***R v Kina* [1993] QCA 480 (29 November 1993) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Battered woman syndrome' – 'Expert evidence - social worker' – 'Fresh evidence' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: In September 1988, after a trial which lasted less than a day, the female appellant, an Aboriginal woman, was convicted of murder for killing her abusive male partner of three years and was sentenced to life imprisonment. The appellant did not give or call evidence at her trial. It was only five years later, after the appellant had spent years speaking to a particular social worker (Mr Berry) in prison, that evidence of the abuse she suffered emerged. Kina applied to the Governor in Council for the exercise in her favour of the royal prerogative of mercy. Section 672A of the *Criminal Code* preserves the pardoning power of the Governor, adding in para. (a) 'that the Crown Law Officer may refer the whole case to the Court of Appeal, to be heard and determined as in the case of an appeal by a person convicted.' Under this provision on 24 May 1993 the Attorney General referred to the Court of Appeal 'the whole case with respect to the conviction of … Robyn Bella Kina on the charge of murder …' of Anthony David Black.

Issue/s:

1. The appellant did not receive a fair trial and a miscarriage of justice occurred because of problems of communication between the appellant and her lawyers which led to fundamental errors at trial.
2. There was fresh evidence of such a nature that, had it been placed before the jury who decided the case, there was a substantial possibility of acquittal.
3. The fresh evidence was of such a nature that refusal of it would lead to a miscarriage of justice.

Decision and Reasoning: The appeal was allowed, the conviction and verdict set aside and a new trial ordered. Evidence of Mr Berry, the social worker, was important in this case. Mr Berry first saw the appellant before her trial in April 1988. Over the following months, the appellant slowly disclosed her story to Mr Berry – that the deceased had continually beaten her up, forced her to have anal sex with him and that he tied her up. Mr Berry tried to communicate with the appellant's lawyers before the trial but was advised that her legal representatives wished that he 'would not interfere with proceedings'. After the trial, the social worker saw the appellant in a counselling capacity. The appellant's self-esteem improved and in 1991 she was able to give evidence about the deceased's threat to anally rape her 14 year old niece.

In finding there was a miscarriage of justice, Fitzgerald P and Davis JA held that:

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice".