

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

PETER JAMES ROBINSON

APPELLANT

AND

THE QUEEN

RESPONDENT

Robinson v The Queen [1999] HCA 42
Date of Order: 22 June 1999
Date of Publication of Reasons: 2 September 1999
B59/1998

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal made on 20 March 1998 and in lieu thereof order that the appeal against convictions be allowed.*
3. *That the convictions and sentences be quashed.*
4. *That there be a new trial of the appellant.*

On appeal from the Supreme Court of Queensland

Representation:

A J Rafter for the appellant (instructed by Legal Aid Queensland)

M J Byrne QC with C W Heaton for the respondent (instructed by Director of Public Prosecutions (Queensland))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Robinson v The Queen

Criminal law and procedure – Evidence – Sexual assault of child under 12 – Uncorroborated evidence of complainant – Necessity for warning by trial judge to jury.

Evidence – Criminal trial – Sexual assault of child under 12 – Uncorroborated evidence of complainant – Necessity for warning by trial judge to jury.

Criminal Code (Q), s 632.

1 GLEESON CJ, McHUGH, KIRBY, HAYNE AND CALLINAN JJ. The principal issue in this appeal concerns the meaning and effect of s 632 of the *Criminal Code* (Qld), which came into force on 1 July 1997, and which concerns warnings and comments by trial judges to juries.

2 Following a trial before Judge Healy QC and a jury, the appellant was convicted of two offences of unlawful anal intercourse with a child under the age of 12 years. He was sentenced to concurrent terms of imprisonment of six years for each offence.

3 The appellant appealed against the convictions and sentences to the Queensland Court of Appeal¹. By majority, the appeal was dismissed².

4 At the conclusion of the hearing of a further appeal to this Court, the Court made orders allowing the appeal, setting aside the orders of the Court of Appeal and ordering that the appeal to that court against the convictions be allowed, quashing the convictions and sentences, and ordering a new trial of the appellant. The Court announced that it would give its reasons for those orders at a later time.

5 The alleged offences were said to have been committed one night in late October or early November 1993 at the home of the complainant at Willowbank. The complainant was a boy aged eight at the time of the alleged offences. He was 11 at the time of the trial. The appellant was 19 at the time of the alleged offences.

6 The evidence was brief. It was common ground that, on the evening in question, the complainant and the appellant were sleeping on mattresses in the garage of the complainant's home. The complainant was involved in the Joey Scouts. The appellant was a Joey Scout leader. The complainant's father was in hospital at the time, and the appellant had taken the complainant to a scout swimming carnival. The two had planned to camp out that night in the yard of the complainant's house, but, because of the weather, it was suggested by the complainant's mother that they might use the garage as a kind of indoor camp. The complainant gave evidence that, in the course of the evening, he woke to find that the boxer shorts he had been wearing had been pulled down and that he was being anally penetrated by the appellant. The appellant then left the room. The complainant pulled his mattress over to the side of the room, but when the appellant

1 (1998) 102 A Crim R 89.

2 Williams and Cullinane JJ, Lee J dissenting.

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returned he pulled it back close to his own mattress and, according to the complainant, again penetrated him.

7 The complainant did not tell his mother about the incident for three years. During November 1996, in the course of a discussion about abuse of another child, the complainant told his mother that he had been abused by the appellant. The matter was immediately reported to the police. In the course of his interview with the police, the complainant said that, about two years after the alleged occurrence, he had told a friend about the matter. The two were talking about sex and prostitutes, and in that context the complainant referred to what the appellant had done to him. The friend, in response, described the alleged behaviour of the appellant as that of "a poofster". That was the whole of the evidence of complaint.

8 The complainant's evidence in chief took the form of the tender by the prosecution, without objection, of a videotaped interview between the complainant and the police on 30 November 1996, and the identification by the complainant of some photographs of the scene of the alleged incident. In the course of the interview, the complainant alleged that he had been anally penetrated, twice, on the evening in question, and he gave an account of the circumstances in which this occurred and of his later allegations to his friend and then to his mother. The prosecutor did not specifically ask the complainant whether the information he gave the police was true, but everybody at the trial seems to have assumed that this was implicit in his testimony. The jury had before them, without objection, evidence of everything the complainant said to the police. In the course of cross-examination, counsel for the appellant asked the complainant whether what he had told the police was true. The complainant said that it was. The evidence of the complainant was substantially the only evidence against the appellant. The complainant's mother and father gave evidence about the circumstances under which the appellant had spent the evening with the complainant, but that was not in dispute. A medical practitioner who examined the complainant, after he went to the police, was called. The witness said that, upon examination, he found no signs of abnormality, but that this was not surprising having regard to the time that had elapsed between the conduct described by the complainant and the time of the examination.

9 The appellant gave evidence in which he agreed with the complainant's evidence as to the circumstances in which they had spent the night together, but denied that he penetrated, or in any way acted indecently towards, the complainant.

10 At the close of the evidence, counsel for the appellant addressed the jury for three minutes. The prosecutor addressed the jury for 25 minutes. The learned judge summed up relatively briefly. In the course of the summing-up he reminded

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<i>Kirby</i>	<i>J</i>
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the jury of counsel's submission that the absence of an early complaint may show inconsistency of conduct on the part of the complainant, and he pointed out that it was relevant to the complainant's credibility. However, he also observed that there may be many reasons why a complaint is not made immediately. Those, he said, were matters for the jury to consider. Subject to that, the judge gave the jury no warnings, and he made no other comment, about the nature of the evidence relied upon by the prosecution. No further directions were sought by counsel. The appellant was convicted and sentenced. By majority (Williams and Cullinane JJ; Lee J dissenting) the Court of Appeal of Queensland dismissed his appeal. By special leave he appealed to this Court.

11 Before this Court, three grounds of appeal were argued. They were as follows:

- "(i) The Court of Appeal erred in deciding that there was not an appreciable risk of a miscarriage of justice by reason of the Learned Trial Judge's failure to give the jury an appropriate warning in relation to the complainant's evidence.
- (ii) The Court of Appeal erred in deciding that it was open to the jury to conclude that penetration had occurred.
- (iii) The Court of Appeal erred in deciding that the Learned Trial Judge was not required to direct the jury that statements made by the complainant in [the videotape] and in his oral evidence that he had complained to various people, did not constitute evidence of the facts complained of."

12 There is no substance in the second ground of appeal. It is true that, on occasions in the course of his evidence, the complainant showed a degree of uncertainty and hesitation in his account of what the appellant did to him. Some particular answers given by the complainant, if considered in isolation, were consistent with indecent behaviour falling short of actual penetration. On the other hand, other parts of the complainant's evidence unequivocally asserted penetration. In particular, as has been noted, trial counsel for the appellant elicited from the complainant, in cross-examination, the evidence that everything that the complainant had told the police had been true and correct. The information given by the complainant to the police included allegations of penetration.

13 It was a matter for the jury to decide, on the whole of the evidence before them, whether they were satisfied beyond reasonable doubt that penetration had occurred. There was ample material upon which they could reasonably come to that conclusion.

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14 As to the third ground of appeal, it is important to bear in mind the procedure that was, by consent, adopted at the trial. This involved the tender, without objection, of the videotaped interview, in the course of which the complainant not only made allegations to the police, but also told the police of allegations he had made to his mother and to a friend. It is possible that the appellant's counsel consented to this course for tactical reasons. There was material in the interview which was capable of giving arguable support to the defence case.

15 No direction of the kind referred to in the third ground of appeal was sought by trial counsel. This may have been because, having regard to the way the trial was conducted, it was not considered that there was any real danger that the jury might treat the complaints to the mother and the friend as evidence of the truth of what the complainant alleged. There was no evidence of recent complaint; a point that was emphasised by trial counsel in his short address. Furthermore, in relation to what the complainant told the police as to what had happened to him, the position was complicated by the fact that he verified that information in his evidence in court. The judge should have directed the jury as to the use that could properly be made of the interview, but the majority in the Court of Appeal were correct to conclude that, in the circumstances, this omission did not warrant a quashing of the convictions.

16 There is, however, substance in the first ground of appeal.

17 Section 632 provides:

"(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.

(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.

(3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses."

18 Sub-section (1) of s 632 does not materially alter the common law, putting to one side the exceptional case of perjury. As Lord Diplock explained in *Director*

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of *Public Prosecutions v Hester*³, in common law systems, unlike some other systems, an accused can be convicted on the testimony of a single witness. The sub-section restates the general common law rule, and, to an extent, establishes the context of what is to follow.

- 19 Sub-section (2) is to be understood in the light of common law rules which developed by way of qualification to the general principle stated above. Since an accused person could be convicted on the evidence of one witness only, the law was required to address the problem of unreliability. Such unreliability could arise from matters personal to the witness, or from the circumstances of a particular case. The law requires a warning to be given "whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"⁴. However, as was held in *Longman v The Queen*⁵, in relation to a similar Western Australian provision, the sub-section is not directed to such a general requirement. Rather, it is aimed at a more specific rule, by which the common law identified certain classes of case where evidence was considered to suffer from intrinsic lack of reliability. Although the classes were not closed, they included certain well-established categories. Thus, in *Carr v The Queen*⁶, reference was made to "the rules which oblige a trial judge to warn the jury of the danger of convicting upon the uncorroborated evidence of an accomplice, the victim of a sexual offence and the sworn evidence of a child". It will be noted that the present case fell into both of the second and third categories. The reasons for those categories were discussed in such cases as *Longman v The Queen*⁷ and *B v The Queen*⁸. They included what are now rejected as "stereotypical assumptions"⁹.

3 [1973] AC 296 at 324.

4 *Longman v The Queen* (1989) 168 CLR 79 at 86. See also *Bromley v The Queen* (1986) 161 CLR 315 at 319, 323-325; *Carr v The Queen* (1988) 165 CLR 314 at 330.

5 (1989) 168 CLR 79.

6 (1988) 165 CLR 314 at 318-319.

7 (1989) 168 CLR 79 at 91-94.

8 (1992) 175 CLR 599 at 616.

9 *R v Ewanchuk* [1999] 1 SCR 330 at 336.

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20 Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.

21 Sub-section (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury "that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness". That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies, or matters relating to the circumstances, which bring into operation the general requirement considered in *Longman*. Moreover, the very nature of the prosecution's onus of proof may require a judge to advert to the absence of corroboration. In *R v Murray*¹⁰, Lee J, discussing a similar New South Wales provision which was limited to sexual offences, said:

"Section 405C(2) has brought about the result that women are no longer, in the eyes of the law, to be put before juries as persons whose evidence requires corroboration before it is safe to act upon it. That concept which has been in the law for a long time has now gone. That, of course, does not mean that a judge cannot draw attention to the absence of corroborating testimony from witnesses who are shown by the evidence to have been present and able to offer corroboration of the girl's story, if it were true, nor does it preclude the judge from making such observations as he considers ought to be made about the credibility of the complainant's evidence, but always with the proviso, of course, that he must make it clear to the jury that those are his opinions and that the weight to be given to the testimony of the woman is entirely a matter for the jury. The fact that a judge does not comment upon the absence of corroboration of the complainant's evidence cannot, in my view, in the case of those offences to which s 405C applies now be made the basis of a criticism of his summing-up, but again this does not mean that the judge cannot or should not, as is done in all cases of serious crime, stress upon the jury the necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a

10 (1987) 11 NSWLR 12 at 19.

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<i>Kirby</i>	<i>J</i>
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conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

There will be cases where the failure to bring home to the jury the position of the uncorroborated witness will undoubtedly lead to the verdict being set aside but that is a different matter altogether from requiring a direction that it is unsafe to act on the uncorroborated evidence of the complainant in a sex case."

22 Section 632 distinguishes between witnesses and complainants. Ordinarily, in this context, a complainant is a species of the genus witness. The generic term is used in sub-section (2), but the concluding words of sub-section (3) are specific. In that respect the relationship between the two sub-sections lacks complete symmetry. Perhaps the explanation is that the drafter had mainly in mind sexual cases, but the section is not limited to sexual offences, and the common law's categories of potentially unreliable witnesses included some who were not complainants.

23 There was discussion in argument, and in the reasons for judgment in the Court of Appeal, of the operation of sub-sections (2) and (3) in light of the fact that the child whose uncorroborated testimony was relied on in the present case fell into two categories classified by the common law as unreliable, by reason of his age and his status as a complainant in a sexual case. For reasons that will appear, the issue is not decisive of the outcome of the present appeal. However, it would normally be inappropriate to set a jury the task of distinguishing between the status of a witness as a complainant and his or her status as a child. The statutory provisions are not expositions of legal or sociological theory; they are intended to operate in the practical context of a summing-up at a criminal trial. Judges are required to frame their directions, not only so as to comply with any relevant statutory provision, but also so as to be both fair and intelligible. A trial judge, faced with the statutory prohibition in sub-section (3), would run a serious risk of confusing a jury, and giving an inappropriate or misleading direction, if the judge set out, in literal compliance with the statute, to distinguish between the supposed unreliability of complainants as a class and the supposed unreliability of child witnesses as a class. The question is not only one of statutory construction; it is also a practical question of framing a clear and fair set of directions. As a matter of statutory construction, the prohibition in sub-section (3) is limited to complainants. As a matter of framing a summing-up, in a case such as the present, a trial judge would be ill advised to seek to draw that distinction. It would be difficult to do it in a manner which was fair to the accused and intelligible to a jury. However, fairness to the appellant would not have required any such attempt.

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24 In the present case there would have been no difficulty in framing a warning which did not transgress the prohibition in sub-section (3).

25 As the dissenting judgment in the Court of Appeal pointed out, there were particular features of the case which demanded a suitable warning. Without seeking to describe these features exhaustively, they included the age of the complainant at the time of the alleged offences, the long period that elapsed before complaint, which in turn meant that it was impossible for a medical examination to verify or falsify the complaint, and the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred. A curious feature of the case was the absence of any conversation of any kind, on the evening in question or later, between the complainant and the appellant, about the appellant's conduct. There was no threat, and no warning to the complainant not to tell anyone. The complainant and the appellant maintained a harmonious relationship. There was no suggestion of any earlier or later misconduct by the appellant towards the complainant. An important aspect of the inconsistency and uncertainty about the matter of penetration was that the complainant said he was asleep when the first act of penetration occurred, and that he woke up while it was going on. Finally, some features of the history of complaint may have indicated a degree of suggestibility on the part of the complainant.

26 Taken together with the absence of corroboration, these matters created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt. That warning should have referred to the circumstances set out above, and should have been expressed in terms which made clear the caution to be exercised in the light of those circumstances.

27 It is for those reasons that it was considered that the appeal should be allowed and a new trial ordered.