The accused's first claim is that the appeal should be allowed on the ground that permitting the jury to play the pre-recorded video evidence of the complainant in the absence of judge and counsel constituted a miscarriage of justice. It appears to follow from s 668E of the *Criminal Code* (Q)[93] that that claim needs to be approached in four stages. First, was there an irregularity? Secondly, if so, was it, or did it cause, a miscarriage of justice? Thirdly, if so, can it be said, after examining the whole trial record, that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned their verdict of guilty so that no substantial miscarriage of justice has actually occurred within the meaning of the "proviso" in s 668E(1A)? Fourthly, if so, does the case nonetheless fall within a category precluding the application of s 668E(1A) on the ground, for example, that there has been a significant denial of procedural fairness or a serious breach of the presuppositions of the trial[94]? On occasion it may be desirable to consider the fourth stage before the third.

110 This preferred method of approach to the complaint about playing the pre-recorded video should also be adopted for the accused's other two complaints.

111 *Was there any irregularity?* For the reasons given by Hayne J[95], this question must be answered "Yes".

112 *Was there a miscarriage of justice?* In the special circumstances of this case, for the reasons given by Hayne J[96], the question must be answered "No".

113 *Substantial miscarriage of justice?* Since there was no miscarriage of justice, the ground of appeal fails, and there is no occasion to go to the proviso. In any event, the prosecution did not rely on it.

Failure to direct jury

114 This too was said to be a miscarriage of justice.

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93 See the reasons of Kirby J at [20].

94 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]-[46] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

95 At [85]-[96].

96 At [76]-[81].

115 *Was there an irregularity?* In view of the special emphasis the jury were permitted to devote to the evidence it probably was irregular in the circumstances of this case not to warn them against giving the evidence undue weight[97].

116 *Was there a miscarriage of justice?* For the reasons given by Hayne J[98], the answer is "No".

117 *Substantial miscarriage of justice?* This question does not arise for the same reasons as those given in relation to the issue of playing the pre-recorded video.

Admission of the complainant's statement to police

118 This was claimed to be a third miscarriage of justice.

119 *Was there an irregularity?* For the reasons given by Hayne J[99], it was not an error to receive the complainant's statement under s 93A of the *Evidence Act* 1977 (Q) ("the Act") despite the tender of the pre-recorded evidence. The following additional points may be made.

120 The opening words of s 93A are similar to those of legislation modelled on the *Evidence Act* 1938 (UK), s 1[100]. The Queensland model is s 92(1) of the Act which opens as follows:

> "In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact ...".

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97 See *R v Rawlings* [1995] 1 WLR 178 at 183; [1995] 1 All ER 580 at 585; *R v Welstead* [1996] 1 Cr App R 59 at 66 and 70; *R v H* [1999] 2 Qd R 283 at 291 [18]; *R v C* [2000] 2 Qd R 54 at 56 [32]; *R v Lewis* (2002) 137 A Crim R 85 at 89 [12]; *R v BAH* (2002) 5 VR 517 at 523 [11], 524 [13] and 536 [65]-[66]; *R v Lyne* (2003) 140 A Crim R 522; *R v NZ* (2005) 63 NSWLR 628 at 632 [11], 664 [152], 676 [208] and 677 [210].

98 At [82].

99 At [97]-[106].

100 It was repealed by the *Civil Evidence Act* 1995 (UK).

Certain conditions are then set out, one of which is that the maker of the statement be called as a witness in the proceeding[101].

121 There are cases holding that legislation in this form does not permit the tender of previous inconsistent statements[102] or previous consistent statements, including the proofs of witnesses[103]. The argument for this outcome is that the latter course in particular undercuts the benefits of oral trial in cases of factual controversy. A witness's proof of evidence can be a document carefully prepared by a lawyer who is under the influence of high hopes of what the witness may say as distinct from what the witness is initially prepared to say, who has one eye to the avoidance of future difficulties, and who relies heavily on the employment of leading questions. Thus a witness's proof can sometimes be something which is not really the witness's own statement. In contrast, witnesses who answer non-leading questions, whether they do so along the lines the party calling them wants or not, are giving their own evidence. The technique of oral question and answer enables witnesses to do themselves better justice by giving evidence which is theirs, not someone else's, and renders it easier for triers of fact to assess their reliability and credibility as they are speaking directly to those triers of fact, and not through the medium of a written statement of questionable provenance.

122 However, the better view is that on the true construction of legislation taking the form of s 92(1) of the Act, prior written statements can be tendered as of right[104]. That outcome in English law was reversed by legislation[105]. But it remains the law in Australian jurisdictions having legislation in the form of s 92(1) of the Act.

123 It is one thing to approve or disapprove of legislation. It is another thing to construe it. Section 93A is dealing with a narrow field, and with peculiar

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101 See also *Evidence Act* 1958 (Vic), s 55(1); *Evidence Act* 1929 (SA), s 34C(1); *Evidence Act* (NT), s 26D(1). For repealed Australian legislation to the same effect see *Evidence and Discovery Acts* 1867 to 1962 (Q), s 42B; *Evidence Act* 1898 (NSW), s 14B(1).

102 *Cartwright v W Richardson & Co Ltd* [1955] 1 WLR 340; [1955] 1 All ER 742.

103 *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647 at 707-708.

104 *Harvey v Smith-Wood* [1964] 2 QB 171; *Hilton v Lancashire Dynamo Nevelin Ltd* [1964] 1 WLR 952; [1964] 2 All ER 769; *North v Union Steam Ship Co of New Zealand Ltd* [1973] 2 NZLR 577; *Nominal Defendant v Owens* (1978) 22 ALR 128.

105 *Civil Evidence Act* 1968 (UK), s 2(2).

problems – those concerned with evidence from children and intellectually impaired persons. The legislation rests on the assumption that an account given before the trial "can be of more probative value than present testimony, particularly if the present memory is faulty or it is difficult for the witness to articulate it in court"[106]. The legislative judgment is that it is more important to have before the trier of fact a clear statement from these types of witnesses, even if it is in an unsworn document, than to preserve the principle of orality in its full integrity.

124 The arguments of the accused rested on an appeal to traditional analysis, and to the startling outcome that would eventuate if s 93A were construed adversely to the accused. The outcome is less startling when it is remembered that certain types of crime and other unlawful conduct can be hard to prove without the relaxation effected by s 93A. It is also less startling when some of the safeguards provided in the Act are borne in mind. One is that it is a condition of admissibility that the maker of the statement be available to give evidence (s 93A(1)(b)) and be called by the tendering party if any other party requires it[107]. A second is the discretion to reject the evidence conferred by s 98[108]. A third is s 130[109]. A fourth is s 99[110]. A fifth is s 100[111]. But even without these safeguards, the construction of s 93A advocated by the accused cannot be maintained in the face of its language.

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106 *R v F (CC)* [1997] 3 SCR 1183 at 1200 [37].

107 The provisions are set out in the reasons of Hayne J at [100].

108 See the reasons of Hayne J at [101].

109 Section 130 provides:

> "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."

110 See the reasons of Hayne J at [101].

111 Section 100 provides:

> "For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this part shall not be treated as corroboration of evidence given by the maker of the statement ...".

125 There is one other provision which may support the construction of s 93A stated by Hayne J. It is s 103, which provides:

> "Sections 92 to 95 and 101 shall be construed as in aid of and as alternative to one another, any other provision in any other part, and any other law practice or usage with respect to the admissibility in evidence of statements."

The reception of "statements" in oral evidence in chief takes place under a law with respect to the admissibility of statements – a "law" established by the common law. The reception of "statements" under ss 21AK and 21AM of the Act takes place under a "provision" in another part of the Act. Section 93A is to be construed "as in aid of and as alternative to" that law and that provision – not to be narrowed so as to be subordinated to them and to have no effect where they operate. However, since s 103 received no attention in argument it is undesirable to say anything more about it.

126 CRENNAN J. I agree, for the reasons given by Hayne J and the additional reasons given by Heydon J, that the appeal in this matter should be dismissed. I have nothing to add.